ZaöRV

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

3|2026

86. Jahrgang

Seiten 729–1020

HJIL

Heidelberg Journal of International Law

Christine Langenfeld
The Justiciability of Article 2 TEU and Domestic Constitutional Autonomy 729

Monica Hakimi
International Law and Power Politics: On Koskenniemi's *Perceptions of Justice* 739

Interview with *Professor Eliav Lieblich*
on the Occasion of the 3rd Max Planck-Cambridge Prize Ceremony 761

Impulses from the Max Planck Trialogues on the Law of Peace and War: Climate Change and the Law Surrounding Armed Conflict

With Contributions by
Anne Peters, Mario Pasquale Amoroso, Giorgia Berrino, Margaretha Wewerinke-Singh, Leonie Brassat, Niklas Reetz, Jérôme de Hemptinne, Romina Pezzot, Amanda Kron, Britta Sjöstedt, Madara Melnika, Leon Seidl, Moritz Vinken 771

Articles by
Paul Gragl, Muhammad Asif Khan, Kevin Grimmeiß, Juliane Bertram, Johann Remé 837

C.H.BECK

MAX-PLANCK-INSTITUT
FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY-SA

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)

The Journal may also be cited as:

Heidelberg Journal of International Law (HJIL)

Herausgeber/Editors in Chief: Helmut Philipp Aust, Armin von Bogdandy, Anne Peters
in Gemeinschaft mit Rüdiger Wolfrum

Schriftleitung/Managing Editor:
Kelly Amal Dhru
Robert Stendel

Schriftleitung Comment/Comment Editor:
Carolyn Moser

Schriftleitung Rezensionen/Book Reviews Editor:
Alexander Wentker

Wissenschaftlicher Beirat/Academic Advisory Board:
Lorand Bartels, Christina Binder, Emily Crawford, Cristina Fraenkel-Häberle, Matthias Goldmann, Rainer Grote, Daniel Halberstam, Laura Hering, Michael Ioannidis, Jannika Jahn, Louis Kotzé, Florian Kriener, Christian Marxsen, Irini Papanicolopulu, Sabrina Ragone, Raphael Schäfer, Dana Schmalz, Pál Sonnevend, Luke Dimitrios Spieker

V.i.S.d.P.: Helmut Philipp Aust, Armin von Bogdandy, Anne Peters

Postanschrift: Redaktion MPI für Völkerrecht, Andrea Hug, Im Neuenheimer Feld 535 D-69120 Heidelberg

zaoerv@mpil.de

Mit der Einreichung eines Manuskripts bietet der Autor den Herausgebern die Übertragung der Nutzungsrechte, einschließlich des Rechts zur öffentlichen Zugänglichmachung (§ 19 a UrhG), das Recht zur Aufnahme in Datenbanken, das Recht zur Speicherung auf elektronischen Datenträgern und das Recht zu deren Verbreitung und Vervielfältigung sowie das Recht zur sonstigen Verwertung in elektronischer Form an. Das in § 38 Abs. 4 UrhG niedergelegte zwingende Zweitverwertungsrecht des Autors nach Ablauf von 12 Monaten nach der Veröffentlichung bleibt hiervon unberührt.

Manuskriptsendungen an die Redaktion werden erbeten unter der Adresse:

https://www.editorialmanager.com/heidelbergjil

Sie müssen den unter https://www.nomos.de/zeitschriften/zaoerv/#autorenhinweise einsehbaren Manuskriptrichtlinien entsprechen und werden nur unter der Voraussetzung angenommen, dass der*die Autor*in nicht denselben Gegenstand in einer anderen Publikation behandelt. Sie geben die wissenschaftliche Auffassung der*s jeweiligen Autorin*s wieder.

Erscheinungsweise: Vier Ausgaben jährlich

Bezugspreis 2026: Normalpreis jährlich € 246,00 (inkl. MwSt.)

Einzelheft: € 76,00 (inkl. MwSt.)

Jeweils zuzüglich Versandkosten.

Hinweise zu Preiserhöhungen finden Sie in den beck-shop AGB unter Ziff. 10.4.

With the submission of a manuscript the author offers to transfer to the editors the rights of use, including the right of communication to the public (§ 19 a German Copyright Law), the rights to publicly reproduce or access, the rights to include in any databank, the rights to store on electronic data carriers and the rights to distribute and copy as well as the rights to any other utilisation in electronic form. The mandatory statutory secondary rights of the author after 12 months from the date of publication as set out in § 38 section 4 Copyrights Act (UrhG) shall not be affected hereby.

Manuscripts should be sent to the editorial office at the following address:

https://www.editorialmanager.com/heidelbergjil

They need to comply with the manuscript guidelines available at http://www.zaoerv.de and will only be accepted if the author has not treated the same subject in another publication. They reflect the scientific view of the respective author.

Subscription price for the complete volume (4 issues): € 246,00

Single issue: € 76,00

Postage and handling fees will be added.

Cancellation of subscriptions: Publisher must be notified no later than 6 weeks prior to the end of the calendar year.

Verlag: Verlag C.H.Beck GmbH & Co. KG, Wilhelmstraße 9, 80801 München, Postanschrift: Postfach 40 03 40, 80703 München, Telefon: (089) 3 81 89-0, Telefax: (089) 3 81 89-398, info@beck.de, Postbank München IBAN: DE82 7001 0080 0006 2298 02, BIC: PBNKDEFFXXX. Amtsgericht München, HRA 48045. Persönlich haftende Gesellschafter: Dr. h. c. Wolfgang Beck (Verleger in München) und C.H.Beck Verwaltungs GmbH, Amtsgericht München, HRB 254521.

Bestellungen über jede Buchhandlung und beim Verlag.

Abo-Service: Tel.: 089/38189-750, Fax 089/38189-358, E-Mail: kundenservice@beck.de

Abbestellungen müssen 6 Wochen vor Jahrgangsende erfolgen.

Adressenänderungen: Teilen Sie uns rechtzeitig Ihre Adressenänderungen mit. Dabei geben Sie bitte neben dem Titel der Zeitschrift die neue und die alte Adresse an.

Hinweis gemäß Art. 21 Abs. 1 DS-GVO: Bei Anschriftenänderung kann die Deutsche Post AG dem Verlag die neue Anschrift auch dann mitteilen, wenn kein Nachsendeauftrag gestellt ist. Hiergegen kann jederzeit mit Wirkung für die Zukunft Widerspruch bei der Post AG eingelegt werden.

ISSN 0044-2348

Druck: Druckerei Himmer GmbH, Steinerne Furt 95, 86167 Augsburg

chbeck.de/nachhaltig
produktsicherheit.beck.de

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

MAX-PLANCK-INSTITUT

FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT
UND VÖLKERRECHT

ZaöRV 86 (2026)

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

Inhaltsverzeichnis

Comment

Christine Langenfeld: The Justiciability of Article 2 TEU and Domestic Constitutional Autonomy 729

Re-Reading Historic Articles in the ZaöRV: Anniversary Series

Monica Hakimi: International Law and Power Politics: On Koskenniemi's *Perceptions of Justice** 739

Max Planck-Cambridge Prize for International Law

Interview with *Professor Eliav Lieblich* on the Occasion of the 3rd Max Planck-Cambridge Prize Ceremony 761

Impulses from the Max Planck Trialogues on the Law of Peace and War

Anne Peters: Climate Change and the Law Surrounding Armed Conflict – The Climate of War 771

Mario Pasquale Amoroso: Climate Change and Warfare as Interconnected Concerns in International Legal Negotiations 785

Giorgia Berrino: Climate Change and Armed Conflict Beyond the Crisis Paradigm 789

Margaretha Wewerinke-Singh: Self-Determination, Jus Cogens, and the Climate/Security Nexus 793

Leonie Brassat: Climate Change as a Threat to International Peace and Security? 797

Niklas Reetz: Security, with Caveats 803

Jérôme de Hemptinne: From Tactical Law of Armed Conflict to Macro-Perspective of Climate Law 807

Romina Pezzot: Wartime GHG Emissions as Widespread, Long-Term and Severe Damage to the Environment 811

Amanda Kron: Stringent Due Diligence and Corporate Climate Harm in Conflict-Affected Contexts 815

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Britta Sjöstedt: The Lived Experiences of Wars in a Climate Crisis 819
Madara Melnika: NATO's Responsiveness to Climate Change 823
Leon Seidl: Climate Adaptation in a Changing Peacebuilding Environment 829
Moritz Vinken: The Enlightened Uncanny and International Law 833

Abhandlungen

Paul Gragl: Die EU auf dem Weg zu einer resilienten Sicherheits- und Verteidigungspolitik* 837
Muhammad Asif Khan: Participation as an Obligation? Rethinking Investment Practices Through the Right to Development* 869
Kevin Grimmeiß: Independent Justice in the Name of His Holiness? Vatican Tribunals and International Law Requirements* 897
Juliane Bertram: Die Voraussetzung gescheiterter Verhandlungen in der Streitbeilegungsklausel der UN-Frauenrechtskonvention* 921
Johann Remé: The German Doctrine of Normative Authorisation as an Inspiration for US Administrative Law after *Loper Bright** 947

Rezensionsaufsatz

Russell A. Miller: Measuring The Rule of Law in Germany 983

Buchbesprechungen

Deeks, Ashley S.: The Double Black Box. National Security, Artificial Intelligence, and the Struggle for Democratic Accountability (*Klaudia Klonowska*) 999
Roth-Arriaza, Naomi: Fighting Grand Corruption: Transnational and Human Rights Approaches in Latin America and Beyond (*Leonardo Borlini*) 1007
Rossa, Elisabeth: Die Finalität europäischer Verteidigung. Eine Untersuchung vor dem Hintergrund des Grundgesetzes (*Alexander Silke*) 1013

* Alle mit Sternchen versehenen Beiträge haben zuvor ein Begutachtungsverfahren (double-blind peer review) durchlaufen. / All articles marked with an asterisk were subject to double-blind peer review.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Comment

The Justiciability of Article 2 TEU and Domestic Constitutional Autonomy

I. Taking Stock: Case Law on the Rule of Law 730
II. Can the Case Law on the Values Clause Extend Beyond Safeguarding the Rule of Law? 733

This comment focuses on the values clause in Art. 2 of the Treaty on European Union (TEU) and the pertinent case law of the Court of Justice of the European Union (CJEU).

What is the sum and substance of Art. 2 TEU? This Article sets out the fundamental values that are integral to democratic society and declares them to be the foundation of the European Union (EU). It constitutes a legally binding commitment to the idea of a system of values and has a systematic link with the EU's Charter of Fundamental Rights.[1] It is equally addressed to the EU and its Member States and provides a legal structure for homogeneity as an organising principle.[2] By homogeneity, I mean the equivalence or likeness, as opposed to the uniformity, of certain legal principles that are characteristic of a liberal constitutional order. Art. 2 TEU defines a consensus among the Member States on their core values which is a requirement for integration and a safeguard for the Union's legitimacy. Art. 2 TEU thus contains the substantive content for building a European identity and is intended to ensure the ability of the Union to function properly.[3]

I will first address the CJEU's case law on the rule of law, which is the starting point for the case law on the values clause. I will then turn to the CJEU's recent decision in the infringement case against Hungary, where the Court employed a more far-reaching approach to values than it had done

1 See also Christian Calliess 'Art. 2 EUV' in: Christian Callies and Matthias Ruffert (eds), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (6th edn, C. H. Beck 2022), para. 28.

2 See Winfried Kluth, 'Die Mitgliedstaaten der Europäischen Union als Gestalter und Adressaten des Integrationsprozesses: Grundlagen und Problemaufriss' in: Winfried Kluth (ed.), *Europäische Integration und nationales Verfassungsrecht* (1st edn. Nomos 2007), 9-29 (22); Meinhard Hilf and Frank Schorkopf, 'Art. 2 EUV' in: Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (87th supplemental delivery, C. H. Beck 2026), para. 18.

3 See Hilf and Schorkopf (n. 2), paras 8-10.

DOI 10.17104/0044-2348-2026-3-729 ZaöRV 86 (2026), 729-738

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

before, by incorporating other values of Art. 2 TEU as a yardstick for national legislation.

I. Taking Stock: Case Law on the Rule of Law

By activating Art. 19 in conjunction with Art. 2 TEU and Art. 47 of the Charter,[4] the CJEU has developed an instrument which allows it to review the independence and impartiality of the courts in the Member States, and thereby also the protection of the EU legal order – that is, a review of the consistent implementation of EU law in the Member States through recourse to the national courts as EU courts. However, it must be emphasised that the CJEU restricts its review to whether the minimum standards required by the rule of law have been met;[5] in addition, the CJEU always assesses the challenged rule in its general context.[6] For the most part, it is only through an overall assessment of the often complex interplay of various national laws that a lasting danger to the rule of law can be identified.

Therefore, in its jurisprudence on the rule of law as it applies to the judiciary, the CJEU has found a way out of what has been described in academic writing as the Copenhagen dilemma. This dilemma refers to the perceived inability of EU institutions to guarantee the preservation of the very values – and here specifically, judicial independence – that are essential to the existence of the EU.[7] The parallels to the well-known Böckenförde dictum (that is, 'The liberal secular state is built on conditions that it cannot

4 See, e. g. ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, judgement of 27 February 2018, case no. 64/16, ECLI:EU:C:2018:117, paras 29-52; ECJ, *European Commission v. Republic of Poland* (Independence of the Supreme Court), judgement of 24 June 2019, case no. 619/18, ECLI:EU:C:2019:531, paras 47-59; ECJ, *Repubblika v. Il-Prim Ministru*, judgement of 20 April 2021, case no. 896/19, ECLI:EU:C:2021:311, paras 62-73.

5 See, e. g. ECJ, *PPU Minister for Justice and Equality* (Deficiencies in the System of Justice), judgement of 25 July 2018, case no. 216/18, ECLI:EU:C:2018:586, paras 37, 68 et seq.; ECJ, *Repubblika* (n. 4), paras 56 et seq.; ECJ, Asociatia 'Forumul Judecatorilor Din Romania' (Associations of Judges), judgement of 8 May 2024, case no. 53/23, ECLI:EU:C:2024:388, para. 36.

6 See, e. g. ECJ, *European Commission* (n. 4), paras 78 et seq.; ECJ, *A. K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court), judgement of 19 November 2019, case nos 585/18, 624/18 and 625/18, EU:C:2019:982, para. 136 et seq.; ECJ, *Repubblika* (n. 4), paras 56 et seq., 66, 72.

7 See, e. g. Julian Scholtes, 'Constitutionalising the End of History? Pitfalls of a Non-Regression Principle for Article 2 TEU', EuConst 19 (2023), 59-87 (60); Oliver Mader, 'Wege aus der Rechtsstaatsmisere: der neue EU-Verfassungsgrundsatz des Rückschrittsverbots und seine Bedeutung für die Wertedurchsetzung', EuZW 32 (2021), 974-978 (975).

 DOI 10.17104/0044-2348-2026-3-729

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

itself guarantee')[8] are clear. The Copenhagen dilemma is that the EU, bound by the principle of conferral, does not have any competences regarding the design of the national judiciaries.[9] However, this does not mean that the EU must idly stand by and watch the rule of law being undermined in its Member States. The president of the German Constitutional Court, Stephan Harbarth, has therefore described the Copenhagen dilemma as a 'false dilemma' in light of the European Court of Justice's case law on the rule of law.[10]

The CJEU's case law on the rule of law encompasses the judiciary as a whole. The CJEU views Art. 19(1) subpara. 2 TEU as being affected not only when a Member State court interprets and applies EU law, but also when a national court's jurisdiction potentially involves the interpretation and application of EU law.[11] Given the level of European integration, one would struggle to find a Member State court that is not in some way potentially concerned with EU law. This broad view of Art. 19 TEU is persuasive since it is hardly imaginable and almost schizophrenic that a court could be structurally independent in interpreting and applying EU law while not being independent when it interprets laws outside of the EU context. In other words, an independent judiciary is a structural characteristic which must be guaranteed for all Member State courts.

As previously mentioned, the CJEU addresses the potential dangers of overextending this case law by taking a restrained approach, in order to minimise the interference with the national competence to organise the judiciary. It has adopted a comprehensive approach which assesses the national justice system in its entirety and implies an openness towards Member State traditions within the meaning of Art. 4(2) first sentence TEU, as long as these traditions do not endanger judicial independence.[12] Accordingly, the CJEU has not developed a uniform and formal EU-wide definition

8 Ernst-Wolfgang Böckenförde, 'Die Entstehung des Staates als Vorgang der Säkularisation' in: Ebracher Studien, *Säkularisation und Utopie – Ernst Forsthoff zum 65. Geburtstag* (W. Kohlhammer 1967), 75-94 (93).

9 See, e. g. Scholtes (n. 7), 60; Mader (n. 7), 975.

10 Stephan Harbarth and Christoph Spielmann, 'Grundlagen und Grenzen der unionsrechtlichen Kontrolle der richterlichen Unabhängigkeit in den Mitgliedstaaten', DVBl 138 (2023), 1177-1185 (1177, 1185).

11 See, e. g. ECJ, *Associação Sindical* (n. 4), paras 29 and 40; ECJ, *European Commission v. Republic of Poland* (Independence of Ordinary Courts), judgement of 5 November 2019, case no. 192/18, ECLI:EU:C:2019:924, para. 104; ECJ, *Asociația 'Forumul Judecătorilor din România' and Others v. Inspecția Judiciară and Others*, judgement of 18 May 2021, case nos 83/19, 127/19, 195/19, 291/19, 355/19 and 397/19, ECLI:EU:2021:393, paras 191 et seq.

12 See, e. g. ECJ, *A. K. and Others* (n. 6), paras 152 et seq.; ECJ, ECJ, *Repubblika* (n. 4), paras 48, 53 et seq.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

of the rule of law; rather, by making reference to other sources such as the Venice Commission,[13] it has identified certain 'red lines' which negatively define the limits for the rule of law, to borrow a term from Armin von Bogdandy.[14]

Indeed, the CJEU must ensure that the line between the legislative competence to organise the judiciary – which remains with the Member States – and the Court's powers of judicial review, does not become blurred through increasingly stringent standards of judicial review so as to avoid a 'competence creep'[15] – in other words, the EU may not de facto assume the role of the designer of the national judicial systems through the back door.

The CJEU's case law on the rule of law and, specifically, on judicial independence has been largely consolidated and – despite much initial criticism – can now be considered widely accepted.[16] Time will tell if the broader erosion of the rule of law and the growing trend towards authoritarian and illiberal tendencies in many places, which have also gained ground in the EU,[17] can be countered in the long term. What is certain is that such case law is just one instrument among many others, particularly policy measures, in the battle against the erosion of the rule of law in the Member States. Nonetheless, it can at least slow down problematic developments and bolster opposition. It would not be an overstatement to say that the EU's measures, including financial measures to protect the EU budget, contributed to the

13 See, e. g. ECJ, *European Commission* (n. 4), para. 82.

14 Armin von Bogdandy, Tyrannei der Werte? Probleme und Wege europäischen Schutzes nationaler Rechtsstaatlichkeit (January 17, 2019), Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-04, available at SSRN: https://ssrn.com/abstract=3317539.

15 See, Stephen Weatherill, 'Competence Creep and Competence Control', YBEL 23 (2004), Issue 1, 1-55 (5-9); Sacha Prechal, 'Competence Creep and General Principles of Law', Review of European and Administrative Law 3 (2010), 5-22 (5-6).

16 See, e. g. Daniel Sarmiento, 'Interim Revolutions', Verfassungsblog, 22 October 2018, doi: 10.17176/20181026-145427-0; Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU', GLJ 21 (2020), 29-34 (34).

17 See also Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', Cambridge Yearbook of European Legal Studies 19 (2017), 3-47 (5-9); Laurent Pech and Dimitry V. Kochenov, 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid', RECONNECT Policy Brief No. 1, 2019, 1-2; Werner Schroeder, 'The Rule of Law as a Value in the Sense of Article 2 TEU: What Does It Mean and Imply' in: Armin von Bogdandy, Piortr Bogdanowicz, Iris Canor, Christoph Grabenwater, Maciej Taboroswki and Matthias Schmidt (eds), *Defending Checks and Balances in EU Member States* (Springer 2021), 105-126 (106); Rainer Hofmann and Alexander Heger, 'Zur Zukunft der Europäischen Union als Werteunion', EuGRZ 49 (2022), 361-378 (361-362).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

outcome of the elections in Hungary that we witnessed just a few months ago.

II. Can the Case Law on the Values Clause Extend Beyond Safeguarding the Rule of Law?

Firstly, the rule of law is not a value like any other of the Art. 2-values. It is intrinsically linked to the functioning of the EU and its autonomy.[18] In this regard, the CJEU's recourse to this value in conjunction with Art. 19 TEU and Art. 47 of the Charter is well-founded in terms of legal doctrine.

Conversely, recourse to other values in Art. 2 TEU, such as democracy and respect for human rights, and their invocation as justiciable standards is viewed more critically.[19] There are, of course, those who wish to treat the value of democracy in Art. 2, read in conjunction with Art. 10 TEU (which establishes the two-fold democratic legitimacy of the European Union through the European Parliament and the national democratic institutions), in the same way as the value of the rule of law, as both constitute a structural requirement for the legitimacy of the exercise of sovereign power by the Union as a whole. In substance, the focus should be solely on fundamental and systemic breaches of the democratic principle which undermine its very core.[20] One example mentioned in that regard is a situation where the political process in a Member State no longer allows for a democratic transfer of power through free and fair elections.[21]

The debate on the nature of the EU as a union of values reflects the contrast between so-called pro-integration positions and more sceptical positions, which ultimately pertains to the questions of how to reconcile the goal of European integration and safeguard its foundations while still respecting national identities. While one side views judicial enforcement of EU values as having the potential to realise an 'EU of values' in the truest

18 See, e. g. Schroeder (n. 17), 112; General Court, *Yanukovych v. Council*, judgement of 15 September 2016, case no. 348/14, ECLI:EU:T:2016:508, para. 98. On the link between autonomy and values, see Charlotte Langenfeld, *Die Autonomie des Unionsrechts in der EuGH-Rechtsprechung* (Mohr Siebeck 2024), 336-340.

19 See Frank Schorkopf, 'Der Wertekonstitutionalismus der Europäischen Union', JZ 75 (2020), 477-485 (483-485); Christoph Möllers and Linda Schneider, *Demokatiesicherung in der Europäischen Union* (Mohr Siebeck 2018), 124-128.

20 See Mehrdad Payandeh, 'Demokratiesicherung im europäischen Legitimationsverbund', EuZW 37 (2026), 517-522 with further references.

21 Payandeh (n. 20), 521.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

sense,[22] the other side finds judicial protection of values through the CJEU problematic because this would, in their view, replace the Member States' beliefs and convictions with those of the CJEU which could weaken national identity.[23]

However, is this truly the case, given the fact that Art. 2 TEU, when correctly understood, reflects the minimum of common values which makes up the character of the European Union as a union of liberal democracies devoted to the rule of law? The relevant case law of the CJEU shows that the danger of overextending judicial review and interfering with the constitutional autonomy of the Member States can be avoided by applying a restrictive approach.[24] In sum, not only must Art. 2 TEU be considered legally binding but there is also much to support the justiciability of Art. 2 TEU, insofar as the scope of application of EU law is touched upon through other provisions of European Union law. Otherwise, the scope of application of EU law, which is defined by the treaties as well as Art. 51(1) of the Charter, would be exceeded.

Art. 2 TEU characterises the EU and is a prerequisite for the functioning of the EU legal order. It is essential for European integration that the Member States align their respective constitutional orders with the values in Art. 2 TEU.[25] In that respect, imagine a scenario in which the EU was increasingly dominated by illiberal democracies and authoritarian regimes. In such a Union, one wonders how the mutual trust that is essential for the functioning of both the single market and the area of freedom, security, and

22 See, e. g. Dimitry Kochenov 'The Acquis and Its Principles' in: András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Methods to Achieve Compliance* (Oxford University Press 2017), 9-27 (26-27); Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations', in: Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), 15-35 (22, 35); Jürgen Bast and Armin von Bogdandy, 'Grundlagenteil und Verfassungskern der EU-Verträge', JZ 79 (2024), 115-125 (122, 124); Shu-Perng Hwang, 'Judikativer Werteschutz in der Europäischen Union: Eine verfassungsvergleichende Perspektive', EuR 59 (2024), 240-268 (261-265).

23 See, e. g. Martin Nettesheim, 'European "Frankenstein Constitutionalism": TEU Article 2 as a Federal Homogeneity Clause', AJIL Unbound 118 (2024), 167-171 (170-171); Martin Nettesheim, 'Die Werte der Union: Legitimitätsstiftung, Einheitsbildung, Förderalisierung', EuR 57 (2022), 525-546 (544-546); Bernd Martenczuk, 'Art. 7 EUV und der Rechtsstaatsrahmen als Instrument der Wahrung der Grundwerte der Union' in: Stefan Kadelbach (ed.), *Verfassungskrisen in der Europäischen Union* (1st edn, Nomos 2018), 41-60 (45 et seq.); Oliver Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law', Hague Journal on the Rule of Law 11 (2019), 133-170 (140).

24 See, e. g. ECJ, *PPU* (n. 5), paras 37, 68 et seq.; ECJ, ECJ, *Repubblika* (n. 4), paras 56 et seq.; ECJ, *Asociatia* (n. 5), para. 36.

25 See, e. g. Schroeder (n. 17), 112; General Court, *Yanukovych* (n. 18), para. 98.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

justice could continue to exist. Moreover, how could such an EU effectively face the challenges of the future, such as those in the fields of defence and security, which can only be addressed through joint efforts and cooperation? Whether we call it a 'union of values' or a 'union based on the rule of law', a European Union which seeks to ensure peace and prosperity now and in the future, and which seeks to assert itself on a world stage that is increasingly controlled by authoritarian actors and the unchecked exercise of power, requires common beliefs, which are laid down in Art. 2 TEU. A Europe that is divided and made up of populist states whose authoritarian governments are intent on maintaining and expanding their power will destroy the European project.

The inherent foundations of the union laid down in Art. 2 have a constitutional counterpart in Art. 23 paragraph 1 of the German Basic Law.[26] An EU which no longer fulfils the basic prerequisites for the exercise of public authority laid down in this provision is one in which Germany could no longer participate.

Secondly, the question to what extent Art. 2 TEU is justiciable as a self-standing provision, apart from the value of the rule of law, became relevant in the infringement proceeding against Hungary regarding the rights of members of the LGBTI+ community in the areas of media and education.[27] However, the question of whether Art. 2 TEU might apply autonomously, i. e. outside the scope of EU law, was not initially raised. During the proceedings, the Commission's argument was in essence that the Hungarian legislation was discriminatory and disproportionate and violated the relevant directives, the freedom to provide services and the Charter and because of the extraordinary and severe character of those violations also violated the values in Art. 2 TEU.[28] In its judgment of 21 April 2026, the CJEU upheld the Commission's actions on all counts and, for the first time, found a separate violation of Art. 2 TEU dismissing Hungary's invocation of national identity under Art. 4 (2) TEU.[29]

Against this background, the question arises which are the boundaries of the judicial protection of values. The Hungary judgment is not very clear in this respect, perhaps because the severity of the violation of EU law was

26 See Robert Uerpmann-Wittzack, 'Art. 23 GG' in: Ingo von Münch and Philip Kunig (eds), *Grundgesetz* (8th edn, C. H. Beck 2025), para. 20; Ferdinand Wollenschläger, 'Art. 23 GG' in: Horst Dreier (ed.), *Grundgesetz-Kommentar* (3rd edn, Mohr Siebeck 2015), para. 62.

27 ECJ, *Commission v. Hungary* (Values of the European Union), judgement of 21 April 2026, case no. 769/22, ECLI:EU:C:2026:326.

28 See, ECJ, *Commission v. Hungary* (n. 27), in particular paras 83, 93, 95, 106, 207-212, 312-320, 353-361, 377-384, 417-418,475-481, 494-512, 565-574.

29 See ECJ, *Commission v. Hungary* (n. 27), paras 544-564.

DOI 10.17104/0044-2348-2026-3-729

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

more than obvious. Hence, the Court did not need to explore the substantive content of Art. 2 TEU as a standard for judicial review more deeply. I will come back to this point at the end of my intervention.

The aforementioned link between the values of Art. 2 TEU and the existence and functioning of the EU as a common market and a common area of freedom, security, and justice means that Art. 2 TEU can only be invoked in infringement or preliminary ruling proceedings, when the matter involves a potential breach by a Member State of a specific EU obligation deriving from other provisions of the Treaty or from secondary law. Art. 2 TEU cannot be invoked on a free-standing or autonomous basis without such a clear nexus. Any other interpretation would entail the risk of granting the CJEU a general authority to supervise the Member States and their constitutions. This would put into question the constitutional autonomy as protected by Art. 4 para 2 TEU and thus endanger the further acceptance of the European integration project as a whole. Moreover, this would ultimately eliminate the limitations to the scope of application of the Charter established in Art. 51(1) of the Charter, because Art. 2 TEU also includes respect for fundamental rights as one of the values stated therein. However, the CJEU may only adjudicate questions on fundamental rights protection in the EU within the scope of application of the Charter.

Such a restriction on the CJEU's recourse to Art. 2 TEU as a standard of judicial review must be distinguished from the binding legal effect of Art. 2 TEU in the context of proceedings pursuant to Art. 7 TEU, which explicitly refers to Art. 2 TEU and which can also extend to matters beyond the agenda of European integration programme, i. e. beyond the explicit competences attributed to the European Union by the treaty. It has been the intention of the contracting Member States to create a proceeding with the purpose to review general compliance with fundamental values after the accession of a Member State.[30] Consequently, the legally binding effect of Art. 2 TEU and the judicial review of its contents by the Luxemburg Court are two distinct questions.

This seems to correspond to the line taken by the CJEU in the *Hungary* case, where the Court for the first time found a violation of Art. 2 TEU.[31] Even if the Court's reasoning in this regard could appear open to interpretation, one can nonetheless discern that the CJEU did observe all of the prerequisites that should apply for invoking Art. 2 TEU in a restrictive manner. First, the CJEU found that there were violations of the freedom to

30 See ECJ, *Hungary v. Parliament and Council*, judgement of 16 February 2022, case no. 156/21, ECLI:EU:C:2022:97, paras 164 ff.; ECJ, *Poland v. Parliament and Council*, judgement of 16 February 2022, case no. 157/21, ECLI:EU:C:2022:98, paras 206 ff.

31 See ECJ, *Commission v. Hungary* (n. 27), paras 544-564.

 DOI 10.17104/0044-2348-2026-3-729

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

provide services and the Charter.[32] The CJEU then – at the end of the judgment – began its review of the violation of Art. 2 TEU by stating:

> '*As a preliminary point, it must be borne in mind that, in addition to the infringements of EU law found in paragraphs 163, 204, 235, 311 and 416 of the present judgment* [referring to violations of the relevant secondary law], *Hungary has, by adopting the amending law, also acted in breach of Articles 1, 7, 11 and 21 of the Charter* [referring to the freedom to provide services]. *The Court therefore must assess whether all of these infringements may give rise to an infringement of Art. 2 TEU.*'[33]

In the following, the CJEU also made an explicit reference to the limits of the scope of application of EU law, including in Art. 51 (1) of the Charter, which must not be rendered ineffective by an application of Art. 2 TEU.[34] It can be inferred from these statements that the CJEU has only invoked Art. 2 TEU as a justiciable standard of review in conjunction with other infringements of EU primary and secondary law. This interpretation of the European Court of Justice's (ECJ's) judgment in the *Hungary* case is confirmed by a Chamber judgment of 21 May 2026, in which the Court rejected the isolated application of Article 2 TEU with reference to Article 51(1) of the Charter whilst expressly citing the Hungary judgment.[35]

Thirdly, let me conclude with some remarks on the substantive boundaries for the justiciability of Art. 2 TEU. Substantively, Art. 2 TEU establishes minimum standards derived from core values which – as expressed by the second sentence of Art. 2 TEU – are shared by the EU and its Member States as liberal democracies and pluralist societies. However, Art. 2 TEU must not be used as a general clause in order to progressively transform national societies under the ultimate control of Luxemburg and the European Commission. Not every infringement of the Charter is an infringement of the values in Art. 2 TEU. To qualify for an infringement of these values, its character must be such as to call into question the core common values; an infringement which demonstrates a fundamental disregard or, in the words of Advocate General Ćapeta, a 'negation' of these values.[36] The CJEU confirmed that such an infringement had occurred in the case of Hungary because the goal of the disputed Hungarian legislation was the marginalisation and stigmatisation of persons whose sexual identity was not that of the majority.[37]

32 See ECJ, *Commission v. Hungary* (n. 27), paras 311-352, 416-493.

33 ECJ, ECJ, *Commission v. Hungary* (n. 27), paras 544-545.

34 See ECJ, *Commission v. Hungary* (n. 27), paras 550-551.

35 See ECJ, *Orbán v. 24.hu Szerkesztősége*, judgement of 21 May 2026, case no. 843/24, ECLI:EU:C:2026:426, para. 30.

36 Opinion of Advocate General Ćapeta, delivered on 5 June 2025, *European Commission v. Hungary*, case no. 769/22, ECLI:EU:C2025:408, paras 237-247.

37 See ECJ, *Commission v. Hungary* (n. 27), paras 551-556.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Ultimately, Art. 2 TEU should therefore only extend to a limited core of fundamental rights protected by the Charter where first, there is a more or less fixed consensus among the Member States as to their content and secondly, which form the identity of the EU as a community of democracies under the rule of law. It goes with this, that the finding of an Art. 2 TEU infringement requires a severe breach – a violation of the so-called red lines mentioned above. This restrained understanding of Art. 2 TEU as a standard of judicial review is in line with the systematic relationship between Art. 2 and Art. 7 and Art. 49 TEU, which describe the basic requirements for membership in the EU. This view seems to be shared by the CJEU in the judgment against Hungary, where it states:

> '*Only manifest and particularly serious breaches of one or more values common to the Member States may give rise to a finding, in the context of an action for failure to fulfil obligations, that there has been a failure by a Member State to fulfil legally binding obligations under Article 2 TEU, such breaches being incompatible with the very identity of the Union as a common legal order of a society in which pluralism prevails*.'[38]

Here, the respect for the constitutional identities of the Member States as guaranteed by Art. 4 (2) TEU, finds its limits. In essence, this concerns the development of a positive sense of identity from the perspective of constitutional pluralism. Whether this concept will prevail is an open question. The case law on fundamental values alone is not sufficient; rather, this is precisely where politics comes into play. The effective protection of values as a foundation for the European project requires a variety of different approaches and tools: Policy-based, financial, et cetera. Ultimately, however, the existence and further development of the EU will depend on a critical mass of states not pulling in the opposite direction. Above all, the EU as we know it depends on the will of its citizens. In Hungary, this will has asserted itself with great force after decades of moving in the opposite direction. That is indeed a cause for hope.

Christine Langenfeld[*]

---

38 ECJ, *Commission v. Hungary* (n. 27), para. 551.

* The author holds a chair for public law at the law faculty of the Georg-August-Universität Göttingen, Göttingen, Germany, <*enomiko@gwdg.de*>. Since July 2016 she serves as a Justice of the German Federal Constitutional Court.

This comment was prepared for the Constitutional Forum in Milan (3th-4th June 2026), organised by Armin von Bodgandy, Max Planck Institute for Comparative Public Law & International Law (MPIL) and Marta Cartabbia, former president of the Italian Constitutional Court. The oral form has been maintained.

 DOI 10.17104/0044-2348-2026-3-729

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Re-Reading Historic Articles in the ZaöRV: Anniversary Series

International Law and Power Politics: On Koskenniemi's *Perceptions of Justice*

Monica Hakimi*
Columbia Law School, New York, United States
monica.hakimi@columbia.edu

Abstract 739
I. Introduction 740
II. The American Universe 741
III. The European Universe 747
IV. A Final Rupture? 751
V. Conceptual Convergence 753
VI. Conclusion 757

Abstract

Martti Koskenniemi wrote 'Perceptions of Justice' against the backdrop of the 2003 Iraq War. The piece draws a stark distinction between American and European conceptions of justice – and approaches to international law. Over twenty years later, his distinction might still (or again) resonate. This retrospective analyses it in light of his other work and more contemporary events, arguing that it is a mix of misguided and confused. The United States and Europe have for decades, if not centuries, been profoundly entwined; each has significantly shaped and been shaped by its relationship with the other. The urgent question now is not what our distinct, essential characteristics might be but how we will redefine ourselves going forward, given the enormous challenges that we both, and the world more generally, confront. We are unlikely to make much progress on this question so long as we imagine, as Koskenniemi and the U.S. Trump Administration both seem to

* William S. Beinecke Professor of Law, Columbia Law School. I am grateful to Madison Finley for excellent research support and to Don Herzog, Jacob Katz Cogan, and the editorial team at HJIL for their valuable feedback on earlier drafts.

DOI 10.17104/0044-2348-2026-3-739 ZaöRV 86 (2026), 739-759

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

do, that if law does not constrain power, it must just be the sieve through which power runs.

I. Introduction

Martti Koskenniemi published *Perceptions of Justice: Walls and Bridges Between Europe and the United States* in 2004, with the 2003 Iraq War fresh in mind. The article 'insist[s]' on contrasting American and European sensibilities, in an effort to show that they are 'informed by different, indeed incompatible notions of justice' and 'live in incommensurable conceptual universes'.[1] In this telling, Americans are imperial instrumentalists, eager to impose their worldview on others, often through the resort to military power and without regard to legal constraints. Europeans are more (for lack of a better word) enlightened. They better appreciate the importance of international law – and specifically, of adhering to international legal form and legal rules – as a way to recognise 'the other as equal, even similar to oneself'.[2] Of the two sensibilities, Koskenniemi clearly prefers the latter. He suggests that it provides the best path forward.

The question is whether this analytic frame – which rests on a contradistinction between two stereotypes – illuminates 'a deeper insight' that should inform how international lawyers approach the enterprise.[3] In 2026, the frame might still (or again) resonate. During the second Trump administration, the United States has promoted an 'America First' agenda[4] that undercuts many multilateral institutions[5] and relies heavily on U.S. military and economic coercion to advance supposed U.S. interests.[6] Has the United States always behaved so imperialistically, or are we witnessing something new? And how does Europe fit into the picture? Does Europe offer 'a normative alternative'[7]

1 Martti Koskenniemi, 'Perceptions of Justice: Walls and Bridges Between Europe and the United States', HJIL 64 (2004), 305-314 (306).

2 Koskenniemi, 'Perceptions' (n. 1), 313.

3 Koskenniemi, 'Perceptions' (n. 1), 306.

4 The White House, National Security Strategy of the United States of America: November 2025, November 2025, at 8, available at <https://www.whitehouse.gov/wp-content/uploads/2025/12/2025-National-Security-Strategy.pdf>, last access 22 June 2026.

5 Jacob Katz Cogan, 'The Trump Administration Signals Major Reevaluation of U.S. Engagement with International Organizations', AJIL 119 (2025), 777-789.

6 E.g., Ariane Tabatabai and John Drennan, 'Understanding Trump's Coercive Foreign Policy', Lawfare, 13 February 2026, available at <https://www.lawfaremedia.org/article/understanding-trump-s-coercive-foreign-policy>, last access 22 June 2026.

7 Helmut Philipp Aust, Claus Kreß and Heike Krieger, 'The End of an Era?: On US Intervention in Venezuela and Its Consequences', Verfassungsblog, 3 February 2026, doi: 10.59704/ca1a455631ad72f8.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

to the United States, one 'rooted in democracy, human rights, and the rule of law […] based on the Enlightenment', or are the two more alike than they are different?[8]

Koskenniemi himself seems to have been of two minds on these questions. A few years after publishing *Perceptions of Justice*, he retreated from the stark dichotomy that he had earlier 'insist[ed]' on drawing.[9] With the benefit of some reflection, he said, Americans and Europeans seem not to 'live in incommensurable conceptual universes';[10] they instead 'appear to inhabit the same conceptual space'.[11] In Koskenniemi's then-more-considered opinion, both suffer from a common flaw. They 'appear equally fixated to the search for a right answer and the belief that this is accessible by technical reasoning, in one case through interpretation, in the other by 'rational choice'.[12]

My view, which I will develop over the course of this essay, is that this entire line of reasoning is misguided. Trading in simplistic narratives and convenient stereotypes does not give us a 'deeper insight' into the world.[13] It misrepresents reality and distracts us from the serious task before us. In fact, the United States and Europe have for decades, if not centuries, been profoundly entwined. Each has shaped and been shaped by its extensive connections to the other. The questions that require urgent attention are not what the essential characteristics of each might be but how we can realistically redefine ourselves from here – both separately and together – given the enormous problems that we, and the world more generally, confront.

II. The American Universe

Koskenniemi begins *Perceptions of Justice* with an anecdote about America. In the 1970s, his eventual-wife Tiina spent a year as an exchange student in the American Midwest. As her year ended, 'all of [her American friends] were sorry that she would have to leave the US and felt that this was,

8 Anne van Aaken, 'From Cooperation to Anomie and Transaction in the Transatlantic Relationship? A View from Europe on the Trump Administration 2.0', AJIL 119 (2025), 723-734 (723).

9 Koskenniemi, 'Perceptions' (n. 1), 306.

10 Koskenniemi, 'Perceptions' (n. 1), 306.

11 Martti Koskenniemi, 'The Politics of International Law – 20 Years Later', EJIL 20 (2009), 7-19 (16). The text that appears to retreat from the earlier claim reads: '[T]he more I think about the traditional (European) jurisprudence of exegesis and the managerialism that seeks to challenge it, the more the two appear to inhabit the same conceptual space.'

12 Koskenniemi, 'Politics' (n. 11), 16.

13 Koskenniemi, 'Perceptions' (n. 1), 306.

DOI 10.17104/0044-2348-2026-3-739

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ultimately a sad turn in her life, an aspect of the tragedy and injustice in the world – the injustice that not all can be Americans".[14] The story serves to expose what Koskenniemi takes to be the quintessentially American characteristic: the belief that 'in every human being, more or less deep, lives an American', and that the U.S. mission in the world is to 'liberate that little figure', including with the use of military force, when necessary.[15]

No doubt, some Americans can be seen in Koskenniemi's stereotype, not least the neo-conservatives who were ascendant in President George W. Bush's administration and drove the 2003 Iraq War. Stereotypes often *do* contain some truth. But they usually also distort reality and overlook contrary facts to create false impressions and significant blind spots. So, let me offer my own American story and explain why I think it offers a clearer window into America's relationship with the rest of the world.

My parents came to America shortly before Tiina did, but they arrived from Iran, not Finland. They came neither with a 'plan', nor on an exchange program to get them settled, nor secure in the belief that they would soon return to life as normal at home.[16] After the 1979 Iranian revolution, they never did return home. Some of my most salient childhood memories are of their struggles as they realised that they were destined to be American – watching television footage of the revolutionary takeover of the U.S. embassy in Tehran, trying in vain to contact close friends and relatives, inviting more recent emigrees to live with us for months at a time, and of course, the constant discomfort of being asked, 'Where are you from? No, where are you *really* from?'

I myself was too American for my Iranian relatives and too Iranian for my American surroundings. I remember deciding, as only a child could, that I would lean into becoming American. I wanted to leave behind what Iran for me, at the time, represented. Iran was closed, both practically and conceptually. Many of my relatives were stuck there for years after the revolution. They seemed to lack effective agency, even once they arrived in the United States, unable to adjust to their new surroundings. Relative to their American counterparts, they seemed, on the whole, insular, tribalistic, and misogynistic. There were certain ways to behave, and certain ways not to behave, and the rules for men and women were different. The United States was more open. But it was also more confounding. Even as I wanted to be American, I could not figure out what that meant, because as I came to realise, America is not one thing.

The United States is a highly pluralistic and diverse country. We have, internal to us, isolationists, humanists, xenophobes, and hegemonists. We

14 Koskenniemi, 'Perceptions' (n. 1), 305.
15 Koskenniemi, 'Perceptions' (n. 1), 307.
16 Koskenniemi, 'Perceptions' (n. 1), 309.

 DOI 10.17104/0044-2348-2026-3-739

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

have insular religious communities and secular cosmopolitan ones. We have some of the world's best institutions for research and those who distrust and resent them. We have sizeable immigrant populations from all over the world. We have been, for most of my life, economically and culturally dynamic, democratic, and committed to – one might even say obsessive about – the practice of law. Any claim that we are uniformly committed to spreading a singular, American brand of freedom to the rest of the world, law be damned, strikes me as deeply unserious.

Indeed, although Koskenniemi posits that all Americans share a particular conception of the world, his account of the American conception seems to take different twists each time he references it. First, he presents the American conception as sceptical of the added value of international law. He reports that his 'friends in Massachusetts' deride him even for invoking foundational legal texts.[17] 'Come on, … Martti', they say, 'everything about Europe is dependent not on law but on American power!'[18] These Americans attribute world events to U.S. power, 'not … law'.[19] Law is, for them, irrelevant. Second, Koskenniemi presents the American conception as amoralistic. International law might at times have value, in this version, but its added value depends on factors that lie outside it. Nothing internal to law makes it worthwhile, so there is not any reason to 'honour [it] simply because it is there'.[20] Third, the American conception is instrumentalist. International law 'has value as an instrument' for those whose interests are embedded in it.[21] 'Once you opt for international law', he says, 'what you receive are treaties made by more or less democratic governments acting so as to advance the interests of their peoples or, perhaps more often, the elites of individual states'.[22] Finally, the American conception is messianic. International law has value not just to the Americans whose interests are embedded in it but also to the rest of the world, since all are thought to benefit from the freedoms that the United States uses it to bestow.

One might reasonably ask whether this conception – in turns, sceptical, amoralistic, instrumentalist, and messianic – is internally coherent. For example, if Americans are across-the-board sceptical of the added value of international law, how can we also see it as an instrument for advancing U.S. interests or be messianic about it? If we think it is an instrument for embedding and advancing U.S. interests, wouldn't we also think that it carries the

17 Koskenniemi, 'Perceptions' (n. 1), 305.
18 Koskenniemi, 'Perceptions' (n. 1), 305 f.
19 Koskenniemi, 'Perceptions' (n. 1), 306.
20 Koskenniemi, 'Perceptions' (n. 1), 308.
21 Koskenniemi, 'Perceptions' (n. 1), 307.
22 Koskenniemi, 'Perceptions' (n. 1), 307.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

value of those interests? But putting aside these inconsistences, one can find a throughline that ties Koskenniemi's different iterations together and to the overall tenor of the piece. The American conception is, at bottom, egoistic and self-involved.[23] For Americans, Koskenniemi suggests, international law never has any value independently of the United States. It has value insofar as it is backed by American power and advances American positions – as it often, when interpreted by Americans, does. We Americans deliver what we say law is, like a 'monologue […] to a hostile world to which [we ourselves] remain closed'.[24] And we expect others happily to take what we give them.[25]

To substantiate his claim, Koskenniemi references President Bush's 2002 remark that '[t]he ideal of America is the hope of all mankind'.[26] In fact, many Americans (in and out of government) found that sentiment to be problematic, especially as the basis for the 2003 invasion of Iraq.[27] Many wanted the government to leave Iraq and Afghanistan almost immediately upon arrival.[28]

23 See also Koskenniemi, 'Perceptions' (n. 1), 311 (describing the American conception as reflecting 'the position of the powerful actor […]: a thoroughly self-reliant, self-centred identity, less imperial than aloof, fearful of corruption by contact with the outside').

24 Koskenniemi, 'Perceptions' (n. 1), 311.

25 See also Koskenniemi, 'Perceptions' (n. 1), 314 ('The instrumentalist bridge takes you over: you with everything that belongs to you.').

26 Koskenniemi, 'Perceptions' (n. 1), 307 (citing Present George W. Bush's Remarks to the Nation: President's remarks to the Nation, Ellis Island, 11 September 2002, available at <https://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020911-3.html>, last access 22 June 2026).

27 For evidence of the popular discontent, see Eric Lichtblau, 'Threats and Responses: Dissent; Tens of Thousands March Against Iraq War', The New York Times, 16 March 2003, available at <https://www.nytimes.com/2003/03/16/us/threats-and-responses-dissent-tens-of-thousands-march-against-iraq-war.html>, last access 22 June 2026, ('[T]ens of thousands of antiwar protesters marched in several demonstrations around the country [on March 16, 2003] in opposition to the Bush administration's policy on Iraq.'). For different positions – many of them critical – by American legal scholars, see Lori Fisler Damrosch and Bernard H. Oxman, 'Agora: Future Implications of the Iraq Conflict Editors' Introduction', AJIL 97 (2003), 553-557 (555) (introducing a symposium that 'present[s] a diversity of perspectives on what the Iraq crisis suggests for the future of the UN Charter system and general international law on the use of force'); Sean D. Murphy, 'Assessing the Legality of Invading Iraq', Geo. L. J. 92 (2004), 173-258 (criticising the US legal argument for the 2003 Iraqi invasion). For the discontent among scholars from other disciplines, see Robert J. Art et al., 'War With Iraq Is Not In America's National Interest', The New York Times, 26 September 2002, archived at <https://sadat.umd.edu/sites/sadat.umd.edu/files/iraq_war_ad_2002_2.pdf>, last access 22 June 2026, ('War with Iraq is not in America's national interests'); Daniel W. Drezner, 'IR Scholars Weigh in Against Iraq', Foreign Pol'y, 12 October 2004, available at <https://foreignpolicy.com/2004/10/12/ir-scholars-weigh-in-against-iraq/#cookie_message_anchor>, last access 22 June 2026, (describing an open letter signed by 650 international relations scholars, including 'a wide array of realists, rational choice theorists, democratization activists, area experts, and liberal institutionalists' 'blasting the Bush administration's foreign policy').

28 On Iraq, see, for example, Gideon Rose, 'Iraq's Descent Chronicle of a Death Foretold', Foreign Aff., 9 July 2014, available at <https://www.foreignaffairs.com/iraq/iraqs-descent>, last

 DOI 10.17104/0044-2348-2026-3-739

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Many challenged the torture, rendition, detention, and targeted killing programs that the U.S. government instituted against suspected terrorists.[29] Barack Obama, who in 2002 opposed the government's decision to invade Iraq, won the U.S. presidency in 2008 on the promise to withdraw U.S. combat troops as soon as possible and to close the detention facility at Guantánamo Bay, Cuba.[30]

---

access 22 June 2026, ('From 2003 to 2006, the Bush administration essentially kept one eye on the exit.'); Carroll Doherty and Jocelyn Kiley, 'A Look Back at How Fear and False Beliefs Bolstered U.S. Public Support for War in Iraq', Pew Research Center, 14 May 2023, available at <https://www.pewresearch.org/politics/2023/03/14/a-look-back-at-how-fear-and-false-beliefs-bolstered-u-s-public-support-for-war-in-iraq/>, last access 22 June 2026, ('In October 2003, a 56 % majority of Democrats said that U.S. forces should be brought home from Iraq as soon as possible.'). On Afghanistan, see Anna Shortridge, 'The U.S. War in Afghanistan Twenty Years On: Public Opinion Then and Now', Council on Foreign Relations, 7 October 2021, available at <https://www.cfr.org/blog/us-war-afghanistan-twenty-years-public-opinion-then-and-now>,last access 22 June 2026, ('[E]ven in the early days of the war, Americans harbored doubts about the chances of success and the potentially high price tag'); Amber Phillips, 'When and How Americans Started Souring on the War in Afghanistan', The Washington Post, 19 August 2021, available at <https://www.washingtonpost.com/politics/2021/08/18/when-how-americans-started-souring-war-afghanistan/#>, last access 22 June 2026, ('In 2004, just a few years into the war, 41 percent of Democrats considered the war in Afghanistan to be a mistake, compared with just 9 percent of Republicans […].'); David Bacon, 'The Fierce, Enduring Legacy of America's Anti-Afghanistan War Protests', The Nation, 9 September 2021, available at <https://www.thenation.com/article/world/photos-afghanistan-war-protests/>,last access 22 June 2026, ('The first marches followed Congress's vote by just two weeks, at the end of September. Once the invasion began, in October, the protests only continued.').

29 See Jameel Jaffer, *The Drone Memos: Targeted Killing, Secrecy and the Law* (The New Press 2016), 7 ('When President George W. Bush left office, he was unpopular and distrusted. The evidence he had cited to justify the invasion of Iraq had been exposed as a fiction. His administration's torture policies were widely viewed as an embarrassment and an outrage. The Supreme Court had repeatedly rejected his policies relating to military detention and prosecution.'); Paul Gronke, et al., 'U.S. Public Opinion on Torture, 2001-2009', Political Science and Politics 43 (2010), 437-444 (using a public-opinion survey data to document the opposition among Americans to torture throughout the Bush presidency).

30 See Transcript: 'Barack Obama's Caucus Speech', The New York Times, 3 January 2008, available at <https://www.nytimes.com/2008/01/03/us/politics/03obama-transcript.html?pagewanted=print>, last access 22 June 2026, ('I'll be a president who ends this war in Iraq and finally brings our troops home.'); Barack Obama, 'Remarks in Washington, DC: "The War We Need to Win"', The American Presidency Project, 1 August 2007, available at <https://www.presidency.ucsb.edu/documents/remarks-washington-dc-the-war-we-need-win>, last access 22 June 2026, ('As President, I will close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions. Our Constitution and our Uniform Code of Military Justice provide a framework for dealing with the terrorists.'); Executive Office of the President, 'Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities', Executive Order No. 13492, 27 January 2009, 74 Federal Register 4897, available at <https://www.federalregister.gov/documents/2009/01/27/E9-1893/review-and-disposition-of-individuals-detained-at-the-guantanamo-bay-naval-base-and-closure-of>, last access 22 June 2026, ('The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order.').

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

What's 'astonishing', then, is not 'to what extent American academics agree on the ethical-political desirability of military intervention',[31] but the extent to which American policymakers have been rudderless and unable to right this ship. Over the past two decades, they have ambled from one foreign crisis to another without clear goals or markers of success and eager to limit their military entanglements but unable effectively to do so.[32] Obama did not close the detention facility at Guantánamo Bay. He took almost his full first term to remove U.S. troops from Iraq only to re-insert them a few years later to degrade the so-called Islamic State in Iraq and Syria (ISIS).[33] In 2011, he first resisted and then acceded to conducting a significant military operation in Libya.[34] He announced that he would withdraw all U.S. troops from Afghanistan only to leave them there as he left office.[35] President Trump campaigned in 2016 on promises to leave Afghanistan, but he, too, reversed course. In his first year in office, he sent extra forces to Afghanistan on a

31 Koskenniemi, 'Perceptions' (n. 1), 308, n. 10.

32 See James Dobbins, Gabrielle Tarini and Ali Wyne, 'The Lost Generation in American Foreign Policy: How American Influence Has Declined, and What Can Be Done About It', September 2020, RAND, 1-39 (13-14), available at <https://www.rand.org/pubs/perspectives/PEA232-1.html>, last access 22 June 2026, ('Twenty-first century American foreign policy has been criticized for its overreliance on force, its unrealistic objectives, and its lack of strategic coherence […]'); William C. Martel, *Grand Strategy in Theory and Practice: The Need for an Effective American Foreign Policy* (Cambridge University Press 2015), 300 ('[I]n the absence of a single, identifiable adversary, American grand strategy entered a period of drift and imbalance, often in the direction of being highly reactive to events.'). See also, e.g., Carroll Doherty, Alec Tyson and Rachel Weisel, 'Support for U.S. Campaign against ISIS; Doubts about Its Effectiveness, Objectives', Pew Research Center, 22 October 2014, available at <https://www.pewresearch.org/politics/2014/10/22/support-for-u-s-campaign-against-isis-doubts-about-its-effectiveness-objectives/>, last access 22 June 2026, ('The public continues to support the U.S. military campaign against Islamic militants in Iraq and Syria. But […] just 30 % think the U.S. and its allies have a clear goal' in taking military action.').

33 See Michael Brill, 'Revisiting the War Against ISIS: The History of Operation Inherent Resolve and Its Future Under the Trump Administration', Institute for Future Conflict, 15 May 2025, available <https://ifc.usafa.edu/articles/revisiting-the-war-against-isis#:~:text=For%20as%20much%20as%20President,rolling%20back%20the%20ISIS%20caliphate>, last access 22 June 2026, ('For as much as President Obama had staked politically in withdrawing all US troops from Iraq by the end of 2011 and attempting to avoid reengagement with the country's political turmoil thereafter, he reluctantly deployed US forces back to Iraq after the fall of Mosul to ISIS in June 2014.').

34 See Interview by Bernard Gwertzman with James M. Lindsay, 'Obama's "Poorly Conceived" Libya Intervention', Council on Foreign Relations, 25 March 2011, available at <https://www.cfr.org/interview/obamas-poorly-conceived-libya-intervention>, last access 22 June 2026.

35 See The Associated Press, 'A Timeline of U.S. Troop Levels in Afghanistan Since 2001', Military Times, 6 July 2016, available at <https://www.militarytimes.com/news/your-military/2016/07/06/a-timeline-of-u-s-troop-levels-in-afghanistan-since-2001/>, last access 22 June 2026.

 DOI 10.17104/0044-2348-2026-3-739

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

more narrowly defined mission[36] before ultimately making a weak deal with the Taliban that rendered the U. S. withdrawal in 2021 a fait accompli – and a complete mess.[37]

U. S. foreign policy – and specifically, military policy – during this period did not reflect a master 'plan for [the] world'.[38] Neither was it particularly instrumentalist, if by that one means driven by clearly delineated policy goals or a concerted effort to spread 'the universal value which is the same as the American value' (whatever that means).[39] Instead, U. S. policy reflected a hodgepodge of competing impulses, none strong enough to command the full weight of the U. S. government behind it but each too strong to be ignored.

III. The European Universe

And what of Europe? How does Koskenniemi describe its defining characteristics, in contradistinction to the United States? He contends that, unlike Americans, Europeans are 'modest, often dull and bureaucratic' and 'nervous about […] "empire"'.[40] Whereas Americans seek to impose their vision on the world, Europeans object to the idea that 'international law can, and should, be replaced by the unilateral, world-ordering politics of a self-appointed hegemon'.[41] They are, in this account, 'suspicious of blueprints and moral rhetoric', with one notable exception.[42] Europeans are staunchly committed to formal law,[43] transposing onto it 'the virtues that justice traditionally possessed'.[44] Convinced that we are '[u]nable to save ourselves', Koskenniemi says, Europeans believe

36 See David Nakamura and Abby Phillip, 'Trump Announces New Strategy for Afghanistan that Calls for a Troop Increase', The Washington Post, 21 August 2017, available at <https://www.washingtonpost.com/politics/trump-expected-to-announce-small-troop-increase-in-afghanistan-in-prime-time-address/2017/08/21/eb3a513e-868a-11e7-a94f-3139abce39f5_story.html>, last access 22 June 2026.

37 See, e. g., Reuters, 'Scathing Report on US Withdrawal from Afghanistan Blames Trump and Biden', The Guardian, 1 July 2023, available at <https://www.theguardian.com/us-news/2023/jun/30/us-afghanistan-war-military-pullout-report-biden-trump>, ('The White House Report effectively blamed the chaotic US pullout and evacuation operation on a lack of planning and troop reduction rounds by Trump following a 2020 deal with the Taliban to withdraw US forces.'), last access 22 June 2026.

38 Koskenniemi, 'Perceptions' (n. 1), 309.

39 Koskenniemi, 'Perceptions' (n. 1), 308.

40 Koskenniemi, 'Perceptions' (n. 1), 310.

41 Koskenniemi, 'Perceptions' (n. 1), 309.

42 Koskenniemi, 'Perceptions' (n. 1), 310.

43 Koskenniemi, 'Perceptions' (n. 1), 310.

44 Koskenniemi, 'Perceptions' (n. 1), 312.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

that 'only law can save'.[45] And by 'law', he clearly means formal legal rules. '[I]f rules govern, the formalist assumes, then I am not at the mercy of others', because '[a]ppeal to the pure form of the rule not only constructs oneself as a potential other but also the other as equal'.[46]

When Koskenniemi wrote *Perceptions of Justice*, he maintained that the dichotomy between the American and the European conceptions is stark. In this account, the American conception reflects the position of the powerful, eager to impose its will on others, while the European conception reflects 'the position of the weaker party, the one for whom law is not about fulfilling policy-objectives but for protection: for whom normative ambiguity is not an opportunity but a threat'.[47] According to Koskenniemi, the strong benefit from normative ambiguity through which they can exert power; the weak, from clear rules that forestall such power. 'The point of instrumentalism is to override rules just as certainly as it is the point of rules to prevent impunity.'[48] Thus, unlike the egoistic and self-involved instrumentalism of Americans, 'the formalist's values reach beyond such individual preferences and back to the community', as reflected in formal law.[49]

If this depiction of the European sensibility is accurate, it gets lost in the broad arc of European practices. We can even put aside the long history of European colonisation. During the period in question, France has persistently worked to keep Africa within its sphere of influence with policies that support African autocrats and render many of their countries militarily and economically dependent.[50] Europe also expanded and turned more hegemonic during this period. In 2004, the European Union grew from fifteen to twenty-five states, significantly increasing its weight in global affairs.[51] On the whole, more decision-making shifted from the national level to the European Union (EU) and then rippled out to regulate conduct outside EU borders.[52]

45 Koskenniemi, 'Perceptions' (n. 1), 310.

46 Koskenniemi, 'Perceptions' (n. 1), 312 f.

47 Koskenniemi, 'Perceptions' (n. 1), 312.

48 Koskenniemi, 'Perceptions' (n. 1), 313.

49 Koskenniemi, 'Perceptions' (n. 1), 313.

50 See, e. g., Paul Taylor, 'Macron's Africa Reset Struggles to Persuade', Politico, 13 March 2023, available at <https://www.politico.eu/article/france-emmanuel-macron-africa-reset-strategy-francafrique/>, last access 22 June 2026; see generally Tony Chafer, 'Chirac and 'la Françafrique': No Longer a Family Affair', Modern & Contemporary France 13 (2005), 7-23 (discussing the history of the French 'sphere of influence – the so-called 'pré carré' – in sub-Saharan Africa').

51 See Council of Europe, '2004 Enlargement: Facts and Figures', last updated 30 January 2025, available at <https://www.consilium.europa.eu/en/infographics/2004-enlargement-facts-and-figures/>, last access 22 June 2026.

52 See Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Moreover, Europe consistently acted in close military alliance with the United States.[53] The 1999 intervention in Kosovo and the extensive state-building exercise that followed were conducted by the North Atlantic Treaty Organization (NATO). The United States and Europe also worked together through NATO – and on another state-building exercise – in Afghanistan following the terrorist attacks of 11 September 2001. Several European states that were at the time or would soon become EU members participated in the so-called 'coalition of the willing' against Iraq in 2003, with still more state-building to follow.[54] The 2011 Libya operation was, again, a NATO operation. Dozens of states, many of them European, participated in or otherwise supported the operation against ISIS in Iraq and Syria. The list goes on. Notwithstanding the deep 'suspicio[n] of blueprints and moral rhetoric' that Koskenniemi attributes to Europeans, they were, in fact, integral to these military (mis)adventures.[55]

And then, of course, there is Ukraine. A few years before Russia invaded the Crimea region in 2014, President Obama announced what was already evident to many keen observers of U.S. foreign policy: the United States sought to 'pivot' away from Europe and the Middle East toward the Indo-Pacific region.[56] The pivot stalled out. European leaders evidently wanted more, not less, attention from the United States.[57] By the time Obama left office in 2017, he acquiesced. Though he continued to press European states to invest more in their mutual defence and in addressing other global problems, Obama ultimately used the 2016 NATO summit 'to state clearly what will never change – and that is the unwavering commitment of the United

53 See generally NATO, 'NATO Operations and Missions', last updated 30 July 2025, available at <https://www.nato.int/cps/en/natohq/topics_52060.htm>, last access 22 June 2026 (detailing NATO actions in Kosovo, Afghanistan, and Libya).

54 See Philip H. Gordon, 'The Crisis in the Alliance', Brookings, 24 February 2003, available at <https://www.brookings.edu/articles/the-crisis-in-the-alliance/>, last access 23 June 2026 ('[E]ight NATO members and ten EU candidates publicly lining themselves up with Washington rather than with France, Germany, or their domestic public opinion […] join[ed] the coalition […].').

55 Koskenniemi, 'Perceptions' (n. 1), 310.

56 Barack Obama, 'Remarks by President Obama to the Australian Parliament: Parliament House: Canberra, Australia', 17 November 2011, available at <https://obamawhitehouse.archives.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament>, last access 23 June 2026 ('After a decade in which we fought two wars that cost us dearly, in blood and treasure, the United States is turning our attention to the vast potential of the Asia Pacific region.'). See also Kenneth G. Lieberthal, 'The American Pivot to Asia', Brookings, 21 December 2011, available at <https://www.brookings.edu/articles/the-american-pivot-to-asia/>, last access 23 June 2026.

57 See, e.g., Michael Crowley, 'Obama's Latest Pivot – to Europe', Politico, 24 April 2016, available at <https://www.politico.com/story/2016/04/obama-europe-crisis-222368>, last access 23 June 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

States to the security and defense of Europe, to our transatlantic relationship, to our commitment to our common defense'.[58]

Within just a few months, that unwavering commitment to Europe – like so much else in U.S. foreign policy during this period – wavered. To the collective horror of most European leaders, President Trump openly and persistently called into question the continued relevance and desirability of NATO for the United States.[59] And yet, even Trump did not in his first term break the NATO alliance. So, when President Biden entered office in 2021 with the triumphant declaration that 'America is back',[60] Europe again rallied behind him.[61] And when Russia embarked on a full-scale invasion of Ukraine in 2022, it was Europe, not the American public, that kept pushing the U.S. government to get more deeply involved (a more accurate term might be 'mired') in the conflict, without any obvious end game in sight.[62]

---

58 Cheryl Pellerin, 'Obama: U.S. Commitment to European Security is Unwavering in Pivotal Time for NATO', DoD News, 10 July 2016, archived at <http://defense.gov/News/News-Stories/Article/Article/832567/obama-us-commitment-to-european-security-is-unwavering-in-pivotal-time-for-nato/>, last access 23 June 2026.

59 See Ashley Parker, 'Donald Trump Says NATO is "Obsolete," UN is a "Political Game"', The New York Times, 2 April 2016, archived at <https://archive.nytimes.com/www.nytimes.com/politics/first-draft/2016/04/02/donald-trump-tells-crowd-hed-be-fine-if-nato-broke-up/>, last access 23 June 2026; David E. Sanger and Maggie Haberman, 'Donald Trump Sets Conditions for Defending NATO Allies Against Attack', The New York Times, 20 July 2016, available at <https://www.nytimes.com/2016/07/21/us/politics/donald-trump-issues.html?_r=0>, last access 23 June 2026.

60 See Jim Garamone, 'President Biden Tells World: "America Is Back"', U.S. Department of War, 19 February 2021, archived at <https://www.war.gov/News/News-Stories/Article/Article/2509091/president-biden-tells-world-america-is-back/>, last access 23 June 2026.

61 See Aamer Madhani, 'Biden Declares "America is Back" in Welcome Words to Allies', Associated Press, 19 February 2021, available at <https://apnews.com/article/biden-foreign-policy-g7-summit-munich-cc10859afd0f542fd268c0a7ddcd9bb6#>, last access 23 June 2026 ('"Welcome back, America," said European Council President Charles Michel, effectively summing up the mood of the Munich conference.'); see also Mark Landler, 'Global Leaders Chart a New Course in Post-Trump Era', The New York Times, last updated 12 May 2025, available at <https://www.nytimes.com/live/2021/02/19/world/g7-meeting-munich-security-conference/global-leaders-chart-a-new-course-in-post-trump-era?smid=url-share>, last access 23 June 2026 ('Whatever their lingering differences over Brexit or how to handle Russia and China, Mr. Johnson and other European leaders are eager to take advantage of an American president who wants to banish the "America First" policy of his predecessor, Donald J. Trump.'), last access 23 June 2026.

62 See, e.g., Alexander Ward and Quint Forgey, 'Baltics Quietly Push Biden to Pursue Stronger Russia Policy', Politico, 21 January 2022, available at <https://www.politico.com/newsletters/national-security-daily/2022/01/21/baltics-quietly-push-biden-to-pursue-stronger-russia-policy-495814#:~:text=President%20JOE%20BIDEN%20did%20tell,by%20all%20NATO%20member%20countries>, last access 23 June 2026, ('[T]hree Baltic states have quietly lobbied U.S. and NATO officials to take their own concerns about the situation seriously – and to do something about it.'); Paul McLeary, '"Please Guys, Wake Up": European Leaders Push Biden, Congress on Ukraine', Politico, 18 January 2024, available at <https://www.politi

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

IV. A Final Rupture?

The 2024 U.S. election was in many respects a referendum on what the United States had become – both domestically and on the international plane. The two are, of course, connected. As the United States became a more global entity, it changed rather dramatically on the inside. For me personally, many of these changes have been positive. The possibilities for social and economic mobility in the United States during the second half of the twentieth century allowed my family's Persian community and many other immigrant communities to thrive. The openness of elite institutions of higher education allowed me to build a fulfilling life that would have been unimaginable to my childhood self. The enormous diversity across the United States provides me with endless opportunities to learn, to create, and to explore. I could go on; even with my misgivings, my appreciation for this country and what it has given me run deep. I also share the strong sense among many Americans today that we have lost our way. Over the past twenty years, our country has become harsher, more militant, more polarised, less social, and less responsive to the basic wants and needs of most of its population.

The backlash against what the United States has become (however one describes it) has been fierce. This backlash is, at least in part, a reaction to the United States's global orientation. Under the second Trump administration, the United States has actively worked to destroy the international legal and political order that earlier U.S. administrations had helped to create and tried to sustain.[63] As the United States has redefined itself and its position in the world, it has pushed Europe to do the same. In the process, Europe has not upheld all of the pre-existing international legal rules – or even the most

co.com/news/2024/01/18/biden-congress-ukraine-europe-00136404>, last access 23 June 2026; Shannon Pettypiece, 'Biden Heads to Europe Amid Pressure to Ramp Up Support for Ukraine', NBC News, 23 March 2022, available at <https://www.nbcnews.com/politics/white-house/biden-heads-europe-pressure-ramp-support-ukraine-rcna20832>, last access 23 June 2026, ('Poland has been pushing the U.S. to do more to get involved in the conflict, including a proposal for a NATO peacekeeping mission to Ukraine.'); Laura Gozzi and Tom Bateman, 'Pressure Grows on Biden to Let US Weapons strike Russia', BBC News, 30 May 2024, available at <https://www.bbc.com/news/articles/c844g9eyzz7o>, last access 23 June 2026, ('Pressure on the US to relax the ban on Ukraine striking inside Russia has ramped up in recent days, with France's President Emmanuel Macron voicing direct support for the move.').

63 On the dramatic changes in U.S. governmental practice during the first several months of the second Trump administration, see Jacob Katz Cogan (ed.), 'Special Issue on the Contemporary Practice of the United States and the Outset of President Trump's Second Term in Office', AJIL 119 (2025), 667-825.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

sacrosanct of these rules – simply because of their legal forms and no matter the downside costs. Europe has repeatedly hedged between its supposed commitments to international law and its interests in advancing its strategic position, relative to those around it.

The 2026 war with Iran is illustrative. The United States and Israel initiated a massive military campaign against Iran with the apparent goal of instituting a regime change and/or denying it nuclear weapon capabilities. The campaign contravenes the formal legal rules on the use of force, codified in the United Nations (UN) Charter. Most European leaders have not insisted on fidelity to these rules.[64] As Anthony Dworkin details, 'several European leaders have implied that a realistic view of global politics requires moving away from fully supporting the prohibition on the use of force', or that international law must be 'weighed against the principle of reality'.[65] Most European states have chosen to lean toward, not away from, the United States.[66] When Iran reacted to the campaign against it by attacking its Arab neighbours, European states gave the anti-Iran coalition military support, even if only for what they said were 'defensive' operations.[67] When the UN Security Council addressed the war, European states endorsed a resolution that condemned Iran for attacking its neighbours, without supporting one that would also have con-

64 For summaries of global and European reactions, see Claudia Ciobanu and Sam McNeil, 'World Leaders React with Alarm, Caution to U.S. and Israeli Strikes on Iran', Los Angeles Times, 28 February 2026, available at <https://www.latimes.com/world-nation/story/2026-02-28/world-leaders-react-cautiously-to-u-s-israeli-strikes-on-iran>, last access 23 June 2026; Lili Bayer and Andrew Gray, 'EU Nations Call for "Maximum Restraint", Respect for International Law in Iran Conflict', Reuters, 1 March 2026, available at <https://www.reuters.com/world/middle-east/eu-nations-call-maximum-restraint-respect-international-law-iran-conflict-2026-03-01/>, last access 23 June 2026.

65 Anthony Dworkin, 'War Over law: Europe's Unforced Errors Over the Use of Force in Iran', European Council on Foreign Relations, 12 March 2026, available at <https://ecfr.eu/article/war-over-law-europes-unforced-errors-over-the-use-of-force-in-iran/>, last access 23 June 2026, (quoting Belgian foreign secretary Maxime Prévot). See also, e.g., Matthias Matthijs, 'Europe's Disjointed Response to the U.S.-Israeli War With Iran', Council on Foreign Relations, 6 March 2026, available at <https://www.cfr.org/articles/europes-disjointed-response-to-the-u-s-israeli-war-with-iran>, last access 23 June 2026.

66 E.g., Max Colchester and Bojan Pancevski, Europe is Quietly Playing a Crucial Role in the Iran War, The Wall Street Journal, 23 March 2026, available at <https://www.wsj.com/world/europe/europe-is-quietly-playing-a-crucial-role-in-the-iran-war-aad34a00?st=NsG3X8&reflink=article_email_share>, last access 23 June 2026.

67 See 'The Iran War Serves as a Stress Test for European Strategic Autonomy', The Soufan Center, 10 March 2026, available at <https://thesoufancenter.org/intelbrief-2026-march-10/>, last access 23 June 2026; John T. Psaropoulos, After Iran's Warning, Europe Fails to Unite on War Launched by US, Israel, Al Jazeera, 4 March 2026, available at <https://www.aljazeera.com/news/2026/3/4/amid-middle-east-crisis-europe-fumbles-towards-mutual-defence>, last access 23 June 2026.

 DOI 10.17104/0044-2348-2026-3-739

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

demned the campaign against it.[68] However one describes the European position in this war – whether 'disjointed',[69] reflecting a 'strategic vacuum',[70] or 'confused and divided'[71] – Europe seems more at sea than not, without the United States standing closely by its side.

V. Conceptual Convergence

Given the extent to which the United States and Europe have historically been entwined, can we really say that the two occupy 'incommensurable conceptual universes'?[72] Koskenniemi himself went from 'insist[ing]' on their incommensurability to suggesting that they are actually 'the same'.[73] What unites them, Koskenniemi asserted, is that they 'appear equally fixated to the search for a right answer and the belief that this is accessible by technical reasoning, in one case through interpretation, in the other by 'rational choice'.[74]

I agree that the American and the European conceptions are not dichotomous. But in my view, their shared conceptual foundation runs much deeper than a desire for and belief in 'a right answer'.[75] Many international lawyers, on both side of the Atlantic, share the assumption that the only alternative to establishing and adhering to formal legal rules is an individualistic free-for-all in which 'everybody had better carry a rifle'.[76] Some put faith in formal legal rules, as the only option for forestalling anarchy; others deny that formal legal rules can. But the assumption that these are the only options – rule by law or rule without law – is fairly constant.[77]

Koskenniemi leaves the assumption unstated, so to see how extensively it permeates his logic, one has to dig more deeply into his conceptual 'gram-

68 UNSC Res 2817 of 11 March 2026, UN Doc. S/RES/2817; UN, Security Council Adopts Resolution 2817 (2026) Condemning Iran's 'Egregious Attacks' against Neighbours as Middle East Violence Rapidly Escalates, UN Doc. SC/16315, 11 March 2026, available at <https://press.un.org/en/2026/sc16315.doc.htm>, last access 23 June 2026.

69 Matthijs (n. 65).

70 Atlantic Council Experts, 'Experts React: How the World Is Responding to the U.S.-Israeli War with Iran', Atlantic Council Dispatches, 3 March 2026, available at <https://www.atlanticcouncil.org/dispatches/experts-react-how-the-world-is-responding-to-the-us-israeli-war-with-iran/>, last access 23 June 2026.

71 Dworkin (n. 65).

72 Koskenniemi, 'Perceptions' (n. 1), 306.

73 Koskenniemi, 'Politics' (n. 11), 16.

74 Koskenniemi, 'Politics' (n. 11), 16.

75 Koskenniemi, 'Politics' (n. 11), 16.

76 Koskenniemi, 'Perceptions' (n. 1), 313.

77 I defend this claim at Monica Hakimi, 'Thinking Constructively about International Law', Yale J. Int'l L. 51 (2026), 43-95.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

mar'.[78] Koskenniemi regularly suggests that, where formal legal rules do not resolve what is to be done, operational decisions must be attributable to extralegal forces – for example, raw power, abject self-interest, or base political preferences.[79] Consider his early critique of the proceduralisation of international environmental law and the associated paucity of formal legal rules. He contends that 'a "pure" procedural orientation will lead to little more than extended reformulations of the principle of the free choice of means'.[80] In other words, '[i]n the absence of materially constraining law and an external legal *telos*', each state has 'free choice' on how to proceed.[81] At that point, the state's operational decisions by 'necessity' reflect 'political choices' because they cannot be based on the binding and consensual rules of formal law;[82] they inherently involve 'genuine disagreements about the setting of environmental and economic priorities'.[83] In this logic, the only alternative to establishing formal legal rules that settle disagreements about what is to be done is for states to exercise 'free choice' in advancing their own priorities, to the detriment of those who disagree. 'For if the law is indeterminate', Koskenniemi instructs, 'there is nothing that may obstruct or realize any purpose'.[84] What happens must be attributable to the forces that lie outside law.

This assumption – that law ends wherever the formal legal rules do – puts Koskenniemi in a bind, because he also contends that formal legal rules cannot resolve what is to be done. In his telling, formal legal rules work like empty vessels through which 'any conceivable position in regard to a dispute

78 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue Cambridge University Press 2006), 566-569.

79 Koskenniemi, '*Apology to Utopia*' (n. 78), 599 ('Antagonism is embedded in the *raison d'être* of the law itself and carried within it as the endlessly repeated rejection of its "other" ["direction", "power", "violence", "corruption", etc.].').

80 Martti Koskenniemi, 'Peaceful Settlement of Environmental Disputes', Nordic J. Int'l L. 60 (1991), 73-92 (74).

81 Koskenniemi, 'Peaceful Settlement) (n. 80), 74, 85.

82 See, e. g., Koskenniemi, '*Apology to Utopia*' (n. 78), 595, 602 (responding to the criticism that he 'exaggerate[s] the role of conflict in international law' by emphasising that he never aimed to deny the 'constant move to reconciliation' in international law); Martti Koskenniemi, 'What is International Law For?', in: Malcolm D. Evans (ed.), *International Law* (2nd edn, Oxford University Press), 57-81 (69) ('The very ideas of treaty and codification make sense only if one assumes that there at some point emerges an agreement […]. The point of law is to give rise to standards that are no longer merely "proposed." […].').

83 Koskenniemi, 'Peaceful Settlement' (n. 80), 85 f. See also Koskenniemi, 'Politics' (n. 11), 7 f. ('[T]he kinds of issues that lawyers had always pointed to when they discussed the use of "discretion" reflect "the inevitability of 'politics' in the profession of public international law".').

84 Martti Koskenniemi, 'Legal Universalism: Between Morality and Power in a World of State', in: Sinkwan Cheng (ed.), *Law, Justice, and Power: Between Reason and Will* (Stanford University Press 2004), 46-69 (60).

 DOI 10.17104/0044-2348-2026-3-739

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

or a problem' can be taken.[85] Their indeterminacy is not, in his view, a 'scandal or (even less) a structural "deficiency"'.'[86] It is, he says, 'an absolutely central aspect of international law's acceptability'.[87] But it means that the formal legal rules cannot constrain or excise the other forces that seep into how people interpret or apply them. In his influential *From Apology to Utopia*, Koskenniemi emphasises the 'inevitability of political choice' in law, where, he says, 'political choice' 'cannot be grounded on law'.[88] If law extends no further than the formal legal rules, and these rules are themselves indeterminate, then politics must run throughout law. And law cannot be 'an instrument for more or less shared "values" or "interests"'; neither can 'its significance' be tied to 'whether it made nations "behave" towards some postulated end-state'.[89]

The bind, once one assumes Koskenniemi's logic, is that we are damned if we do and damned if we do not. We need to adhere to formal legal rules to constrain the outside forces that reflect existing power disparities,[90] but because these rules are themselves indeterminate, they cannot 'save us'.[91] Worse, because they are contingent on the very forces that they are supposed to constrain, they reinforce the '*structural bias* in the relevant legal institutions' that serves the already powerful.[92] 'In any institutional context', Koskenniemi explains, 'there is always such a structural bias, a particular constellation of forces that relies on some shared understanding of how the rules

85 Koskenniemi, '*Apology to Utopia*' (n. 78), 564.

86 Koskenniemi, '*Apology to Utopia*' (n. 78), 591.

87 Koskenniemi, '*Apology to Utopia*' (n. 78), 591.

88 Koskenniemi, '*Apology to Utopia*' (n. 78), 602, 613.

89 Koskenniemi, '*Apology to Utopia*' (n. 78), 564, 589. See also Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', M. L. R. 70 (2007), 1-39 (7) ('Even if the institutions were to apply the same rules, they would apply them differently owing to "differences in the respective context, object and purposes, subsequent practice of the parties and *travaux preparatoires*". Everything depends on the bias of the institution.').

90 See also, e. g., Martti Koskenniemi, 'Solidary Measures: State Responsibility as a New International Order?', BYIL 72 (2001), 337-356 (341) ('The conditions of coercion have to be carefully determined: vague clauses would give too much room for political abuse.'); Martti Koskenniemi, 'Methodology of International Law', in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2019), Article last updated November 2007), para. 2 ('Arguments have binding force to the extent that they do not just describe what States – or other powerful actors – do or will, but actually require them to do something that they would not wish to do. To this extent, their persuasive force lies in their normativity, here being opposable to power.').

91 Koskenniemi 'Perceptions' (n. 1), 310.

92 Koskenniemi, '*Apology to Utopia*' (n. 78), 607. See also Koskenniemi, 'The Fate' (n. 89), 8 ('If there are no regime-independent ways of describing an issue, the door is open to the unilateral assumption of jurisdiction by experts who feel themselves powerful enough to have the last word.').

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

and institutions should be applied'.[93] His claim seems to be that the persistent 'structural bias' neuters the indeterminacy that would exist if formal legal rules could be detached from the social and political settings in which they have to be interpreted and applied.[94] So, rather than save us or do nothing, law becomes 'part of the problem'; it turns what are, in Koskenniemi's telling, political choices into 'expert', 'technocratic' practices that 'work […] in favour of those who are privileged, against the disenfranchised'.[95]

Koskenniemi's logic here converges with what he claims is the American conception: law cannot do anything independently of the other forces that operate alongside it – which, during the post-World War II period, included massive amounts of American power. To the extent that international law worked during this period, such that it had a practical effect, the logic would go, it must have been tied, in one way or another, to the U.S. power that saturated it. Indeed, in 2007, Koskenniemi echoed the views of his 'friends in Massachusetts'[96] in suggesting that, when all is said and done, 'we found no Kantian federation but the naturalism of Pufendorf and Hobbes – powerful actors engaged in strategic games with their eye on the Pareto maximum'.[97]

The Trump administration takes this logic to its natural conclusion. '[Y]ou can talk all you want about international niceties', the White House deputy chief of staff has said.[98] 'But we live in a world, in the real world […] that is governed by strength, that is governed by force, that is governed by power.'[99] Like Koskenniemi, Trump rails against the 'rule of unelected bureaucrats'[100] (a.k.a. technocrats) 'stealing your paychecks, attacking your values, and trampling your freedoms'.[101] Koskenniemi claims that technocrats are 'part

93 Koskenniemi, '*Apology to Utopia*' (n. 78), 608.

94 See also Koskenniemi, 'The Fate' (n. 89), 7 ('Everything depends on the bias of the institution.').

95 Koskenniemi, '*Apology to Utopia*' (n. 78), 608 f.; see also Koskenniemi, 'The Fate' (n. 89), 8 f. ('The resulting regulation may also be more geared toward *enabling* private power than limiting it. […] In such (and other ways), traditional international law is pushed aside by a mosaic of particular rules and institutions, each following its embedded preference.').

96 Koskenniemi 'Perceptions' (n. 1), 305.

97 Koskenniemi, 'The Fate' (n. 89), 15.

98 Stephen Collinson, 'Trump's New US Mission Statement: Strength, Force, Power', CNN, 6 January 2026, available at <https://www.cnn.com/2026/01/06/politics/trump-greenland-venezuela-colombia-miller-analysis>, last access 23 June 2026 (internal quotation marks omitted).

99 Collinson (n. 98).

100 Read the full text of Trump's speech to a joint session of Congress, PBS News, 5 March 2025, available at <https://www.pbs.org/newshour/politics/read-the-full-text-of-trumps-speech-to-a-joint-session-of-congress>, last access 23 June 2026.

101 Donald J. Trump, 'Remarks in Warren, Michigan', 29 April 2025, available at <https://www.govinfo.gov/content/pkg/DCPD-202500540/pdf/DCPD-202500540.pdf>, last access 23 June 2026.

 DOI 10.17104/0044-2348-2026-3-739

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

of the problem'.[102] Trump uses his power to diminish them, both in the U. S. administrative state and in international institutions. If there are differences between Koskenniemi's concerns in the early aughts and the ones Trump is now addressing, the differences seem to be more about rhetorical style than they are about substance. Trump seems simply to be taking the mask off what Koskenniemi tells us was already there.[103]

Thus, in the final analysis, the European formalists and the American egoists that Koskenniemi describes share the same conceptual universe – which also appears to be *his* conceptual universe. In this universe, the powerful do what they want, except insofar as law constrains them. Many, on both sides of the Atlantic, seem to think that it cannot effectively do that, and that where it does not, it becomes 'functionally irrelevant',[104] inert, or just the sieve through which the contested preferences of the powerful flow.[105] Koskenniemi tellingly concludes *Perceptions of Justice* by comparing the practice of international law to what happens at the Western Wall in Jerusalem. Both, he says, have a 'somewhat mystical' quality that '[m]any people might find […] silly, or incomprehensible', presumably because they do not, in Koskenniemi's telling, do much to bring about practical change.[106] They instead enable practitioners, who have been stripped of all agency, to 'open their hearts and save their prayers'.[107] American lawmakers who want to abdicate decision-making responsibility and, like true believers, avoid making the compromises that would be necessary to address rampant gun violence in the United States have a similar practice. Freed from operational relevance, they offer Americans thoughts and prayers and consider their work done.

VI. Conclusion

The fact that Koskenniemi can muster no more than wistful hope for international law – that he insists that formal law, when 'strictly followed', can 'unite[…]' and 'save' us, even as he tells us why it cannot – is revelatory.

102 Koskenniemi, '*Apology to Utopia*' (n. 78), 609.

103 For an articulation of the claim that, with Trump, 'the mask has slipped', see Balakrishnan Rajagopal, International Law In, and As, Crisis', Verfassungsblog, 23 January 2026, doi: 10.59704/d679b589d0be8910.

104 Jack L. Goldsmith and Daryl J. Levinson, 'Law for States: International Law, Constitutional Law, Public Law', Harv. L. Rev. 122 (2009), 1791-1868 (1823) (describing the realist claim).

105 For an elaboration of this logic, see Hakimi (n. 77).

106 Koskenniemi 'Perceptions' (n. 1), 314.

107 Koskenniemi 'Perceptions' (n. 1), 314.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

It exposes that the conceptual apparatus behind his thinking is confused.[108] This apparatus assumes that law can meaningfully exist only in formal rules;[109] that law can have a practical effect only insofar as it overrides all the contrary forces in play;[110] and that the only alternative to this kind of formal law is lawless anarchy, in which the powerful fight amongst themselves to be top dog and impose their will on everyone else.[111]

I and others have challenged these assumptions. We have harnessed facts to show and offered theories to explain that law is not limited to formal rules; that law works in conjunction with other, often competing forces; that this alternative kind of law does not just replicate or reinforce the power dynamics that would exist without it; and that, for all its limitations, it still can serve something like a broader good.[112] Because law constitutes and reshapes – rather than merely channelling or reflecting – power,[113] law opens possibilities for collective action that Koskenniemi's conception forecloses from the start. True believers have taken our challenges to their conception to be heretical. They have routinely and summarily dismissed our arguments that have contradicted them. Their blind faith has led them and all who listen to them without agency, howling thoughts and prayers into the wind, hoping to realise the heaven on earth that they promise they will deliver, once international law takes the form and does the work that they say all law must.[114]

For the rest of us, the project must be different. There is growing evidence that some of the most basic international legal norms of the post-World War II period are under significant strain.[115] Trump is helping to destroy these norms. But while Trump himself is an American president, he is not a purely

108 Koskenniemi 'Perceptions' (n. 1), 310, 314.

109 See n. 45-49, 79 and 88-89, plus accompanying texts.

110 See n. 17-19, 80-84 and 90-95, plus accompanying texts.

111 See n. 76 and 97, plus accompanying texts.

112 In my view, the most sustained challenge in international law has come from the New Haven School of Jurisprudence. For an overview, see W. Michael Reisman, 'The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment', General Course on Public International Law 2012, 9-382. For some of my efforts to emphasise these points, see Hakimi (n. 77); Monica Hakimi, 'What Might (Finally) Kill the Jus ad Bellum', Current Legal Probs. 73 (2021), 101-123; Monica Hakimi, 'Why Should We Care About International Law?', Mich. L. Rev. 118 (2020), 1283-1306; Monica Hakimi, 'Making Sense of Customary International Law', Mich. L. Rev. 118 (2020), 1487-1538.

113 On this point, see Monica Hakimi and Jacob Katz Cogan, 'The End of the U. S.-Backed Order and the Future of International Law', AJIL 119 (2025), 279-290 (283-285).

114 I further defend this point at Hakimi (n. 77).

115 For some earlier warnings and defenses of this claim, see Ingrid Brunk and Monica Hakimi, 'The Prohibition of Annexations and the Foundations of Modern International Law', AJIL 118 (2024), 417-467 (discussing the international legal norms on annexations, the use of force, the right to self-determination, and the territorial entrenchment of state authority); Hakimi and Cogan (n. 113), 285-288 (discussing a broader range of norms).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

American phenomenon. He is the product of a broader set of global trends that cannot simply be reversed – or prayed away.[116] Whatever comes next will not be what came before. Those of us with humanist impulses, on both sides of the Atlantic and across the world at large, will need to find ways to alter these trends and harness some of the energy that is now behind them, so that we can build something new; the alternative, if we do not redefine ourselves together, is that we will keep sliding toward the lawless anarchy that Koskenniemi and his intellectual allies tell us we have always had.[117]

116 For one excellent discussion, see Rita Abrahamsen et al. (eds) *World of the Right: Radical Conservatism and Global Order* (Cambridge University Press 2024).

117 See, e. g., Abrahamsen et al. (n. 116) (calling for the same).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

Max Planck-Cambridge Prize for International Law

Interview with *Professor Eliav Lieblich* on the Occasion of the 3rd Max Planck-Cambridge Prize Ceremony

Fabian Eichberger & *Liana Minkova* in Conversation with *Eliav Lieblich*

The following interview with Professor Eliav Lieblich took place on the occasion of the award ceremony of the 3rd Max Planck-Cambridge Prize. The Max Planck-Cambridge Prize is a joint initiative of the Lauterpacht Centre for International Law, University of Cambridge, and the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. Awarded biennially, the prize highlights the relevance of fundamental research in the field of international law in a phase of reconfiguration of the global order. Its aim is to identify an outstanding mid-career legal scholar whose contributions to the study of international law have enriched the field and are likely to continue and develop further. The interview was conducted by Dr. Fabian Eichberger and Dr. Liana Minkova, both postdoctoral researchers and Fellows of the Lauterpacht Centre.

Career & Personal Trajectory

Fabian Eichberger (F) & Liana Minkova (L): Our warmest congratulations on the award, Eliav. This is a significant achievement, and we would like to start this interview with some questions about the career path that has led you to this moment.

F: You began your legal career serving as a clerk at the Israeli Supreme Court before moving into academia. How did that early experience shape your interest in international law?

Eliav Lieblich (E): Thank you so much! I think, in the most immediate sense, what shaped my interest from early on is seeing how international law

DOI 10.17104/0044-2348-2026-3-761

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

hits reality. A lot of us are conditioned to think, when we study international law, that it mainly serves to constrain state power. Back then – and it was quite a while back and very different times – the Supreme Court was hearing many 'wall cases'[1]. These involved Palestinians from the West Bank petitioning against parts of the West Bank Wall which encroached into their lands or limited their freedom of movement or ability to access their fields. This was just after the International Court of Justice gave its Advisory Opinion which held that the entire Wall was unlawful because it was aimed to incorporate parts of the West Bank into Israel.[2] I remember being struck how two Courts that seemingly apply similar norms of international law reach opposing conclusions concerning a similar set of facts, which got me interested in the ways in which states are not only constrained by law, but how they use it as a legitimating tool.

I also remember how these proceedings looked: on the one hand you had Palestinian villagers that probably needed a special permit to enter Israel for the hearing and perhaps left their homes at 3 AM to get through all the checkpoints and get to Court on time. On the other side you'd have the state lawyers with their maps and presentations and uniformed officers explaining the extreme necessity of it all, of course arguing in front of Israeli judges. Sometimes the petitioners would 'win' in an isolated case, but I recall thinking what is law *really* doing here? Does it constrain in any way or is it mostly used to legitimate a broader project? So these types of questions initially pushed me into the field.

L: You have studied, held visiting professorships, and taught in a variety of academic settings around the world. How have these experiences influenced your scholarly work or perspectives? More specifically, have you found that each institution or context has offered distinct insights or approaches that have informed your research or teaching?

E: Legal scholarship is approached differently in different places and obviously you take something from everywhere you go. US legal scholarship is very pragmatic and tends to emphasise how law works in 'real life' and stays away from purely conceptual discussions. German scholarship is incredibly respectful of doctrinal rigour. The UK's tradition has not only strong doctrinal and critical elements, but also occasionally approaches legal

1 See e. g. Supreme Court of Israel, *Mara'abe v. Prime Minister*, judgment of 15 September 2005, HCJ 7957/04.

2 ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 136.

 DOI 10.17104/0044-2348-2026-3-761

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

scholarship through the lens of analytical philosophy. In my home institution at Tel Aviv University, there is no assumption or doctrine that must be taken for granted, so there's a certain creative impulse in that way of thinking. I try to learn from all of these traditions in my work.

Teaching in different places is also radically different and depends on expectations, culture, and class composition. When I teach at home, I teach things that are extremely explosive in public discourse. My class composition is also very complex in terms of students' lived experiences. To teach (I hope) effectively, I must structure my courses in a way that students have enough knowledge before discussing the most difficult things, so that we have a basis for an informed discussion. Law has a way of 'structuring' exchanges in that way. The downside of course is that sometimes this numbs things that we should not be numb about.

F: In 2021, you published a guide on 'How to Do Research in International Law', which I recall consulting myself early in my PhD research.[3] *The piece has been downloaded thousands of times and has become a point of entry for students of international law around the world. Could you share the story behind this guide?*

E: It was during the height of the Covid pandemic. I remember that things slowed down and there was not much to do; but I had to prepare a new seminar about theories of international law. I thought that it was a good time to prepare something that could help students understand both the types of questions that legal scholarship asks, and their relations to different theories. I got carried away and it became 25 pages, so I decided to upload it to SSRN. I tweeted it and the next morning, when I woke up, it had already been downloaded over a thousand times and happily is still being used. I think this also has to do with the way Twitter was working back then and the international legal community it formed. Unfortunately, today it's a bit different.

Research

F&L: Thank you for sharing some insights into your professional journey with us. Now, we would like to turn to your academic work, and, more broadly, to your broader research process, including how you identify specif-

3 Eliav Lieblich, 'How to Do Research in International Law? A Guide for Beginners', Harv. Int'l L. J. 62 (2021), 42-67.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

ic research questions, and how your work connects to both history and real-life experiences.

F: Your work is described by the prize committee as 'outstanding, innovative, and highly original' and positions you as 'a leading authority' in ius in bello *and* ius contra bellum*. Which are the themes or questions in these fields that most excite you right now?*

E: First of all, I was extremely honoured to read that description of my work! But to be honest, October 7, the war in Gaza, and the shocking local and global developments we are witnessing almost on a daily basis have made it quite difficult to be genuinely excited about 'pure' scholarship at this point in time. Personally, in the past two years, I found myself devoting a lot of time (along with some of my colleagues) addressing current events because it just felt wrong to do something else.[4]

But more broadly, I am preoccupied now with a more primordial question about the role of (international) legal scholarship in times in which many basic premises that we took for granted are unravelling. For example, for decades, critical approaches to international law highlighted the legitimating function of law. But that assumes that people and politicians care about legitimacy. When I look around, I see an era of vice signalling: some leaders gain political capital precisely from demonstrating that they don't care about this stuff. So what do we do? Should we withdraw into scepticism, or should we double down on our normative commitments? I think many of us are concerned with questions of this order right now, and we should be.

L: Your recent article on prohibition of forcible reprisals[5] *and your discussion of the figure of the 'common judge' made me think about a dilemma we have in the field of international relations scholarship. The anarchical nature of global governance has been a common theme of international relations scholarship and the reason why scholars who define themselves as 'realists' have remained deeply sceptical about international law. At the same time, realism can become a self-fulfilling prophecy as states can use such theoretical arguments to justify non-compliance. In your article you make a strong argument that the absence or failure of a common judge is not a justification for*

4 See Kai Ambos, 'Respect for International Law in Gaza: The Perspective of Israeli Scholars', Verfassungsblog, 23 July 2025, doi: 10.59704/a8afd62366c0f5e2.

5 Eliav Lieblich, 'The Death and Life of the Prohibition on Forcible Reprisals', Yale J. Int'l L. 51 (2026), 1-42.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

opportunistic behaviour. Could you tell us a bit more about your argument and how it can help us rethink international affairs?

E: That article argues that throughout centuries, thinkers of international law have justified using inter-state force as a form of punishment, by arguing that there is no central authority in the international system (a common judge) to punish violators – and that accordingly, that right reverts to individual states. My article basically says that the fact that there is no central authority cannot alone justify lethal force, unless you have a pre-existing justification to use such force. If we believe that the only possible justification to use lethal force is self-defence, the absence of a common judge cannot be a justification to use force for other purposes, such as punishment.

Of course, my argument cannot 'convert' a political realist since such realists generally do not believe that normative concepts have a meaningful application between sovereigns, as these exist in an anarchical 'state of nature'. My argument can work, however, if your international relations perspective is liberal, constructivist or idealist, since these theories accept that normative ideas can have a role in international relations.

F: You have co-authored a book with Eyal Benvenisti,[6] *with whom many of us worked closely in his capacity as Whewell Professor here at Cambridge. As a scholar, how have you experienced collaborating closely with others in your academic writing?*

E: I think that it is unfortunate that we do not cooperate enough in legal academia, and our institutions also do not encourage it too much. Thinking about ideas together generates more insights, and there is also something comforting about it. Having said that, since legal scholarship is so theoretically and methodologically diverse, it is crucial that you work with people that have roughly similar points of departure as you – not about everything of course, but *at least* about what counts as 'law' as a field of analysis and what legal scholarship should be doing. When you write about international law you need to have a clear theory about your object of research. Is it legal doctrine? Does it include policy considerations? Does it include societal interactions? Does it focus on power relations? When selecting collaborators, you have to make sure that you both share a reasonably common understanding about such things.

6 Eliav Lieblich and Eyal Benvenisti, *Occupation in International Law* (Oxford University Press 2022).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

L: In your article on 'whataboutism' in international law you do something very intriguing – you engage with a concept whose meaning is often taken for granted, partly due to the negative connotations commonly associated with it, and you seek to 'unpack' that concept by distinguishing between the different forms such rhetoric could take and by examining the role of social context.[7] *Was it challenging to engage in this kind of conceptual inquiry? And in your view, why is it important for international legal scholarship to ask these kinds of challenging, perhaps uncomfortable, questions?*

E: The basic argument in this article is that 'whataboutism' is essentially an argument about inconsistency, and that this can be a normatively relevant argument if there are relationships of public power between the person making an allegation and the one making a whataboutist objection. This is because a duty to act consistently is a duty of fairness that exists in situations when public power is exercised. In international law, there is a peculiar situation in which states are simultaneously perceived as private entities interacting with each other as individuals (think of the Lotus model), and as public entities exercising public authority over one another and over individuals. This creates a sense of confusion about whataboutism on the international level.

What was especially challenging here was to find the theoretical 'handle' that would help me understand whether whataboutism is necessarily a logical fallacy (as alleged many times) or rather, that it can be at times a good argument. I found a useful theoretical outlook in a branch called informal logic, which deals precisely with the question what makes arguments good and relevant. I think it is crucial for us to ask such questions, at least some of the time, because this type of engagement is what separates us, as legal academics, from practising lawyers or judges. Not that there is anything wrong with being a practitioner or doctrinal scholar – far from it! – but I think we need to say 'something more' to justify the academic enterprise in law as something that goes beyond a trade school.

F: Many international lawyers struggle with the dissonance between the law and practice on the ground. Do you remember particular moments that prompted you to reflect on the practical impact of your work – both positively and negatively?

E: This happened quite a lot in the past several years, less in relation to research and more in the context of 'scholactivism' for lack of better

7 Eliav Lieblich, 'Whataboutism in International Law', Harv. Int'l L. J. 65 (2024), 343-386.

 DOI 10.17104/0044-2348-2026-3-761

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

word.[8] Many of my colleagues and I were involved in efforts to respond to first what we saw as shocking authoritarianism by the Netanyahu government,[9] and then violations of international law in Gaza.[10] Once you engage in such work, people are going to use it in ways that lack nuance, or that are abusive.

In a sense when you are positioned in such an explosive public context, whatever you do might get appropriated. What guides me personally when engaging in public discourse is an awareness of the problematic role that international law academics had throughout history in legitimating governmental power in a myriad of ways. I think that governments of powerful states can take care of themselves and while legal academia should care about the society in which it operates, it should be extremely careful not to become an instrument of state power.

F: Given that you also focus on the history and theory of international law, what role do you believe historical analysis plays in helping us understand contemporary legal dilemmas relating to war and the use of force?

E: I think that history is worth knowing intrinsically, but what I found especially worthwhile in analysing law from a historical perspective is that it exposes continuities. Often, different actors portray something as a 'new' challenge, and then there is an impetus that if something is 'new' we need 'new' law, which is usually more permissive precisely since there is a 'new' challenge. Well, if the challenge is not *really* new, this deflates the argument somewhat.

History also allows us to understand persistent trends in the way states argue. For example, the argumentation the USSR used to justify its 1956 intervention in Hungary is remarkably similar to the argument Russia used for its full-blown invasion of Ukraine in 2022.

Historical analysis can also demonstrate that while some legal arguments and doctrines indeed change throughout time, the underlying power relations remain and so the 'new' legal argument basically gives a new form of legitimation to the practices that are virtually similar. I think TWAIL approaches have been especially influential in this type of thinking.

8 For a critique of scholactivism see Tarunabh Khaitan, 'On Scholactivism in Constitutional Studies: Skeptical Thoughts', I.CON 20 (2022), 547-556.

9 Ittai Bar-Siman-Tov, Tamar Hostovsky Brandes, Eliav Lieblich, Yaniv Roznai and Adam Shinar, 'Scholactivism in the Service of Counter-Populism: The Case of the Constitutional Overhaul in Israel', I.CON 22 (2025), 1059-1093.

10 See Bar-Siman-Tov, Hostovsky Brandes, Lieblich, Roznai and Shinar (n. 9).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Future Plans

F&L: Thank you very much, Eliav. For the remainder of the interview, we would like to turn to the broader impact of your work, as well as your future plans.

L: You are a member of the editorial board of Just Security and have also contributed your own posts. In your view, what unique contributions do such platforms make to the development and dissemination of scholarship in the discipline? What do they contribute to the discipline that more traditional academic formats might not?

E: I think the obvious contribution is speed and accessibility. For example, people do not always have time to read long judgments and want to understand the key issues quickly. In the past, case reports were only published in journals and you would have to wait long months before you could read an analysis of an important case. And blogs are of course open access.

Furthermore, blogs also allow to engage with specific events that are important to highlight, but which might not justify a full-blown journal article. What I also found is that blogs are a great venue for younger people to get themselves in the conversation. At least in my experience most international law blogs are happy to publish PhD students and early-career researchers.

The downside of course (and this also has to do with social media, an entire other issue) is that there is sometimes a rush to get something out there fast, a frame of mind which is not really conducive to the type of deep analysis we expect from academics. And once something is out there, it has a life of its own. But I can say that at least in Just Security there's a good 'quality assurance' system and things are read by several high-level people before they get published. I am extremely impressed with how it works.

F: Are there specific new projects, collaborations, or research directions that you are planning to pursue, which you could share at this stage?

E: I find that current events really require a time to reflect about our role more generally. Still, I find myself thinking about three main themes:

First, how does the rise of 'vice signalling' affect international law? We are accustomed to thinking about state speech as 'positive speech' (even if it is a lie), as states seek to portray themselves in the best possible way. They thus speak in international legal terms, which also affects the formation of custom.

 DOI 10.17104/0044-2348-2026-3-761

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

But how does law-destroying discourse affect the validity of the legal norm? Second, I am interested in the change which we already see in BRICS discourse about existing international institutions, as the U. S. rapidly withdraws and creates a vacuum. Suddenly these institutions are far more open to BRICS influence and even ownership. Third, I am thinking about the 'recollectivisation' of war: a shift from the notion of individualised war that characterised the post-Cold War laws of war and a return to notions that treat people as collectives. This challenges some of the key assumptions of the scholarship in the field in recent decades and raises many important questions.

F: It is no news that international law is facing immense challenges – Anne Peters, who is here today, has recently written about international law 'in the Time of Monsters'.[11] *You have yourself written not only on the rules of international law, but also on its broader argumentative structure. What message would you send to younger scholars entering the field of international law? Or would you perhaps even try to dissuade them from doing so?*

E: Setting aside issues of job prospects and the state of academia more generally, I would certainly not dissuade them from doing so. Most of us are sceptical now about law's ability to influence actors that have no interest in the type of legitimacy that legality provides (and this is also true in many domestic contexts where populism is on the rise). But the truth is that some form of international legality is crucial for our survival. And this is not so much because of any ideal conception of what international law is, or any universalist claim about accepted values, but simply because we are facing problems that cannot be solved without global cooperation. And that we need binding rules to solve collective action and cooperation problems is not something that has been invented by utopian human rights lawyers. Quite the opposite.

So my advice to younger scholars is: do international law, but from a place of reflexivity. There were things that (for better or worse) could be taken for granted fifteen years ago that cannot be taken as a point of departure today. We are not going towards increasing integration; not all constituencies in the global north support globalisation; global international organisations are not going to become progressively stronger; human rights are not universally recognised as the end of sovereignty; the U. S. is not going to underwrite the

11 Anne Peters, International Law and Its Scholarship in the Time of Monsters (6 May 2025). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2025-05, available at SSRN: https://ssrn.com/abstract=5242721.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

so-called global order; authoritarian states will gain more influence; and BRICS will be increasingly dominant both in terms of economic and political power and in terms of influence over international law. This is where things stand, and the role of internationally minded peoples is to think about how, under these circumstances, we can achieve the cooperation needed. This is not to say that normative scholarship should be abandoned; but again, we must concede the level of contestation that such claims face nowadays.

F&L: Thank you very much for taking the time to speak with us, Eliav.

E: Thank you for taking the time to engage with my work! And again, I am extremely honoured to receive this prize.

 DOI 10.17104/0044-2348-2026-3-761

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Impulses from the Max Planck Trialogues on the Law of Peace and War

Climate Change and the Law Surrounding Armed Conflict

The Climate of War

Anne Peters*
Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany
apeters-office@mpil.de

I. Introduction: The Double Burden of War and Warming 771
II. Pre Bello: The Military Emissions Gap 774
III. Ad Bellum: Climate Change as a 'Threat Multiplier' 776
IV. In Bello: Inter Arma Silent Leges Climaticae? 778
V. Post Bellum: Climate Change 'Piecemeal' 781
VI. Conclusion: At the Vanishing Point 782

I. Introduction: The Double Burden of War and Warming

The deadly 'scourge of war' (to cite the United Nations [UN] Charter) has in the past years erupted with all its force.[1] So has the 'existential problem' of

---

* Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.
I thank Christian Marxsen, co-editor of the Max Planck Trialogue Series and Leon Seidl, assistant editor of volume 6 (forthcoming 2027), for helpful remarks on the draft of this essay. I also thank the three authors of the Trialogue volume 6 (Jutta Brunnée, Monica Hakimi, and Lavanya Rajamani) and all commentators and engaged listeners for lively discussions at the workshop of 12-13 March 2026, organised by Christian Marxsen at the Humboldt University.

1 SIPRI Yearbook 2026: Armaments, Disarmament and International Security, Summary, 2: '[T]he number of interstate armed conflicts doubled from three in 2024 to six in 2025 and involved at least 13 states […]. The overall estimated number of conflict related fatalities reduced slightly (by 4.2 per cent) from 249 000 in 2024 to 238 000 in 2025 but this was still higher than in any other year in the period 2018-25 (the period for which consistent data is available).' Shawn Davies, Therése Pettersson and Magnus Öberg, 'Organized Violence 1989-2025, and Violent Political Protests', JPR 63 (2026), 705-772 (706) note that in 2025, fatalities remain among the highest levels in the post-1989 period, with only 2021, 2022, and 2024 being more violent (relying on data of the Uppsala Conflict Data Program <https://ucdp.uu.se/>, last access 3 August 2026).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

climate change which 'imperils all forms of life' (to cite the International Court of Justice [ICJ][2]). And although these two issues are – as a matter of principle – global concerns, bringing 'untold sorrow to mankind' (the UN Charter), and having 'planetary proportions' (the ICJ), they predominantly hit populations in the global south: those regions of the world that are most affected by climate change are, at the same time, those that are more prone to armed conflict. Moreover, the two afflictions do not exist independently from each other but are linked: war contributes to global warming to a not-insignificant degree, and global warming is itself often one of several drivers of armed conflict.[3]

Initial stocktakes of the climate costs of only the most visible ongoing wars in Ukraine (since 2022),[4] Gaza (since 2024),[5] and Iran (since February 2026)[6] show how even their direct CO2 emissions by far outstrip the annual emissions of many countries. In the Iran war, for example, tit-for-

2 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 456.

3 Already the drafters of the UNFCCC were aware of this link. The disastrous climate effects of the oil spills and oil fires in the Gulf war of 1990-1991 (the UN-authorised military operation Desert Shield and Desert Storm against Iraq for the liberation of Kuwait) were heavy on the minds of the negotiators of the UNFCCC of 1992. See Pasquale Amoroso, 'Climate Change and Warfare as Interconnected Concerns in International Legal Negotiations', in this issue. See further below, also on the controversial conceptualisation of climate change as a threat multiplier, text with notes 27-30.

4 The initiative 'GHG accounting of War', led by Lennard de Klerk, has produced annual assessments of the GHG emissions of the Russian war against Ukraine, last in 2026. Lennard de Klerk, Mykola Shlapak, Sergiy Zbitsev, Viktor Myroniuk, Oleksandr Sohenskyi, Roman Vaysylyshyn, Svitlana Krakovska, Lidiia Kryshtop and Rostyslav Bun, *Climate Damage Caused by Russia's War in Ukraine: 24 February 2022 – 23 February 2026*, p. 3: 'Russia's Full-Scale Invasion of Ukraine Drove Greenhouse Gas Emissions (GHG) up by 75 Million Tonnes of CO2 Equivalent (tCO2e) in the War's Fourth Year, Bringing the Total Since 24 February 2022 to 311 Million tCO2e.', <https://en.ecoaction.org.ua/climate-damage-4-years-numbers.html>, last access 3 August 2026.

5 Abdo Hassoun, Khawla Al-Muhannadi, Amira Haddarah, Farah Slim, Dalal Iriqat, Ahmed Hamad, Alix Faddoul and Mohamed Buheji, 'Environmental Consequences of Conflict: Lessons from the Recent War on Gaza' in: Abdo Hassoun (ed.), *War on Gaza: Consequences on Sustainability and Global Security* (Springer 2025), 173-188 (177): 'Within just 60 days, the war emitted 281,315 metric tons of CO2, far surpassing the 77 metric tons released in the first 18 months of the Ukraine war. This figure equates to burning 150,000 tons of coal and exceeds the annual emissions of over 135 countries combined.' See also Benjamin Neimark, Frederick Otu-Larbi, Reuben Tete-Larbi, Patrick Bigger, Linsey Cottrell, Lennard de Klerk and Mykola Shlapak, 'Israel-Gaza Conflict Carbon Emissions Exceeded 30 Million Tons', One Earth 9 (2026), <https://doi.org/10.1016/j.oneear.2026.101648>, last access 3 August 2026.

6 Patrick Bigger, Benjamin Neimark and Fred Otu-Larbi, 'Two Weeks of War in Iran Unleashed More Carbon Pollution than Iceland Does in a Year', Climate & Community Institute, 21 March 2026, <https://climateandcommunity.org/wp-content/uploads/2026/03/Research-Snapshot_Iran-Emissions-Methodology.pdf>, last access 3 August 2026.

 DOI 10.17104/0044-2348-2026-3-771

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

tat strikes by Israel and Iran on energy infrastructure such as gas fields, oil refineries, oil storages in Iran, Saudi Arabia, Bahrain, and Qatar have led to oil spills, fires, and 'black rain'.[7] The uncontrolled combustion may lead to relatively more emissions of methane, ozone, and short-lived 'climate-forcers' such as black carbon than if the oil products had been burned in the intended way.[8]

Beyond such climate costs of armed conflict that can be determined and measured in scoping exercises, looser relationships between the twin evils of warming and war should also be kept in mind: every euro spent on armament is a euro not used for the transition needed towards CO2-neutral societies. And any conventional rebuilding the infrastructure destroyed in a war again generates CO2 that would otherwise not be emitted.

Despite these direct and indirect links between the deterioration of the climate system and armed conflict, the bodies of international law addressing those two issues have so far barely been connected. Even more, such a connection appears frivolous or absurd to many observers.[9] International climate law does not even work in peace times, so how could it possibly be expected to work in the extraordinary condition of war?[10] Against such qualms, the Max Planck Trialogues on the Law of Peace and War[11] and the Impulses from the workshop held in Berlin in the spring of 2026 sought to overcome the traditional neglect and refutation of climate concerns in the law surrounding armed conflict, by examining the potential for 'regime interac-

7 Human Rights Watch, 'Iran: Israel's Oil Depot Strikes Endanger Environment, Health', 13 April 2026, <https://www.hrw.org/news/2026/04/14/iran-israels-oil-depot-strikes-endanger-environment-health>, last access 3 August 2026; Human Rights Watch, 'Israel, Iran: Unlawful March Attacks on Energy Infrastructure', 22 April 2026, <https://www.hrw.org/news/2026/04/22/israel-iran-unlawful-march-attacks-on-energy-infrastructure>, last access 3 August 2026; CEOBS, 'Black Rain: the Health and Environmental Risks from Tehran's Oil Fires', 9 March 2026, <https://ceobs.org/black-rain-the-health-and-environmental-risks-from-tehrans-oil-fires/>, last access 3 August 2026.

8 Scientists for Global Responsibility (SGR), 'Devastation and Pollution: Impacts of the Iran War on Present and Future Life', Responsible Science Blog, 4 May 2026, <https://www.sgr.org.uk/resources/devastation-and-pollution-impacts-iran-war-present-and-future-life>, last access 3 August 2026.

9 See Moritz Vinken, 'The Enlightened Uncanny and International Law', in this issue.

10 I will return to the practical and moral objections at the end of this essay.

11 In a Max Planck Trialogue, three authors discuss one topic within the international law surrounding armed conflict. Each trio is composed so as to engage different modes of legal thinking, intellectual paradigms, regional backgrounds, and professional specialisation. By bringing the pluralism of premises and methods to the fore, the Trialogues facilitate the emergence and global refinement of common legal understandings. <https://www.mpil.de/en/pub/research/areas/public-international-law/max-planck-trialogues.cfm>, last access 3 August 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

tion'[12] during the entire cycle of armed conflict – in the phases pre bello, ad bellum, in bello, and post bellum.

II. Pre Bello: The Military Emissions Gap

The military's carbon bootprint is huge.[13] The entire sector is estimated to account for 5.5 percent of all anthropogenic greenhouse gas emissions (GHG), compared to, for example, the 2.5 percent stemming from aviation.[14] In most states of the world, the military sector is overall the largest single organisation and responsible for the largest share of energy consumption. The battlefield is only the tailpipe of a military greenhouse gas emissions chain starting with building infrastructure and weapons, testing, and deploying them.

Despite its enormous climate relevance, the military sector has largely escaped the attention of climate policy and law activists, and has been neglected in reporting and transition efforts. North Atlantic Treaty Organization (NATO) and several European countries have started to develop decarbonisation strategies, but these have mainly focussed on transforming the infrastructure as opposed to actual operations.[15] These strategies do not mention any legal obligations, and can therefore hardly be counted as evidence of an emerging opinio iuris.

---

12 Term coined by Margaret Young, *Trading Fish, Saving Fish* (Cambridge University Press 2011), Chapter 6.

13 See for the data e. g. <https://militaryemissions.org>, last access 3 August 2026. See also Grace Alexander (Conflict and Environment Observatory, CEOBS), *Military Spending and Emissions are Rising but Reporting is Getting Worse*, 6 November 2025, <https://ceobs.org/new-data-reveals-the-military-emissions-gap-is-growing-wider/>, last access 3 August 2026.

14 Tipping Point North South, *Climate Collateral: Why the Military's Impact on Climate Change Can no Longer be Ignored,* Tipping Point North South's Transform Defence for Sustainable Human Safety Series Briefing of November 2025, <https://transformdefence.org/publication/climate-collateral-2025/>, last access 3 August 2026.

15 NATO, Climate Change and Security Action Plan: Compendium of Best Practice (July 2023); NATO Climate Change and Security Impact Assessment (3rd edn, 9 July 2024); Gry Thomasen, 'NATO and Climate Change: Towards a Joint Understanding and Response', International Journal 80 (2025), 312-322. See Madara Melnika, 'NATO's Responsiveness to Climate Change', in this issue. See on various national strategies the table in Ben Barry (with contributions from Shiloh Fetzek and Lieutenant Colonel Caroline Emmett), Green Defence: The Defence and Military Implications of Climate Change for Europe, International Institute for Strategic Studies (IISS), 8 February 2022, Annex I, 25. For Germany: Federal Ministry of Defence (Germany), Strategy on Defence and Climate Change, March 2024, <https://www.bmvg.de/resource/blob/5759520/5308c4904ff6fc0780061b6e424fc27e/strategy-on-defence-and-climate-change-data.pdf>, last access 3 August 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

The climate policies' negligence of the military sector runs against various international climate law expectations.[16] Especially the Paris Agreement (PA) covers the military sector and does not exempt it from the contractual reporting and transparency obligations (unlike the Kyoto Protocol had done).[17] Military activities fall in the PA's scope, because the Agreement encourages developed country parties to 'continue taking the lead by undertaking *economy-wide* absolute emission reduction targets'.[18] Also, the PA is – technically speaking – a protocol to the United Nations Framework Convention on Climate Change (UNFCCC) which insists that the state parties' mitigation policies measures 'should […] be comprehensive, cover *all relevant sources* […] and comprise *all economic sectors*'.[19] Finally, Article 14 of the PA on the global stocktake requires '*comprehensive*' reporting.

It follows that military emissions should figure in the National Greenhouse Gas Inventories under Article 4(1)(a) of the UNFCCC,[20] should be taken into account when preparing the Nationally Determined Contribution (Art. 4(2) and (3) PA), should be reviewed in the global stocktake (Art. 14 PA), and may be examined by the Paris Agreement Implementation and Compliance Committee (PAICC) (Art. 15 PA[21]).[22]

---

16 Given the mostly 'soft' legal nature of the clauses of the climate treaties, incompatibilities of state conduct with those provisions do not lead to the verdict of an actual breach or violation of international law. Nevertheless, the disappointment of expectations and the failure to honour the however 'soft' commitments of the climate regime are not only a political problem, but are normatively relevant within the international rules-based order.

17 On the Kyoto protocol exemptions which had been requested by the US: Axel Michaelowa, Tobias Koch, Daniel Charro and Carlos Gameros, *Military and Conflict-Related Emissions: Kyoto to Glasgow and Beyond* (Perspectives Climate Group 2022), 2-3; Burkely Hermann (ed.), 'National Security and Climate Change: Behind the U. S. Pursuit of Military Exemptions to the Kyoto Protocol', National Security Archive, 20 January 2022, Briefing Book #: 784, <https://nsarchive.gwu.edu/briefing-book/environmental-diplomacy/2022-01-20/national-security-and-climate-change-behind-us>, last access 3 August 2026.

18 Art. 4(3) of the Paris Climate Agreement of 14 December 2015 (emphasis added).

19 Art. 3(3) of the United Nations Framework Convention on Climate Change (UNFCCC) of 9 May 1992 (emphasis added).

20 IPCC, 2019 Refinement of the 2006 IPCC Guidelines for National Greenhouse Gas Inventories (IPCC 2019), page 8.14: 'Military fuel use is reported under "1A5 Non-specified", and this category includes fuel deliveries for all mobile and stationary consumption (e. g., ships, aircraft, road and energy used in living quarters) of the country. Emissions from multilateral operations pursuant to the Charter of the United Nations are not included in national totals. It is good practice to document clearly which activities have been included under the category multilateral operations and report as memo item in the reporting tables.', <https://www.ipcc-nggip.iges.or.jp/public/2019rf/index.html>, last access 3 August 2026.

21 With Decision 20/CMA.1: 'Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement'.

22 Lavanya Rajamani, at the Max Planck Trialogue workshop.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

As far as international *customary law* is concerned, I submit that the no-harm-obligation to exercise stringent due diligence in controlling, recording, and preventing greenhouse gas emissions that risk to cause significant harm to the climate system also extends to the military sector.[23] While the ICJ Advisory Opinion on Climate Change did not specifically address this question, the declaration of Judge Cleveland explicitly gave a positive answer.[24] Moreover, several states mentioned armed conflict in their contributions to the ICJ proceedings.[25] Especially Palestine submitted 'that the climate crisis requires application of the same stringent standard of due diligence to the protection of the global environment, from all emissions of GHG that contribute significantly to global warming, including emissions from armed conflict and other military activities, as well as occupation'.[26]

All this suggests that both treaty law and customary law demand the military sector to decarbonise. But in the current era shaped by leaders who openly espouse war as a means of politics, without consideration for the law and in denial of climate change, it is hard to believe that decarbonisation is still high on the agenda of the military.

III. Ad Bellum: Climate Change as a 'Threat Multiplier'

The intertwinement of climate degradation and conflict dynamics has been intensely scrutinised. The upshot of numerous case studies is that climate change and its consequences such as drought, floods, storms, and crop failures can contribute especially to non-international armed conflict, but are neither a necessary nor a sufficient condition for the outbreak of a war which depends on many contextual factors and non-climatic risk drivers (such as low state capacity, non-inclusive political institutions, competition between pastoralists and settled farmers, and poverty).[27] In order to describe how the climate

23 ICJ, *Climate Change*, Advisory Opinion (n. 2), paras 134-135 applied the no-harm principle to climate harm.

24 ICJ, *Climate Change*, Advisory Opinion (n. 2), Declaration of Judge Cleveland, paras 15-20 on 'International Humanitarian Law and Armed Conflicts'.

25 Eva Baudichau, 'Of Warming and Warzones: The Legal Status of Military Emissions in the ICJ's Climate Opinion', Verfassungsblog, 8 August 2025, doi: 10.59704/ca99ffd63031501e.

26 ICJ, Ms Nilüfer Oral on behalf of the State of Palestine, On the Obligations of States in respect of Climate Change, Verbatim Record of 9 December 2024, CR 2024/46, para. 7.

27 See e. g. Tobias Ide, Michael Brzoska, Jonathan F. Donges and Carl-Friedrich Schleussner, 'Multi-Method Evidence for When and How Climate-Related Disasters Contribute to Armed Conflict Risk', Global Environmental Change 62 (2020), 102063, 1-8; Joshua W. Busby, *States and Nature: The Effects of Climate Change on Security* (Cambridge University Press 2022); Halvard Buahug, Tor A. Benjaminsen, Elisabeth A. Gilmore and Cullen S. Hendrix, 'Climate-

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

change effects interact with and have the potential to exacerbate pre-existing threats and other drivers of instability to contribute to security risks, it has become popular to describe climate change as a 'threat multiplier'.[28] The 'threat multiplier' perspective has however been questioned and criticised, not without merit, because it tends to depoliticise climate change and risks to deflect from its social and economic root causes.[29] Overlapping, the reservations against (over-)securitisation as a rhetoric apply:[30] The framing of climate change as an existential threat serves to take the issue out of normal politics and may divert attention away from problems that have not been designated as security threats, and can lead to an escalation of military violence.

The related legal and policy question whether the Security Council may and should address climate change as a threat to peace and security, especially in terms of chapter VII of the UN Charter, has also been intensely discussed.[31] In fact, the Council has since 2007 recurringly debated climate change and issued a number of presidential statements and country- or region-specific resolutions on the adverse effects of climate change on regional stability.[32] In 2021, the last proposal for a Security Council resolution that would have integrated climate-related security risks as a central component into comprehensive conflict-prevention strategies was defeated by a Russian veto.[33] Since 2023, several

Driven Risks to Peace Over the 21st Century', Climate Risk Management 39 (2023), 100471; Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the IPCC* (Cambridge University Press 2022), 1045, 1102, 1128, 2414.

28 Sherri Goodman and Pauline Baudu, 'Climate Change as a "Threat Multiplier": History, Uses and Future of the Concept', Center for Climate & Security, Briefer No. 38, 3 January 2023.

29 Critically Gabrielle Daoust and Jan Selby, 'Understanding the Politics of Climate Security Policy Discourse: The Case of the Lake Chad Basin', Geopolitics 28 (2023), 1285-1322.

30 Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1998), 24.

31 Anne Dienelt, 'The Climatization of International Peace and Security: A Missed Opportunity?', in: Sandrine Maljean-Dubois and Jacqueline Peel (eds), *Climate Change and the Testing of International Law* (Brill Nijhoff 2023), 199-224; Rouven Diekjobst, 'Sea-Level Rise at the Security Council: On Multiplied Threats and Implied Powers', Völkerrechtsblog, 8 May 2023, doi: 10.17176/20230508-204341-0; Larissa van den Herik, 'The UN Security Council: A Reflection on Institutional Strength' in: Congyan Cai, Larissa van den Herik and Tiyanjana Maluwa, *The UN Security Council and the Maintenance of Peace in a Changing World*, Anne Peters and Christian Marxsen (eds), Max Planck Trialogues on the Law of Peace and War, Vol. 5 (Cambridge University Press 2024), 109-185 (175-181); Erin Pobjie and Kira Vinke, 'Climate Tipping Threats', DGAP Policy Brief 16 (2025), German Council on Foreign Relations, <https://doi.org/10.60823/DGAP-25-42667-en>, last access 3 August 2026; Nicolas S. Reetz, *The Slippery Slope of Securitisation: Climate Change and the International Law on the Use of Force*, Dissertation (European University Institute 2025).

32 E. g. UNSC Res 2524 of 3 June 2020 on Sudan.

33 UNSC Draft Resolution S/2021/990, 13 December 2021.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

members of the Security Council regularly issued 'Joint Pledges to Climate, Peace, and Security'.[34]

The view has consolidated that from a doctrinal perspective, the Security Council may qualify climate change as a threat to the peace without overstepping its competences. However, because of the risks of an overly militarised response, the Council should exercise this competence with self-restraint.[35] To conclude, 'the resort to security [might be] ineffective at best, counterproductive at worst'.[36]

IV. In Bello: Inter Arma Silent Leges Climaticae?[37]

Obviously, rockets, bombs, tanks, and drones are bad for the climate.[38] Therefore, international climate law should have a bearing on the conduct of hostilities. Climate law can and should be applied directly and indirectly (as a guideline for the interpretation and development of international humanitarian law [IHL]).[39] This is all the more plausible as some principles that govern environmental (including climate) law and IHL bear striking similarities.[40] The environmental precautionary approach which is part of the due diligence standard under the duty to prevent climate harm[41] bears a family resemblance with the IHL-based duties of care and precautions.[42] The environmental due diligence overlaps with the IHL-based 'due regard' principle.[43]

34 See letter dated 5 January 2026 from the Permanent Representatives of Denmark and Sierra Leone to the United Nations addressed to the President of the Security Council, 6 January 2026, S/2026/15.

35 Leonie Brassat, 'Climate Change as a Threat to International Peace and Security?', in this issue.

36 Niklas Reetz, 'Security, with Caveats', in this issue.

37 See Marco Tulli Cicero, 'Pro T. Annio Milone Oratio ad Iudices', in: Johan Willem van Rooyen (ed.), *Pro T. Annio Milone Oratio ad Iudices* (Brill 1963), 7.

38 See some data above in notes 4-8.

39 See on these two avenues Stavros-Evdokimos Pantazopoulos, 'Navigating Legal Frontiers: Climate Change, Environmental Protection and Armed Conflict', Int'l Rev. of the Red Cross 106 (2024), 366-392.

40 But see on structural *differences* in those bodies of law: Jérôme de Hemptinne, 'From Tactical Law of Armed Conflict to Macro-Perspective of Climate Law', in this issue; Giorgia Berrino, 'Climate Change and Armed Conflict Beyond the Crisis Paradigm', in this issue.

41 ICJ *Climate Change*, Advisory Opinion (n. 2), para. 294.

42 Art. 55(1), 57, 58 AP I; Principle 13(2) lit a) PERAC. This family resemblance is not eliminated by the fact that the environmental precautionary approach relates to risks that are in scientific terms uncertain while the IHL-based precautions relate to foreseeable risks.

43 Para. 44 of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 12 June 1944, Int'l Rev. of the Red Cross 309 (1995), 583-594; Customary Law Rule 44, Customary IHL database, <https://ihl-databases.icrc.org/en/customary-ihl>, last access 3 August 2026.

 DOI 10.17104/0044-2348-2026-3-771

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

It is generally agreed that international climate law remains *directly applicable* in armed conflict; the relevant treaties are not ipso facto terminated or suspended.[44] Given their subject matter and purpose, these treaties are presumed to apply in times of war, and the inbuilt flexibility of international climate law allows for their continued but nuanced application.[45] Especially the climate law-principle of common but differentiated responsibilities *in the light of different national circumstances* (Art. 2(2) PA) arguably not only refers to long-term structural conditions but also allows to take armed conflict into account as a relevant 'circumstance' which may lead to a modification of the climate obligations of warring parties. In a similar way, the customary obligation to act with due diligence to prevent significant harm to the climate system is flexible and has a 'varying character'.[46] In the words of the ICJ, the determination of due diligence-obligations 'calls for an assessment in concreto', which allows and even mandates to recalibrate the conduct that is reasonably required by law and to adapt what is 'due' to times of war.[47] This however does not inevitably lead to a relaxing of the 'stringent' standard of diligence in climate law[48] – quite to the contrary: armed conflict may well demand a 'heightened' due diligence for some actors such as business.[49] States engaged in armed conflict cannot invoke 'necessity' as a ground precluding the wrongfulness of their lack of accounting, reporting, and controlling emissions, because a licence to unbridled CO2-emissions would 'seriously impair an essential interest […] of the international community as a whole' (Art. 25 (1)(b) Articles on Responsibility of States for Internationally Wrongful Acts [ARSIWA]). It could also, a bit boldly, be argued that the climate-related due diligence obligations implicitly exclude reliance on neces-

44 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ reports 1996, 226, para. 30; ILC, Art. 3 of the Draft Articles on the Effects of Armed Conflicts on Treaties with Commentaries, in: ILCYB 2011, Vol. II, Part Two, para. 100-101, A/CN.4/SER.A/2011/Add.l (Part 2).

45 See for the presumption of the continued application of treaties relating to the protection of the environment: ILC Draft Articles (n. 44), Art. 6, 7 in conjunction with Annex subpara. g).

46 ICJ, *Climate Change*, Advisory Opinion (n. 2), paras 134-137, quote in para. 247.

47 ICJ, *Climate Change*, Advisory Opinion (n. 2), para. 137. The ICJ Climate Opinion here specifically cited the ICJ judgment on the Bosnian genocide, a decision dealing with the duty to prevent harm (genocide) in an armed conflict. See for 'war' as a possible 'national circumstance' Baudichau (n. 25).

48 ICJ, *Climate Change*, Advisory Opinion (n. 2), para. 138.

49 UNDP, Heightened Human Rights Due Diligence for Business in Conflict-Affected Areas: A Guide (2022); ILC, PERAC (United Nations General Assembly, *Protection of the environment in relation to armed conflicts: resolution / adopted by the General Assembly*, UNGA Res 77/104 of 7 December 2022; UN Doc A/RES/77/104, Annex: *Principles on protection of the environment in relation to armed conflicts*, ILCYB 2022, Vol. II, Part Two, 96-187), Principle 10. See Amanda Kron, 'Stringent Due Diligence and Corporate Climate Harm in Conflict-affected Contexts', in this issue.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

sity, because they are so important (even if not specifically intended to apply in abnormal situations of peril for the responsible state).[50]

A kind of *indirect application* of climate law lies in the interpretation and development of IHL in the light of the former.[51] When climate issues aggravate the situation of armed conflict, the IHL-duties become stronger.[52] For example, the prohibition to attack drinking water installations and supply and irrigation works under Art. 54(2) AP I becomes more urgent when climate change has increased water scarcity.

Following this logic, the explicit IHL-rules on protection of the environment (Art. 35(3) and 55(1) AP I[53]) should apply to the climate system which forms part of the natural environment for purposes of international law.[54] These rules should be interpreted dynamically in the light of the best available science on the pernicious and long-lasting effects of climate change.[55] On this basis, the thresholds in these two rules that have been traditionally understood to be extremely high need to be lowered.[56] GHG emissions may qualify as 'widespread, long-term and severe damage to the natural environment' in the sense of those provisions.[57] Moreover, the IHL principle of proportionality should be interpreted in a way that takes climate impacts of attacks into account.[58]

Along these lines, Human Rights Watch qualified as unlawful Israel's attack on the Iranian South Pars Gas Field and Iran's attack on Qatar's Ras Laffangas infrastructure in March 2026, because of their foreseeable knock-on effects on the climate, the environment, and human health.[59] Overall, the

50 See ILC, ARSIWA Commentary on Art. 25, para. 19, A/CN.4/SER.A/2001/Add.1 (Part 2), 84.

51 According to the ICJ, international humanitarian law can be a source of climate-related obligations of states (ICJ, Climate Change Advisory Opinion (n. 2), para. 173).

52 Danish Bashir Mangi, Ihsanullah Butro and Somro Hamidullah, 'The Role of International Humanitarian Law in Addressing the Humanitarian Consequences of Climate Change', Research Journal for Social Affairs 3 (2025), 129-138 (133).

53 See also Principle 13(2)(b) ILC PERAC (n. 49) and the war crime in IAC under Art. 8(2)(b)(iv) Rome Statute.

54 ICJ, *Climate Change*, Advisory Opinion (n. 2), para. 95.

55 See ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (ICRC 2020), Rule 2, para. 54 (p. 34).

56 Mario Pasquale Amoroso, 'Fighting in a Warming World: The Emergence of Climatic Considerations in the Conduct of Hostilities Under International Humanitarian Law', Review of European, Comparative & International Environmental Law 35 (2026), 198-209 (206).

57 Romina Pezzot, 'Wartime GHG Emissions as Widespread, Long-Term and Severe Damage to the Environment'; Britta Sjöstedt, 'The Lived Experiences of Wars in a Climate Crisis', both in this issue.

58 Amoroso (n. 56), 208. For the factoring of environmental impacts into the proportionality assessment: ILC PERAC (n. 49), Principle 14; ICRC Guidelines 2020 (n. 55), Rule 7.

59 Human Rights Watch of 22 April 2026 (n. 7).

 DOI 10.17104/0044-2348-2026-3-771

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

direct and indirect application of climate law in armed conflict would lead to more restraint in the conduct of hostilities and to a reduced admissibility of concrete strikes.

V. Post Bellum: Climate Change 'Piecemeal'

The international law post bellum, the law of peacebuilding, and the transitional justice regimes have so far neglected climate aspects, although peacebuilding activities themselves have a carbon footprint and are not climate neutral.[60] Most importantly, climate change and its negative impacts make peacebuilding more complicated.[61] For example, the United Nations Mission in South Sudan (UNMISS) was in 2022 confronted with a large-scale flooding threatening the largest UNMISS protection of civilians site in Bentiu, hosting over 100,000 internally displaced persons. This raised the question of additional obligations of both the UN and troop contributing states.[62]

Generally speaking, refugee resettlement and the right to return are important peacebuilding topics which today need to address the climate- and conflict-induced displacement of humans. It is estimated that in the last years, 20 to 30 million persons have been on the move due to weather-related events, and this number is expected to rise, with estimates ranging between 40 million and 216 million until 2050.[63] Given that the overwhelming portion of displacements occur in the southern hemisphere, they constitute a destabilising factor in anyway vulnerable and conflict-prone societies. Climate change is being recognised as an intensifier of extant drivers for migration

60 An ongoing project, led by Christina Binder, seeks to map the bits and pieces of legal and political measures that address the effects of climate in regional and universal peacekeeping operations, identifies the applicable law and legal gaps, and suggests institutional responses. 'Peacekeeping in the Anthropocene: Changing Law for a Changing Climate' (PeaceCLaCC), <https://www.unibw.de/recht/peaceclacc>, last access 3 August 2026. See for a first output: Jane A. Hofbauer and Philipp Janig, 'Friedenssicherung in Zeiten des Klimawandels: Wieso Klimagerechtigkeit auch friedenserhaltende Missionen betrifft', Nachhaltigkeitsrecht: Zeitschrift für das Recht der nachhaltigen Entwicklung 5 (2025), 129-137.

61 Richard Matthew, 'Climate Change Adaptation and Peacebuilding', in: Ashok Swain and Joakim Öjendal (eds), *Routledge Handbook of Environmental Conflict and Peacebuilding* (Routledge 2018), 109-120 (116), found that 'climate change adaptation has not been integrated into peacebuilding except in ad hoc and piecemeal ways': this has apparently not much changed in the last years.

62 Philipp Janig, Jane A. Hofbauer und Christina Binder, 'Peacekeeping in the Anthropocene: the Effects of Climate Change and Positive Human Rights Obligations in "Protection of Civilians" Mandates', Max Planck UNYB 26 (2023), 602-630.

63 Viviane Clement et al., *Groundswell: Acting on International Climate Migration: Part II* (World Bank Group 2021), xxii and xxvii.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

such as war, persecution, discrimination, and poverty. This observation has not (yet) led to the creation of a novel and distinct legal category of refugees or migrants, but has triggered developments in human rights law and refugee law. Especially the UN Human Rights Committee has recognised that the risk of an entire country being submerged by sea-level rise may expose individuals to a violation of their right to life with dignity and therefore trigger non-refoulement obligations of the states that 'climate-refugees' seek to enter.[64] Besides, climate change may also undermine the peremptory right to self-determination of peoples who are threatened by sea-level rise in their very existence.[65]

These developments suggest that for the law post bellum, the task at hand is to reconcile climate adaptation and peace-building in a mutually beneficial manner.[66] For example, climate-related human rights in their local adaptations could be activated and might give rise to positive obligations of relevant actors, although difficult questions of attribution and extraterritoriality arise.[67] Overall, the 'call for making peacebuilding more climate-sensitive' demands a comprehensive response.[68]

VI. Conclusion: At the Vanishing Point

The Max Planck Trialogue Impulses seek to bring armed conflict into the climate debate, and make the climate question part of the analysis of war. The relevant rules and principles of international climate law and the bodies of law surrounding armed conflict are not actually inconsistent, and therefore lend themselves to a harmonious, mutually supportive interpretation, and systemic integration.[69] The task at hand is to coordinate legal principles that partly point into different directions. This task is not novel, because such

64 United Nations Human Rights Committee, *Teitiota v. New Zealand*, decision of 23 September 2020 (UN Doc CCPR/C/127/D/2728/2016). In this case, the committee did not find a violation of Arts 6 and 7 ICPPR by New Zealand, because the authorities that had denied Teitiota's asylum request and removed him to his country of origin (Kiribati) had provided an adequate and individualised assessment finding that there was no imminent risk for his life.

65 Margaretha Wewerinke-Singh, 'Self-Determination, Jus Cogens, and the Climate/Security Nexus', in this issue.

66 Florian Krampe et al., 'Climate Change and Peacebuilding: Sub-themes of an Emerging Research Agenda', Int'l Aff. 100 (2024), 1111-1130 (1119).

67 Leon Seidl, 'Climate Adaptation in a Changing Peacebuilding Environment', in this issue.

68 Krampe et al. (n. 66), 1111.

69 See ICJ, *Climate Change*, Advisory Opinion (n. 2), Section 8 (paras 162-173), esp. paras 164 and 168, also paras 311 and 404.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

tensions are built into all relevant bodies of law. For example, international climate law seeks to reconcile the protection of the climate with industrial development.[70] International humanitarian law, in turn, is traditionally characterised as (slightly) tempering the urge for military effectiveness by humanitarian principles, so that care for the climate would just add one additional consideration to the trade-off.

Technically speaking, the interpretation of the IHL-treaties and of the climate change treaties can rely on the principle of Article 31(3) lit. c) Vienna Convention on the Law of Treaties (VCLT) and mutually take the relevant other treaties into account, because both sets of treaties enjoy a quasi-universal membership so that the states parties have a high degree of overlap.[71]

However, introducing climate principles into the law of armed conflict faces serious objections. Would not a 'CO2-friendly war' be morally perverse? How can we dare demand the 'greening' of war, knowing that war not only destroys the environment including its climatic elements but most of all human lives and livelihoods? Would not a 'greener' war unduly endanger the lives of combatants and of civilian populations who should enjoy priority protection over the environment?

Moreover, 'climatising' IHL seems factually unattainable. An inter-governmental agreement on such principles seems out of reach, the rules would not be complied with anyway, they might even be counterproductive, because they would weaken the deterring effect of disastrous wars, and such a regulation is undesirable because it sanitises war and conveys a false aura of legitimacy to violence, instead of terminating it.

Most of these objections sound familiar. In fact, they were voiced against the proposals to introduce humanitarian principles to the laws of war at the end of the nineteenth century.[72] Still, and against these objections, a body of

---

70 See the prominent and recurring references to 'sustainable development' in the Paris Agreement, e.g. in Art. 2(1) PA.

71 ICJ, *Right to Strike under ILO Convention No. 87*, Advisory Opinion of 21 May 2026, paras 91-92. See for the relevance of the 'entire legal system': ICJ, *Climate Change*, Advisory Opinion (n. 2), para. 311.

72 Carl Lueder, 'Krieg und Kriegsrecht im Allgemeinen' in: Franz von Holtzendorff (ed.), *Handbuch des Völkerrechts*, Vol. 4 (Hamburg Verlagsanstalt und Druckerei AG 1889), 171-367 (187, 193, 275-277); Julius von Hartmann, *Kritische Versuche: 2. Militärische Nothwendigkeit und Humanität* (Gebrüder Paetel 1878), 101. In secondary literature: Chris Jochnik and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War', Harv. Int'l L.J. 35 (1994), 49-96 (esp. 54-59); Jochen von Bernstorff, *L'essor et la chute du droit international humanitaire: Une brève histoire de la codification de la protection des civils en temps de guerre (1899–1977)* (Editions Pedone 2024), 12-13 and 16-17; Raphael Schäfer, *Humanität als Vehikel: Der Diskurs um die Kodifikation des Kriegsrechts im Gleichgewichtssystem des europäischen Völkerrechts in den formgebenden Jahren von 1856 bis 1874* (Nomos 2025), 24, 606, and passim.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

international humanitarian law has been successively codified, and this law continues to lead a frail existence, even if only 'at the vanishing point' of international law.[73] It is submitted that the idea of decarbonising war is not less revolutionary and utopian than the idea of humanising it, and that both objectives should be firmly upheld as regulative ideas. That said, we should keep in mind that the best way to protect the climate system (and all life forms) is to prevent war with all possible means.

73 Hersch Lauterpacht, 'The Problem of the Revision of the Law of War', BYIL 29 (1952), 360-382 (382).

 DOI 10.17104/0044-2348-2026-3-771

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Climate Change and Warfare as Interconnected Concerns in International Legal Negotiations

Mario Pasquale Amoroso*
University of Trento, Trento, Italy
mario.amoroso@unitn.it

Environmental protection in international humanitarian law (IHL) appears in a historical context in which climate change was not yet perceived as a global threat. Nevertheless, contrary to the common perception that the relationship between climate change and armed conflict is a recent concern, the links between warfare, environmental harm, and climatic impacts were already present in the negotiations of both humanitarian law and the United Nations (UN) climate change regime. By examining the drafting history of Additional Protocol I (AP I) and the negotiations leading to the UN Framework Convention on Climate Change and the Kyoto Protocol, this article shows how these concerns emerged in parallel across different branches of international law.

In 1977, the AP I established for the first time obligations aiming at protecting the natural environment from the impact of hostilities. In particular, Articles 35 and 55 AP I prohibit the employment of 'means and methods of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage', while at the same time requiring belligerents to 'take care to protect the natural environment against widespread, long-term and severe damage'. By analysing the drafting process of these two provisions, one can observe a certain progressive approach in defining the protected object.

During negotiations, the Diplomatic Conference emphasised that respect for the environment was increasingly becoming part of the 'conscience of the nations', making it necessary to restrict belligerent behaviour in armed conflict that harms the environment.[1] While at the time of drafting the AP I the Stockholm Conference was raising awareness of the need to protect the environment from human-made harm, climate change was not yet included in its agenda.[2] Nevertheless, the drafters of the AP I proved to be ahead of

* PhD candidate at the University of Trento.

1 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (ICRC/ Martinus Nijhoff Publishers 1987), 662.

2 UNGA Res 2994(XXVII) of 15 December 1972, A/CONF.48/14/Rev.1, 3.

DOI 10.17104/0044-2348-2026-3-785

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

subsequent legal developments by interpreting the term 'natural environment' as referring to 'external conditions and influences which affect the life, development and the survival of the civilian population and to living organisms'.[3] Based on this interpretation, the commentary on Article 55 AP I, recalling the debates that took place during its drafting, states that the concept of the natural environment should be understood in the broadest sense to encompass 'the biological environment in which a population is living'. This does not consist merely of 'the objects indispensable to survival mentioned in Article 54 […] but also includes forests and other vegetation […] as well as fauna, flora and other biological or *climatic elements*'.[4] This definition shows how climatic considerations emerged in the rules governing the conduct of hostilities already at the time of its drafting, strongly supporting a wide understanding of the IHL regime as limiting attacks and military operations producing climatic impacts.

However, the identification of a form of environmental protection in IHL did not impede military activities from causing unprecedented environmental damage. Exemplary in this sense has been the Gulf War (the 1990-91 military operation by a United States (US)-led coalition against Iraq, authorised by the UN Security Council), during which the combustion of oil wells resulted in evident climatic impacts, producing around 130-140 million tons of CO2, accounting for 2-3 % of global anthropogenic emissions in 1991.[5] In the same years, the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC) started negotiations for the adoption of a framework agreement aiming at mitigating the impact of climate change. Despite not being the main reason for governments to negotiate this instrument, recent historical events still played an influential role and were certainly in the minds of the drafters. In the first reports of the INC, published in 1991 just a few months after the Gulf War, statements from governments and representatives of international organisations demonstrate the impact of this conflict on the perception of the need for negotiating a climate change framework. During the first session of the INC, Mostafa K. Tolba, the Executive Director of United Nations Environment Programme (UNEP), emphasised that 'since the beginning of the negotiations, the Gulf War had

3 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, 'Report of the Chairman of the Group "Biotope"', 1975, CDDH/III/GT/35, para. 5.

4 Sandoz, Swinarski and Zimmermann (n. 1), 662.

5 Olof Linden, Arne Jernelöv and Johanna Egerup, The Environmental Impacts of the Gulf War 1991 (April 2004). International Institute for Applied System Analysis Interim Report IR-04-019/April, available at: <https://pure.iiasa.ac.at/id/eprint/7427/1/IR-04-019.pdf>, last access 30 June 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

continued to cause great sorrow', and went on to highlight the disastrous environmental destruction that had been resulting from the presence of oil in the fragile waters of the Persian Gulf, from the impact of dangerous substances on the air land, and waters, and from the '*climatic impacts* of large-scale burning of the oil in the region'.[6] This issue was raised again in subsequent sessions when Professor Obasi, Secretary-General of the World Meteorological Organization (WMO,) discussed unresolved issues in climate science and climate change, citing major 'environmental events which had affected climate since the negotiations began, including the oilfield fires in Kuwait'.[7]

This demonstrates that the Gulf War was a pivotal moment in negotiating a regime establishing universal climate change mitigation obligations. While the relevance of this War gradually disappeared during the negotiations for the adoption of the Kyoto Protocol, concerns regarding military emissions emerged in discussions about methodological issues and reporting obligations. In this context, the Conference of the Parties adopted Decision 2/CP.3, stating that 'emissions from multilateral operations pursuant to the Charter of the United Nations shall not be included in national totals, but reported separately'.[8] This exemption would exclude emissions related to UN-authorised military operations or peacekeeping activities from national total inventories, meaning that they would not be considered when assessing compliance with quantified emission limitations and reduction objectives (QELROs). The Decision is the result of pressures by some states, in particular the US, which argued in favour of exempting the activities of military forces from emissions targets so as not to affect the preparedness of the US military.[9]

However, the result was not a general exemption from reporting military emissions. The Decision also states that 'other emissions related to [multilateral] operations shall be included in the national emissions totals of one or more Parties involved', meaning that military activities not mandated by the

---

6 UNGA, 'Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its First Session, held at Washington, D.C., from 4 to 14 February 1991', 1991, A/AC.237/6, para. 9.

7 UNGA, 'Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its Third Session, held in Nairobi from 9 to 12 September 1991', 25 October 1991, A/AC.237/12, para. 16.

8 Conference of the Parties, 'Methodological Issues Related to the Kyoto Protocol', 1997, Decision 2/CP.3.

9 Center for Security Policy, 'The Plot Thickens: Stuart Eizenstat Blows More Smoke in House Hearing About Kyoto's Impact on U.S. National Security', 14 May 1998, available at: <https://centerforsecuritypolicy.org/the-plot-thickens-stuart-eizenstat-blows-more-smoke-in-house-hearing-about-kyotos-impact-on-u-s-national-security-2/>, last access 30 June 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

UN have to be reported by one or more of the involved parties.[10] This demonstrates that the exception did not significantly impact QELRO commitments, but is rather linked to attribution issues that could be created by multilateral operations authorised by the UN. Further attempts by the United States following the adoption of the Kyoto Protocol to question ratification for the national security consequences that could ensue confirm this. Despite the adoption of Decision 2/CP.3, the US Department of Defence, as stated in an internal memo, was still concerned that 'even a 10 % reduction in fuel usage could hinder the implementation of the US national security strategy'.[11] Attempts have been made to defuse the controversy by pointing out that, at the time, all US military operations were authorised by the UN and that domestic military operations, including training exercises, were not acknowledged. While these debates did not lead the Conference of the Parties (COP) to establish further exceptions, they show how military emissions were well-known at the time of the adoption of the Kyoto Protocol, generating concerns regarding compliance with mitigation obligations.

In conclusion, this brief contribution has tried to show how the preparatory works of both regimes reveal an early awareness of the links between armed conflict and climatic harm. Read together, they suggest that the interaction between international humanitarian law and the climate change regime is not a recent development but rather rooted in parallel historical concerns about the environmental consequences of warfare.

10 Axel Michaelowa and Tobias Koch, 'Military Emissions, Armed Conflicts, Border Changes and the Kyoto Protocol', Climatic Change 50 (2001), 383-394 (387).

11 Mackubin Owens, 'Global Warming vs. U. S. Security', Ashbrook Center, 1 August 1998, available at: <https://ashbrook.org/viewpoint/oped-owens-98-globalwarming/?utm_source>, last access 30 June 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Climate Change and Armed Conflict Beyond the Crisis Paradigm

Giorgia Berrino*
University of Florence, Florence, Italy
giorgia.berrino@unifi.it

The current debate on the inadequacy of existing international legal frameworks – such as jus ad bellum, international human rights law, and climate law – to address climate change is now well established. Nowhere is this inadequacy more visible than in the context of armed conflict. Military activities and war-related practices not only escape meaningful regulation under the international climate regime, but also generate significant greenhouse gas emissions and long-term environmental harm largely invisible within existing legal categories. This failure, however, is not merely technical; it reflects a deeper limitation embedded in international law itself.

International law has long been structured as a 'law of crisis',[1] focusing on responding to exceptional disruptive events focusing on responding to exceptional disruptive events – armed attacks, disasters, and humanitarian emergencies – through frameworks designed to manage rupture and restore order. Climate change, however, particularly in its interaction with armed conflict, is not fully captured by this prevailing logic. Rather, it manifests as an *environmental chronic emergency*, a notion recently articulated in the literature[2] building on the concept of 'slow violence'.[3]

---

* Postdoctoral Research Fellow in International Law, University of Florence, where she conducts research within the framework of the 2022 Italian National Research Project 'GenREm – Gendering International Legal Responses to Chronic Emergencies' (Research Team: Ca' Foscari University of Venice, University of Florence, and University of Palermo), which informs this contribution.

1 Hilary Charlesworth, 'International Law: A Discipline of Crisis', M. L. R. 65 (2002), 377-392 (382).

2 Sara De Vido, Deborah Russo and Enzamaria Tramontana (eds), *Gendering International Legal Responses to Environmental Chronic Emergencies* (Edward Elgar Publishing 2026). See, in particular, Sara De Vido, 'Feminist Legal Methods and Environmental Chronic Emergencies: Challenging the Anthropocentric and Androcentric International Legal System', in: Sara De Vido, Deborah Russo and Enzamaria Tramontana (eds), *Gendering International Legal Responses to Environmental Chronic Emergencies*, 2–22.

3 Slow violence is a form of violence that unfolds gradually and out of sight, whose effects are dispersed across time and space, and which is therefore difficult even to perceive as violence; climate change is one such example. See Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011), 2.

DOI 10.17104/0044-2348-2026-3-789

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Environmental chronic emergencies refer to slow, cumulative, and often imperceptible processes of environmental degradation that precede, accompany, and outlast moments of acute crisis. Their effects accumulate over time, generating harm already underway yet often latent and underestimated. Such emergencies do not necessarily culminate in a single, spectacular disaster, but gradually erode environmental conditions, livelihoods, and rights over time and across generations. Because of their silent and structural character, they rarely trigger an autonomous legal response, becoming normatively visible only when they take on catastrophic forms.[4]

The lag between underlying ongoing degradation and its legal recognition, a defining feature of environmental chronic emergencies, is particularly problematic in the context of armed conflict.[5] War is typically treated as an exceptional rupture, yet it is deeply embedded in long-term environmental degradation processes already underway.

In the context of armed conflict, this temporal dimension becomes particularly significant. Environmental harm linked to conflict does not begin and end with the immediacy of hostilities. Military infrastructures, weapons testing, resource exploitation, and ecosystem destruction both draw upon and intensify pre-existing environmental degradation processes, generating and amplifying effects that unfold over decades. Armed conflict, therefore, is not merely an event but also a process: both a product and a producer of environmental chronic emergencies.

This interdependence challenges the conventional framing of war within international law. Legal regimes governing armed conflict, particularly international humanitarian law, remain largely focused on the regulation of conduct during hostilities. While certain rules address environmental protection, they are tied to thresholds such as 'widespread, long-term and severe damage',[6] thereby privileging extreme and exceptional harm. Similarly, international disaster law, even in its expanded engagement with slow-onset events such as drought, continues to emphasise response rather than prevention. As a result, the structural links between environmental degradation and conflict dynamics remain largely unaddressed.

The limitation, therefore, is not merely regulatory, but conceptual. International law continues to operate within a dichotomy between 'normality'

4 For a more in-depth discussion, see De Vido, Russo and Tramontana (eds) (n. 2).

5 See also Eliana Cusato, *The Ecology of War and Peace: Marginalizing Slow and Structural Violence in International Law* (Cambridge University Press 2021), which offers a critical analysis of the relationship between international law, armed conflict, and the environment, highlighting the current shortcomings of international law in addressing forms of slow and structural violence, as well as the need for a 'critical redescription' of the problem.

6 See Art. 35 paras 3 and 55 Additional Protocol I to the 1949 Geneva Conventions.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

and 'exception',[7] treating armed conflict as a discrete event rather than as part of a *continuum* of environmental and socio-economic processes. This produces a form of 'cultivated astigmatism'[8] – a focus on episodic crises that obscures the underlying conditions from which they emerge.

Against this background, reframing climate change as a chronic environmental emergency allows for a rethinking of its relationship with war. Rather than asking how international law should respond to environmental damage caused by conflict, the question becomes how to rethink legal frameworks in light of the processes through which environmental degradation and conflict dynamics are intertwined, exceeding traditional legal categories.

This shift in perspective requires reorienting the focus of international law from moments of crisis to the processes that generate and sustain them,[9] and reconfiguring the temporal horizon of legal responsibility. If climate-related harm associated with armed conflict cannot be confined to the timeframe of hostilities, but must be understood as embedded in processes of environmental degradation that precede, accompany, and follow conflict, then the tendency to conceptualise armed conflict itself as a temporally bounded and exceptional event becomes increasingly problematic. Although contemporary international law has largely moved beyond a strict dichotomy between war and peace, it continues in many respects to frame armed conflict through the logic of exceptionality, treating it as a distinct episode separated from the broader environmental and socio-economic processes in which it is embedded. Processes of environmental degradation intertwined with conflict dynamics cut across these temporal boundaries, rendering fragmented legal regimes based on discrete and temporally separated frameworks increasingly inadequate. Recognising the existence of this continuity is essential to overcome the structural blind spots of international law, which continue to produce a partial and discontinuous understanding of the underlying processes.

---

7 Deborah Russo, 'Moving Beyond an Approach Based on Crisis and Disasters to Address Environmental Chronic Emergencies', in: De Vido, Russo and Tramontana (eds) (n. 2), 23-41 (33, 41).

8 Michael Reisman and Andrew Willard (eds), *International Incidents: The Law that Counts in World Politics* (Princeton University Press 1988), 19.

9 This idea underlies the entire volume by De Vido, Russo and Tramontana (eds) (n. 2). See, in particular, Russo (n. 7), 41, which recalls the general need to reinterpret existing international duties and to reshape future legal strategies to confront the systemic and persistent character of environmental chronic emergencies and the structural factors sustaining environmental decline. In similar terms, see also Cusato (n. 5), 238-239, who emphasises the need to move beyond simplistic causal relationships and to focus on the underlying causes of environmental vulnerabilities.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

In conclusion, the inadequacy of international law in addressing the climate-conflict nexus is not simply a matter of regulatory gaps. It reflects a deeper tension between legal categories and the temporal and structural nature of the phenomena at stake, which can only be overcome by recognising climate change not as a background condition, but as a constitutive element of contemporary conflict dynamics.

 DOI 10.17104/0044-2348-2026-3-789

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Self-Determination, Jus Cogens, and the Climate/Security Nexus

Margaretha Wewerinke-Singh*
University of Amsterdam, Amsterdam, The Netherlands
m.j.wewerinke@uva.nl

I. The Peoples the Frameworks Miss 793
II. Self-Determination as a Peremptory Floor 794
III. Implications for a Climate-Security Order 795

The intensifying interaction between climate change and armed conflict tests the limits of how international law is ordinarily brought to bear. The customary obligation to prevent transboundary harm, the collective security architecture of the United Nations Charter, and the international climate change regime are each typically analysed in terms of obligations owed between States, and have not yet been fully trained on the position of peoples whose very existence as political communities is imperilled by the combined force of environmental breakdown and war. This impulse argues that the right to self-determination – already established in international law as a peremptory norm generating obligations *erga omnes* – belongs at the centre of that analysis.

I. The Peoples the Frameworks Miss

Consider small island developing States and other acutely vulnerable communities. Rising seas, intensified storms, and prolonged droughts threaten

* Associate Professor of Sustainability Law, Faculty of Law, University of Amsterdam; Adjunct Professor of Law, The University of Fiji; Member of the Permanent Court of Arbitration. The author has served as counsel in the recent climate advisory proceedings: as lead counsel for the Republic of Vanuatu before the International Court of Justice and the Inter-American Court of Human Rights, and as counsel for the Commission of Small Island States on Climate Change and International Law before the International Tribunal for the Law of the Sea. She also acted as counsel for the Republic of Vanuatu in the advisory proceedings before the International Court of Justice concerning the obligations of Israel in relation to the presence and activities of the United Nations, other international organisations and third States in and in relation to the Occupied Palestinian Territory. The views expressed are personal and the analysis is offered in a scholarly capacity.

DOI 10.17104/0044-2348-2026-3-793 ZaöRV 86 (2026), 793-796

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

the territorial foundations of their political self-governance and cultural continuity.[1] The International Court of Justice acknowledged in 2025 that the consequences of climate change are 'existential' and of 'planetary proportions'.[2] For peoples at the frontline – many of whom achieved independence only in recent decades – the climate crisis is an ongoing assault on the material preconditions of self-determination.

Armed conflict compounds this from both directions. Military activities are estimated to account for some 5.5 per cent of global greenhouse-gas emissions, yet they remain largely shielded from accountability: reporting of military emissions is voluntary under the climate regime and is, in practice, systematically incomplete.[3] In her declaration appended to the advisory opinion, Judge Cleveland urged that States pay closer attention to armed conflict and military activities as sources of emissions – assessing, reporting and mitigating them, and accounting for the emissions caused by conflict-related destruction of carbon sinks – and that a failure to do so may engage State responsibility.[4] The direct and indirect climate impacts of warfare are, meanwhile, escalating at a moment of acute strain in the international legal order. The applicable legal frameworks – harm prevention, collective security, and the climate treaty regime – are typically cast in terms of State obligations. But the peoples whose existence is most acutely threatened by the convergence of climate change and conflict are not merely passive beneficiaries of those obligations: they are the holders of a right that the international legal order places at the apex of its normative hierarchy.

II. Self-Determination as a Peremptory Floor

Self-determination is firmly established as a peremptory norm of general international law (*jus cogens*).[5] A peremptory dimension has separately been identified in the environmental field: the Inter-American Court of Human

1 Alex Green and Margaretha Wewerinke-Singh, 'State Continuity, Self-Determination and Sea-Level Rise' ICLQ 74 (2025), 555-585.

2 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 456.

3 Ellie Kinney et al., Accounting for the Uncounted: The Global Climate Impact of Military Activities (Griffith University 2025).

4 ICJ, *Obligations of States in Respect of Climate Change* (n. 2), Declaration of Judge Cleveland, paras 18-20.

5 ILC, Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), Conclusion 23 and Annex (2022); ICJ, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 233 (concerning the context of occupation).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Rights has held that the prohibition of conduct capable of causing irreversible damage to the ecological balance that sustains life is itself peremptory.[6] The two norms are complementary rather than redundant. The environmental prohibition protects the planetary conditions of life; self-determination protects the political existence and agency of peoples – their continuing capacity to constitute and govern themselves, and to transmit a culture across generations. It is this latter interest that is uniquely at stake when climate change and armed conflict together threaten not merely a habitable environment, but the survival of a people as a distinct political community. The added value of self-determination lies precisely there: it speaks to who is harmed, and to what it means for a people to be extinguished, rather than to the ecological integrity that the environmental norm safeguards.

Both norms, moreover, generate obligations *erga omnes*, in which all States have a legal interest;[7] and under Articles 53 and 64 of the Vienna Convention on the Law of Treaties, a treaty that conflicts with a peremptory norm is void, or becomes void upon the emergence of a new one.[8] Where climate harm compounded by armed conflict threatens to extinguish a people's capacity for self-governance, the obligation in play engages the very apex of the normative hierarchy.

III. Implications for a Climate-Security Order

At least three implications follow for any legal order seeking to govern the nexus of climate change and armed conflict.

First, on military emissions. If climate obligations are read in the light of the peremptory status of self-determination, the persistent failure to account for military emissions is not merely a question of transparency but a failure to protect a peremptory interest – for the same emissions that escape scrutiny contribute directly to the existential threats borne by the most vulnerable peoples. This strengthens the case for mandatory reporting of military emissions, for closing the exemptions that persist in practice, and for treating their continued exclusion as a systemic compliance concern under Article 15 of the Paris Agreement.

---

6 IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion AO-32/25 of 29 May 2025, paras 287-294.

7 ICJ, *East Timor* (Portugal v. Australia), judgement of 30 June 1995, ICJ Reports 1995, 90 (para. 29); IACtHR, *Climate Emergency and Human Rights* (n. 6), para. 294; ICJ, *Obligations of States in Respect of Climate Change* (n. 2), para. 440.

8 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331, Arts 53 and 64, see also Art. 71.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Second, on harm prevention in wartime. The peremptory character of self-determination reinforces the argument that the customary obligation to prevent environmental harm is not displaced by the *lex specialis* of the law of armed conflict where what is at stake is the destruction of the conditions under which a people can continue to exist and govern itself. The point is not abstract: in its written statement in the 2025 advisory proceedings concerning the Occupied Palestinian Territory, Vanuatu argued that environmental degradation under occupation – soil contamination, the destruction of water systems, agricultural collapse – itself undermines the affected people's right to self-determination.[9] The stringent standard of due diligence affirmed by the International Court of Justice – requiring 'deep, rapid, and sustained reductions' in emissions[10] – acquires additional force when the harm implicates a *jus cogens* norm.

Third, on collective security. Any framework that treats climate change as a collective-security problem must confront the distributional question of who may be asked to bear the costs of compromise. Self-determination supplies a principled floor: whatever trade-offs such a framework entails, it cannot lawfully sacrifice the conditions that enable distinct peoples to exercise political self-governance. The post-1945 order was in many respects morally compromised, yet it rested on the anti-colonial premise that all peoples are entitled to determine their own destiny. A framework centred on climate security must preserve that commitment – not as aspiration, but as legal constraint.

Much work remains to elaborate these implications in detail. But any serious engagement with the nexus of armed conflict and climate change must reckon with the fact that, for some peoples, what is at stake is not merely security, environmental integrity, or human rights in the aggregate, but the very right to exist as a self-determining political community – a right that occupies the highest rank in the international legal order.

9 Written Statement of the Republic of Vanuatu, 28 February 2025, in: ICJ, *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory*, Advisory Opinion of 22 October 2025.

10 ICJ, *Obligations of States in Respect of Climate Change* (n. 2), para. 282.

 DOI 10.17104/0044-2348-2026-3-793

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Climate Change as a Threat to International Peace and Security?

Leonie Brassat*
Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany
brassat@mpil.de

I. Introduction 797
II. Climate Change as a 'Threat to the Peace' Under Art. 39 UN Charter? 798
III. The Risks of Securitisation 799

I. Introduction

Since 2007, the United Nations (UN) Security Council has debated the impact of climate change for international peace and security on several occasions.[1] Yet, to date, it has taken a rather cautious approach and classified climate change merely as a 'threat multiplier', meaning that climate change exacerbates the causes of conflict, and not as a direct 'threat to the peace' under Article 39 UN Charter (UNCh).[2]

This impulse argues that, from a doctrinal perspective, little would prevent the Security Council from going further and classifying climate change as a 'threat to the peace' under Art. 39 UNCh. The text, context, and recent practice by the Security Council regarding Art. 39 UNCh reveal that the understanding of a 'threat to the peace' has evolved over time and now goes beyond a military inter-state understanding, thus leaving room to encompass climate change as well. From a normative perspective, however, such a

* Research Fellow at the Max Planck Institute and Ph. D. Candidate in Public International Law at Humboldt University of Berlin; Research Assistant, United Nations International Law Commission (ILC), Geneva.

1 See for these debates: UNSC Verbatim Record of 17 April 2007, S/PV.5663 and S/PV.5663 Resumption 1; UNSC Verbatim Record of 20 July 2011, S/PV.6587 and S/PV.6587 Resumption 1; UNSC Verbatim Record of 25 January 2019, S/PV.8451; UN Verbatim Record of 13 December 2021, S/PV.8926.

2 In the 2011 and 2019 debates (n. 1), several states described climate change as a 'threat multiplier', but the Presidential Statement merely concluded that '[p]ossible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace' (UNSC Presidential Statement 15 of 20 July 2011, S/PRST/2011/15).

DOI 10.17104/0044-2348-2026-3-797

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

'securitisation' carries significant risks. The question is therefore not whether the Security Council *can* act, but whether it *should*.

II. Climate Change as a 'Threat to the Peace' Under Art. 39 UN Charter?

Traditionally, the concept of a 'threat to the peace' under Art. 39 UNCh was associated with the situation's potential to cause armed conflict between states.[3] Yet, after the Cold War, the Security Council broadened its understanding of a 'threat to the peace' by including internal conflicts and unrests,[4] and acknowledged that 'non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.[5] Most recently, it also linked global health crisis, including Ebola and COVID-19, to international peace and security.[6] This suggests an increasingly broad and positive understanding of peace that encompasses conditions necessary for stable, conflict-free societies.

Against this backdrop, it is conceivable that the Security Council might also recognise the existence of a 'threat to the peace' in relation to climate change. While the existence of a direct causal link between climate change and armed conflict is far from clear,[7] climate change undermines the structural conditions necessary for a lasting conflict-free society, for example, by intensifying migration and causing resource scarcity.[8] In extreme scenarios, it may even threaten the existence of states due to sea-level rise.[9] In doing so,

3 Hans Kelsen, *The Law of the United Nations* (Stevens 1951), 930; Erika de Wet, 'Article 39' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations, A Commentary* (4th edn, Oxford University Press 2024), 1623-1654 (1628, para. 10); Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004), 138.

4 '[T]he practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII […]' (ICTY, *Prosecutor v. Tadic*, Appeal on Jurisdiction of 2 October 1995, 35 ILM 32, 42, para. 30).

5 UNSC Presidential Note of 31 January 1992, S/23500, para. 3.

6 UNSC Res 2177 of 18 September 2014, S/RES/2177 (regarding the Ebola outbreak in Africa); UNSC Res 2532 of 1 July 2020, S/RES/2532, preamble (on COVID-19).

7 Christine Gray, 'Climate Change and the Law on the Use of Force' in: Rosemary Rayfuse and Shirley V. Scott (eds), *International Law in the Era of Climate Change* (Edward Elgar Publishing 2012), 219-240 (219, 221-229).

8 Christopher K. Penny, 'Climate Change as a "Threat to International Peace and Security"' in: Shirley V. Scott and Charlotte Ku (eds), *Climate Change and the UN Security Council* (Edward Elgar Publishing 2018), 25-46 (31, 39-40).

9 Report of the Secretary-General, 'Climate change and its possible security implications'of 11 September 2009, A/64/350, para. 71.

 DOI 10.17104/0044-2348-2026-3-797

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

climate change amounts to a factor that affects the stability, and even the existence, of certain states and societies, and thus poses a 'threat to the peace' in the broader sense.

Besides, the open-ended wording and context of Article 39 UNCh suggest that the Security Council has a wide margin of discretion in making its 'determination' under Art. 39 UNCh.[10] In light of this, the Security Council may readily classify climate change as a threat to international peace and security.

It seems that the key hurdle to classifying climate change as a threat to peace is not legal, but political. While there is a broad recognition among states that climate change poses a threat to peace,[11] disagreement persists as to whether the Security Council is the appropriate institutional forum for addressing climate change,[12] and whether it has the legitimacy to do so.[13]

III. The Risks of Securitisation

Determining that climate change is a threat within the framework of Art. 39 UNCh would not necessarily be desirable from a normative perspective, as such a 'securitisation' carries significant risks and costs.[14]

First, an increasingly broad and positive interpretation of 'threat to the peace' means that essentially every global challenge may become a security issue.[15] The concept of security would then risk losing its analytical and legal value, and degenerate the Security Council from a body that responds to

10 De Wet, 'Article. 39' (n. 3), para. 4 (on the context) and para. 49 (on the margin of discretion). For limits on the Council's discretion: Anna Hood, 'Ebola: A Threat to the Parameters of a Threat to the Peace?', Melbourne Journal of International Law 16 (2015), 29-51 (31).

11 See S/PV.8451 (n. 1), 12 (Germany), 13 (United Kingdom), 29 (Maldives), 35 (Liechtenstein), 46 (Portugal), 50 (Sri Lanka), 57 (Kenya), 66 (Morocco), 71 (Romania), 80 (Tuvalu), 83 (Mauritius).

12 Against: UN Security Council, 8864th Meeting of 23 September 2021, S/PV.8864, at 20 (China) and at 17 (India).

13 See, for example, the statements by Bolivia (S/PV.5663 (n. 1), 26); see also the statements by the Russian Federation (S/PV.8451 (n. 1), 16), South Africa (23), and Bangladesh (55).

14 The Copenhagen School of Security Studies famously criticised the expansion of the security agenda under the term 'securitisation' (Barry Buzan and Ole Wæver, Liberalism and Security: The Contradiction of the Liberal Leviathan (April 1998). Copenhagen Peace Research Institute Working Paper 23, 29).

15 '[A]nything can be securitized and can be deemed worthy of securing or as posing a security risk' (Avril McDonald and Hanna Brollowski, 'Security' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford University Press 2011), para. 21.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

exceptional threats into a general crisis-managing organ. This would not only undermine its own efficiency, but that of the UN as a whole.[16]

Secondly, incorporating climate change into the framework of collective security 'may lead to an overly militarised response'.[17] Individual scholars have already discussed the possibility for states to invoke controversial doctrines – such as the 'unwilling and unable' doctrine, pre-emptive self-defence, or even the problematic concept of humanitarian intervention – to take far-reaching measures, potentially even military ones, against states that contribute the most to climate change.[18] Of course, using force against major emitters may (still) seem rather far-fetched and dystopian.[19] Yet, this is precisely the point: Once climate change is framed in the language of international security, there is a risk of opening 'Pandora's box' and gradually normalising exceptional (military) interventions in other countries under the umbrella of environmental protection.[20]

Thirdly, such a determination comes at high costs in terms of legitimacy and risks reinforcing power asymmetries in an area that disproportionally affects small and developing states. Admittedly, a determination under Art. 39 UNCh opens the door for the Council to make use of its 'exceptional powers' by adopting binding measures, which could arguably overcome enforcement and compliance problems faced by other bodies that are limited to adopting non-binding measures.[21] However, these far-reaching powers make considerations of legitimacy especially relevant. As a body that reflects the post-war international order and grants its permanent members a veto-right, the Council is regularly criticised for its limited representativeness and legitimacy, which contributes to marginalising voices from the Global South.[22] These concerns are particularly relevant in the context of climate change, which already affects small island developing states disproportionately. Several states explicitly warned that the securitisation of climate change risks undermining established principles, such as 'common but differentiated

16 De Wet, 'Article 39' (n. 3), para. 50.

17 Monica Hakimi, 'Climate Change: A Paradigm for Collective Security?' in: Christian Marxsen and Anne Peters (eds), *Trialogues Issue V* (Cambridge University Press, *forthcoming*) (Draft on file with the author).

18 Craig Martin, 'Atmospheric Intervention? The Climate Change Crisis and the Jus ad Bellum Regime', Colum. J. Envtl. L. 45 (2020), 332-417 (381-399).

19 Eliana Cusato, 'Of Violence and (In)visibility: The Securitisation of Climate Change in International Law', London Review of International Law 10 (2022), 203-242 (234).

20 Cusato (n. 19), 234.

21 Cusato (n. 19), 212.

22 Michael Wood, 'United Nations, Security Council' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford University Press 2007), para. 41.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

responsibilities',[23] and may increase the influence of industrialised nations in the development of a non-transparent security agenda.[24]

Lastly, it is questionable if the Security Council has both the scientific expertise and the institutional resources to address the long-term problem of climate change,[25] especially given the veto power of its permanent members which frequently paralyses the Council even when addressing 'traditional' security threats.[26]

Against this backdrop, the legal possibility of classifying climate change as a 'threat to peace' under Article 39 UNCh does not necessarily come hand-in-hand with a normative reason for doing so. Given the risks and costs of this 'securitisation', the Security Council should exercise its discretion by refraining from classifying climate change as a threat to peace.

23 See the remark by Egypt, S/PV.5663 (Resumption 1) (n. 1), 5. See also India, S/PV.5663 (Resumption 1) (n. 1), 21.

24 See, e.g. Venezuela, S/PV.5663 (Resumption 1) (n. 1), 10-11.

25 De Wet, 'Article 39' (n. 3), para. 50.

26 Joyeeta Gupta and Hilmer Bosch, 'Climate Change and Security', in: Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law on Global Security* (Oxford University Press 2021), 548-565 (558).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

Security, with Caveats

Niklas Reetz*
Leuphana Universität Lüneburg, Lüneburg, Germany
niklas.reetz@leuphana.de

International efforts to counter climate change are proving insufficient. In search of more effective mechanisms against climate change, scholars and states, including vulnerable Small Island Developing States, have started framing climate change as a security threat. At the centre of this mobilisation of the United Nations (UN) collective security system is the Security Council, which is called upon to take concrete measures against climate change as a threat to international peace and security. At the same time, there is a plethora of critiques against this collective security system, both in general and in the climate context in particular.[1]

Against these critiques, security framings of climate change often come with caveats. For instance, it is supposed to be seen as a threat to 'human' or 'global' security, instead of national or international security.[2] Among the security measures available, the most confrontational ones, especially the use of force, are supposed to remain unused.[3] In addition, the institutional framework of the Security Council is supposed to be reformed and function more inclusively when addressing climate change.[4]

Considering the perceived need for all these caveats, the question is: why still mobilise the security system against climate change? Behind the scepticism of this question are several reasons why I view the resort to security – and the caveats accompanying it – as ineffective at best and counterproductive at worst. In this brief impulse, I highlight one concern for the (probable) scenario that the caveats would not be effective and another for the (improbable) scenario that they would be.

---

* Postdoctoral Researcher at Leuphana University Lüneburg.

1 For example, Eliana Cusato, 'Of Violence and (In)visibility: The Securitisation of Climate Change in International Law', London Review of International Law 10 (2022), 203-242.

2 For example, UNSC Provisional Verbatim Record of the 6587th Meeting of 20 July 2011, S/PV.6587, 28-29; Craig Martin, 'Climate Change and Global Security: Framing an Existential Threat' AJIL: Unbound 116 (2022), 248-253.

3 For example, Mark Nevitt, 'Is Climate Change a Threat to International Peace and Security?' Mich. J. Int'l L. 42 (2021), 527-579 (576-577).

4 For example, Christina Voigt, 'Security in a "Warming World": Competences of the UN Security Council for Preventing Dangerous Climate Change' in: Cecilia M. Bailliet (ed.), *Security: A Multidisciplinary Normative Approach* (Brill 2009), 291-312 (312).

DOI 10.17104/0044-2348-2026-3-803

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

To begin with, there is a tension between the coercive logic of security and the cooperative logic of the climate regime that the abovementioned caveats are unlikely to overcome. There are many different understandings of 'security'. What seems to underlie most is that security is something extraordinary. This is highlighted by securitisation theory, which characterises a security threat as an issue framed as an emergency condition beyond everyday societal and political challenges. Securitising an issue is oriented towards finding a response to the issue that is equally extraordinary.[5]

Under the UN collective security system, extraordinary security measures are typically coercive. The coercive nature of the use of force is obvious. Other measures, such as sanctions, are propagated as effective yet peaceful alternatives.[6] Even if the use of force was off the table, many alternative measures share the coercive nature. Sanctions, for instance, are taken against the will of the targeted state, with the purpose of bending its will and bringing it back to a desired conduct.[7] This structural similarity between the use of force and sanctions as a form of economic coercion was reflected in the attempt, albeit unsuccessful, by various Global South states to include economic coercion in the conception of prohibited force.[8]

In contrast to the typically coercive nature of security measures, the international community has chosen the path of cooperation to respond to climate change. In recognition of climate change as a global and collective problem, one of the legal principles undergirding the climate regime is that of cooperation.[9] The Paris Agreement foresees international cooperation as an integral element of many of its actions. For example, state parties shall strengthen cooperation on technology development and transfer to support mitigation and adaptation.[10] Cooperation plays a crucial role in compensating for the disadvantaged circumstances of developing countries.

The tension between the coercive logic of security and the cooperative basis of the climate regime risks undermining the latter. This is regardless of whether climate change is called a threat to national, global, or human security. The prioritisation of coercive measures typical of the security system de-prioritises responses to the issue that are outside the security logic,

5 Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1998), 21-26.

6 For example, Voigt (n. 4), 306-308.

7 Georges Abi-Saab, 'The Concept of Sanction in International Law' in: Vera Gowland-Debbas (ed.), *United Nations Sanctions and International Law* (Brill 2001), 29-41 (39).

8 See Erin Pobjie, *Prohibited Force: The Meaning of 'Use of Force' in International Law* (Cambridge University Press 2024), 117-123.

9 ICJ, *Obligations of States in Respect of Climate Change*, advisory opinion of 23 July 2025, paras 214-218, 260-267, 301-308.

10 Article 10 Paris Agreement.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

such as cooperation and economic transformation.[11] Major greenhouse gas-emitting states are already cautious about agreeing to any legally binding obligation they might be found in breach of in the future. The risk that they might become subject to coercive measures is likely to have an even greater chilling effect. This could affect states' willingness to agree to individual mitigation obligations as well as cooperation and support for adaptive capacities in developing countries. Ultimately, cosmetic caveats are unlikely to offset the risk that the security system's fundamentally coercive nature poses to the ambitious cooperation that is required to limit global warming.

But what if coercive security measures are actually necessary, considering the insufficiency of cooperative efforts against climate change to date? In this case, and if the caveats made for the securitisation of climate change (no force or coercion, inclusive procedures, *et cetera*) were to be effective, they would contradict rather than support the purpose of securitisation. The more effective the caveats are, the fewer extraordinary features of security remain. Shifting towards a cooperation-based forum that requires consensus among states to decide on measures, the security system would become increasingly akin to the ordinary climate regime. Taken seriously, the caveats to the securitisation of climate change mean that there are few benefits left in resorting to the security system, other than mere symbolism.

11 Buzan, Wæver and de Wilde (n. 5), 23-26.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

From Tactical Law of Armed Conflict to Macro-Perspective of Climate Law

Jérôme de Hemptinne*
Utrecht University, Utrecht, The Netherlands
j.dehemptinne@uu.nl

The law of armed conflict (LOAC) regulates the conduct of hostilities in real time during concrete tactical operations.[1] Its normative architecture is thus conventionally understood as predominantly micro-operational, structuring discrete battlefield decisions on the basis of information reasonably available at the time. By contrast, international climate law is inherently macro-structural. Instruments such as the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement articulate obligations that are systemic, forward-looking, and cumulative,[2] requiring States to assess environmental harm across extended temporal horizons and broad spatial scales, including its transboundary dimensions. At first sight, this divergence appears to generate a structural disjunction. On closer inspection, however, the ostensibly micro-operational logic of the LOAC is capable, albeit imperfectly, of accommodating broader environmental considerations, while international climate law can, in turn, inform and recalibrate the interpretation and application of its principles in this direction. To substantiate this claim, I will confine this brief reflection to three main observations.

First, although LOAC operates through case-specific assessments, its foundational principles already require consideration of effects extending beyond immediate and localised damage. The principles of distinction, proportionality, and precaution, together with the prohibition of widespread, long-term, and severe environmental harm, presuppose a forward-looking evaluation of the foreseeable consequences of military action.[3] The principal

* Assistant Professor, Utrecht University. I would like to warmly thank Jessica Dorsey for her careful review of this article and for her insightful suggestions. Any errors remain my own.

1 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff Publishers 1987), 683 (para. 2207).

2 ICJ, *Obligations of States in Respect of Climate Change, Advisory Opinion of 23 July 2025, ICJ Reports 2025*, 86 (para. 276).

3 See ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary (ICRC 2020), paras 19, 57, 66, 117, 118, available at: <https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf>, last access 30 June 2026.

DOI 10.17104/0044-2348-2026-3-807

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

difficulty lies not in the absence of such a perspective, but in translating the diffuse and cumulative character of climate harm into the doctrinal language of foreseeability. That said, while climate change is typically the product of aggregated conduct, certain forms of military activity generate environmental effects that are sufficiently well established to fall, in themselves, within the ambit of foreseeable harm. Two examples illustrate this point. First, the destruction of carbon sinks – such as forests or peatlands – predictably releases significant quantities of stored carbon dioxide while simultaneously diminishing future sequestration capacity. Second, attacks against fossil fuel infrastructure are known to produce substantial greenhouse gas emissions through fires, explosions, or leaks. Even where the precise magnitude of such effects cannot be quantified *ex ante*, their likelihood is often sufficient to trigger consideration under the principles of proportionality and precaution. In this respect, LOAC already contains uncontested doctrinal entry points for the incorporation of climate-relevant risks.[4]

Second, the recognition of foreseeable environmental effects at the level of individual operations exposes a deeper structural limitation of LOAC: its traditional focus on discrete acts risks obscuring the cumulative impact of sustained military campaigns. This limitation is accentuated in contemporary forms of warfare, characterised by the repetition and coordination of strikes at scale.[5] Operations that comply with the principles of distinction, proportionality, and precaution when assessed in isolation may nonetheless generate harmful consequences that appear excessive when considered in the aggregate. This concern has prompted the development of the notion of 'cumulative harm', according to which a series of individually lawful acts may, in combination, produce disproportionate outcomes.[6] Although this concept has yet to achieve firm doctrinal consolidation,[7] it finds support in existing precautionary obligations under LOAC. These include, in particular, the duty of constant care reflected in Article 57 of Additional Protocol I, the

4 See generally Stavros-Evdokimos Pantazopoulos, 'Navigating Legal Frontiers: Climate Change, Environmental Protection and Armed Conflict', Int'l Rev. of the Red Cross 106 (2024), 166-392; Mario Pasquale Amoroso, 'Fighting in a Warming World: The Emergence of Climatic Considerations in the Conduct of Hostilities Under International Humanitarian Law', RECIEL (2026), 1-12.

5 See Jessica Dorsey, 'Precautions-by-Design: Safeguarding the Notion of Feasibility in Increasingly Autonomous Warfare' (2 April 2026), 2-7, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6509503>, last access 30 June 2026.

6 Noam Lubell and Amichai Cohen, 'Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts', International Law Studies 96 (2020), 161-193 (176-177).

7 See Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities. The Incidental Harm Side of the Assessment (2018)*, Chatham House, 2-52 (10), available at: <https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard-final.pdf>, last access 30 June 2026.

 DOI 10.17104/0044-2348-2026-3-807

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

prohibition of methods and means of warfare expected to cause widespread, long-term, and severe environmental damage, and the customary obligation to avoid or, at a minimum, mitigate incidental harm.[8] Read together, these norms point toward a more integrated and forward-looking conception of environmental risks[9] that transcends the evaluation of isolated attacks, and instead, governs the conduct of military operations as a whole.[10] From this perspective, precaution operates not merely alongside proportionality but also, in certain respects, upstream of it,[11] addressing categories of harm that an atomised analysis may fail to capture adequately.

Third, the foregoing structural limitations of the LOAC are particularly acute in the context of climate change, which is inherently cumulative, systemic, and transboundary. A strictly atomised application of the LOAC risks, more than in any other environmental domain, underestimating the contribution of military activities to broader patterns of climate degradation and alteration. This tension underscores the need to develop an interpretative approach that complements the predominantly micro-operational logic of the LOAC with a more aggregated conception of the duty of care, as advanced in my second observation, particularly at higher levels of command where operational patterns are conceived, coordinated, and sustained. That said, such a duty cannot be articulated in uniform terms. Rather, it must be calibrated to the capacities of the actors concerned. Armed forces possessing advanced technological and institutional capabilities – enabling, for instance, the integration of environmental data into targeting processes and the identification of ecologically sensitive areas – should be held to a correspondingly heightened standard of care with respect to the anticipation, prevention, and minimisation of environmental harm.[12]

It is precisely at this juncture that international climate law acquires interpretative salience. By requiring States to assess environmental harm in sys-

8 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge University Press 2005), Rule 44.

9 Jessica Dorsey, 'The Erosion of Human(e) Judgement in Targeting? Quantification Logics, AI-Enabled Decision Support Systems and Proportionality Assessments in IHL', Int'l Rev. of the Red Cross 106 (2025), 1041-1071 (1046), and the references cited in footnote 22.

10 See Dorsey (n. 5), 7.

11 For a position emphasising the primacy of precautionary measures, with proportionality as a subsidiary rule when collateral damage cannot be fully avoided, see Dorsey (n. 9), 1048-1053. See also Jeroen van den Boogaard, *Proportionality in International Humanitarian Law: Refocusing the Balance in Practice* (Cambridge University Press 2023), 122; Geoffrey S. Corn, 'War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure', Pepperdine L. Rev. 42 (2015),419-464 (435-436).

12 See Dorsey (n. 5), 5, 10-11. See generally Gabriella Blum, 'On Differential Law of War', Harv. Int'l L. J 52 (2011), 164-217; Jean-François, Quéguiner, 'Precautions Under the Law Governing the Conduct of Hostilities', Int'l Rev. of the Red Cross 88 (2006), 793-821 (802).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

temic, long-term, and transboundary terms – most notably through the preparation and progressive strengthening of nationally determined contributions under Article 4 of the Paris Agreement, as well as through adaptation planning (Art. 7) and enhanced transparency and reporting obligations (Art. 13) – the climate regime provides a normative framework expressly attuned to cumulative effects. These obligations do not lose their relevance in situations of armed conflict. On the contrary, they lend further weight to the need to adopt broader temporal and spatial perspectives on military operations, particularly when assessing their climate-related consequences. Moreover, the principle of differentiated responsibilities and respective capabilities, as developed under climate law frameworks,[13] buttresses the case for a variable standard of environmental due diligence under LOAC, aligned with the capacities of the actors involved. Accordingly, international climate law can usefully inform the interpretation and application of LOAC principles, particularly precaution, by requiring that decision-makers take into account not only the immediate effects of individual operations, but also the foreseeable consequences arising from their repetition and interaction over time. While the operationalisation of such assessments during hostilities may present practical challenges,[14] their integration at the *ex ante* stage – through military planning processes, operational doctrines, and risk assessment frameworks – appears both feasible and normatively compelling.

13 See Valerie Fajardo, 'Reassessing Common But Differentiated Responsibilities and Respective Capabilities. Climate Finance and the Paris Agreement at COP29', Völkerrechtsblog, 12 November 2024, doi: 10.17176/20241112-235915-0.

14 For a discussion of the operational difficulties of an overly broad application of the principle of proportionality, see Amichai Cohen and Yuval Shany, 'Contextualizing Proportionality Analysis? A Response to Schmitt and Merriam and Israel's Targeting Practices', Just Security, 7 May 2015, available at: <https://www.justsecurity.org/22786/contextualizing-proportionality-analysis-response-schmitt-merriam/>, last access 30 June 2026. See also Oded Hen, 'What Aggregate Civilian-Combatant Ratios Tell Us, and What They Don't: A Case Study from the Gaza Conflict', Lieber Institute: Articles of War, 20 March 2026, available at: <https://lieber.westpoint.edu/what-aggregate-civilian-combatant-ratios-tell-us-what-they-dont-case-study-gaza-conflict/>, last access 30 June 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Wartime GHG Emissions as Widespread, Long-Term and Severe Damage to the Environment

Romina Pezzot*
Geneva Graduate Institute, Geneva, Switzerland
romina.pezzot@graduateinstitute.ch

The environment is the physical setting in which armed conflicts occur, rendering it particularly susceptible to both direct and indirect damage. Consequently, there is a constant tension between the environment and armed conflicts to such an extent, that it has been argued that the history of wartime activities is also a history of environmental damage.[1] The law of armed conflict (LOAC) acknowledges such an existing tension, and seeks to strike a balance between the military necessity of those actively participating in hostilities and the humanitarian and environmental considerations regarding those affected by hostilities. This balance is also present at the threshold of environmental damage that is considered unacceptable and, consequently, prohibited.

Widespread, long-term, and severe damage to the environment is the maximum threshold established in Articles 35(3) and 55 of Additional Protocol I (AP I, whose antecedent is the Environmental Modification [ENMOD] Convention) and Rule 45 of the International Committee of the Red Cross International Humanitarian Law (ICRC IHL) Customary Study. This threshold is based on the cumulative characteristics of the damage: geographical extent, durability, and severity. Since destruction and damage are inherent to armed conflicts and some damage is unavoidable, the threshold for environmental harm is intentionally set high to ensure that only the most serious environmental harm is prohibited. To prevent it, parties to armed conflicts shall take constant care to protect the environment. Interestingly, protecting the environment against widespread, long-term, and severe damage is not limited to specific sources of damage or to certain areas or

* PhD researcher in international law at the Geneva Graduate Institute. Her current research focuses on the intersection between international environmental law, climate change law, international humanitarian law and the law on the use of force. She holds a law degree from the University of Buenos Aires and a master's degree in international law from the Geneva Graduate Institute. The author thanks to the Editors as well as to John Hursh and Karem Cardenas Ynfanzon for their valuable comments to the previous version.

1 Silja Vöneky and Rüdiger Wolfrum, 'Environment, Protection in Armed Conflict' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford University Press 2016), para. 26.

DOI 10.17104/0044-2348-2026-3-811

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

components of the environment that may be affected during armed conflicts. This raises the question of whether greenhouse gas (GHG) emissions from Parties to armed conflicts can be considered widespread, long-term, and severe environmental damage, particularly to the climate system.[2] The Russia-Ukraine war illustrates how this armed conflict has affected the climate system, resulting in the emission of 311 million tonnes of CO2 equivalent (tCO2e) since 2022 – a figure comparable to France's annual emissions.[3] The answer to this question lies in the scope of the triad 'widespread, long-term and severe' damage and whether the effects of wartime GHG emissions fall within it. It is argued here that they do.

The triad of 'widespread, long-term and severe' damage is not defined in AP I. Bothe concludes, and I agree with him, that it would be highly dangerous to rely too heavily on the negotiation history of AP I (and the ENMOD Convention) for interpreting those terms, since they belong to a period of development of LOAC and of environmental awareness that is now gone or completely different.[4] The 2022 ICRC Guidelines on the protection of the environment in armed conflict are an appropriate reference because they provide an updated interpretation of those terms. Starting with 'widespread' – referring to the geographical extent of damage – the Guidelines interpret it as covering both direct and foreseeable indirect damage beyond the immediate area of warfare.[5] GHG emissions are transboundary in nature, as they do not remain within the territory where they were emitted. On the contrary, once released, they enter and accumulate in the atmosphere, which is part of the Earth's climate system, which is inherently global and part of the shared global commons. For that reason, given that GHGs transcend the territorial limits of the belligerent parties and extend across the global climate system, they may be regarded as a form of widespread environmental harm.

Regarding the second criterion – which concerns the duration of damage – the ICRC Guidelines interpret 'long-term' as referring to effects that last for years and extend beyond a single season, including ongoing indirect impacts.[6]

2 About the influence of concerns over warfare's climate impacts on the drafting history of AP I and the UN climate change regime, see Mario Pasquale Amoroso's contribution in this volume.

3 Initiative on GHG Accounting of War, 'Climate Damage Caused by Russia's War in Ukraine (24 February 2022- 23 February 2026)', <https://en.ecoaction.org.ua/wp-content/uploads/2026/02/Climate-Damage-Caused-by-War-48-months_ENs.pdf>, last access 6 July 2026.

4 Michael Bothe, 'The Protection of the Environment in Times of Armed Conflict', GYIL 34 (1991), 54-62 (56-58).

5 ICRC, 'Guidelines on the Protection of the Natural Environment in Armed Conflict' (2022), 33-34.

6 ICRC (n. 5), 67-71.

 DOI 10.17104/0044-2348-2026-3-811

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

This criterion is also met since once released, GHGs do not simply dissipate; they accumulate in the atmosphere over time, causing and aggravating climate change. The average lifetime of GHGs in the atmosphere depends on their type. According to scientific studies, carbon dioxide remains in the environment for hundreds of thousands of years, while methane stays around a decade, nitrous oxide about 110 years, and chlorofluorocarbons range from about 52 to 93 years.[7] Consequently, GHG emissions cause long-term and direct damage to the climate system.

Lastly, the 'severe' criterion – which refers to the intensity of the harm – is interpreted by the ICRC Guidelines as denoting serious harm, such as large-scale ecosystem disruption or significant threats to human health or survival.[8] As for GHG emissions (including those from armed conflicts), science has confirmed that they cause severe damage to the climate system because they contribute to climate change, which in turn disrupts biological diversity and causes and aggravates desertification and land degradation[9] as well as sea level rise and ocean acidification.[10] Additionally, the effects of climate change (caused by GHG emissions) threaten several human rights, particularly the right to life.[11]

With all that in mind, it is difficult not to consider wartime GHG emissions as widespread, long-term, and severe damage to the climate system. Given that parties to armed conflicts shall take constant care to prevent damage to the environment from reaching that threshold (Article 55(1) AP I), they must adopt all feasible measures to prevent or mitigate GHG emissions from their military operations (Article 57 AP I and Rule 15 ICRC IHL Customary Study). NATO'AJEPP-4 is a good example of the implementation of this obligation, since environmental risk management is integrated into the overall planning for military activities, including impacts on the climate system.[12] This does not mean that parties must immediately stop emitting GHGs, since that would not be realistic and would ignore military necessity, the other half of the balancing test. On the contrary, they must adopt feasible measures to prevent or mitigate

7 NASA, 'Major Greenhouse Gas Sources, Lifespans, and Possible Added Heat', 22 June 2023, <https://science.nasa.gov/resource/graphic-major-greenhouse-gas-sources-lifespans-and-possible-added-heat/>, last access 6 July 2026.

8 ICRC (n. 5), 61-66.

9 ICJ, *Obligations of States in respect of climate change*, Advisory Opinion of 23 July 2025, paras 325-335.

10 IPCC, 'Special Report on the Ocean and Cryosphere in a Changing Climate' (2019).

11 UN Human Rights Committee, General Comment No. 36: Article 6: Right to Life of 3 September 2019, CCPR/C/GC/36, para. 62.

12 North Atlantic Treaty Organization, 'AJEPP-4: Joint NATO doctrine for environmental protection during NATO-led military activities (Edition B, Version 1)' (2018), 15-16.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

GHG emissions,[13] since the 'take care' obligation is a due diligence obligation applicable in all circumstances during armed conflicts.[14]

It is evident that armed conflicts have an environmental cost, particularly for the Earth's climate system. Therefore, they can no longer disregard their negative impact on the climate system, nor can the climate system remain a casualty of armed conflicts.

13 This is the position followed by ITLOS when concluding that GHG emissions are a form of marine pollution contrary to Article 194.1 of UNCLOS, and that States Parties shall take all necessary measures to reduce and control existing marine pollution and, eventually, to prevent such pollution from occurring. ITLOS, *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, case no. 31, paras 198-199.

14 Karem Hulme, 'Taking Care to Protect the Environment Against Damage', Int'l Rev. of the Red Cross 92 (2010), 675-691 (676-680).

 DOI 10.17104/0044-2348-2026-3-811

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Stringent Due Diligence and Corporate Climate Harm in Conflict-Affected Contexts

Amanda Kron*
Lund University, Lund, Sweden
amanda.kron@jur.lu.se

Following the International Court of Justice (ICJ) Advisory Opinion on obligations of states in respect of climate change, it is clear that there is a heightened duty for states to act with due diligence and take appropriate measures to prevent climate harm.[1] This duty includes an obligation for states to take 'necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors under its jurisdiction'.[2] The stringent due diligence of states will thus have an effect on state regulation of emissions by private actors, which will in turn impact the requirements placed on corporate due diligence.

Businesses can contribute to significant climate harms in conflict-affected contexts.[3] Sectors with large climate footprints frequently operating in conflict-affected contexts include energy, extractives and critical minerals, but also corporations contributing to deforestation. Situations of armed conflict are often characterised by an environmental governance vacuum, with limited state monitoring, institutional capacity, and compliance.[4] The regulation and monitoring of private actors and their potential adverse impacts on climate change thus become even more important in conflict-affected contexts, with heightened requirements for home states. The text engages with three sources of obligations in this context: the ICJ Advisory Opinion, Guiding Principle 7 of the United Nations Guiding Principles on Business and Human Rights (UNGPs) and Principle 10 of the International Law

* Doctoral Candidate, Lund University.

1 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, ICJ Reports 2025, 86 (para. 138): 'the Court recognizes that the standard of due diligence for preventing significant harm to the climate system is stringent'.

2 ICJ, *Climate Change* (n. 1), para. 428.

3 The text will primarily use the terms conflict-affected contexts or areas, which are the terms used by the UN Working Group on Business and Human Rights and the International Law Commission.

4 David Jensen and Amanda Kron, 'Environmental Peacebuilding and the United Nations', in: Ashok Swain and Joakim Öjendal (eds), *Routledge Handbook of Environmental Conflict and Peacebuilding* (Routledge 2018), 121-142 (134).

DOI 10.17104/0044-2348-2026-3-815

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Commission (ILC) Principles on Protection of the Environment in Relation to Armed Conflicts.

This text accordingly explores the duty of states to regulate climate impacts by corporate actors in conflict-affected contexts. In particular, it contends that the stringent due diligence duty of states should inform equally stringent regulations and corporate due diligence requirements on climate harm. The requirement of regulatory due diligence for states and associated due diligence requirements for corporations can pave the way for a greater focus on prevention and a more holistic understanding of potential climate harms.

In fact, such requirements and instruments for corporate due diligence in the face of climate harms can draw on the understanding of heightened due diligence required in conflict-affected and high-risk contexts by the UNGPs. Heightened due diligence is referenced in the commentary to UNGP 7 on supporting business respect for human rights in conflict-affected areas. Importantly, UNGP 7 falls under Pillar I of the UNGPs, and focuses on the duty of states to protect human rights. This duty includes taking all appropriate measures (including regulatory) and to 'review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business'.[5]

Later analyses by the United Nations Working Group on Business and Human Rights (UN Working Group) have confirmed and built on this understanding. The 2018 report from the UN Working Group regarding human rights due diligence notes that a 'key aspect' of fulfilling the state duty to protect against human rights abuses by businesses 'is to use available regulatory levers',[6] and emphasises that 'in high-risk operating environments, such as conflict-affected areas, business enterprises need to exercise heightened human rights due diligence'.[7] A 2022 guide developed by United Nations Development Programme (UNDP) and the UN Working Group states that the practical consequence of heightened human rights due diligence is 'that for a business to know and show that it respects human rights in conflict-affected contexts, it needs to identify and assess not only actual or potential adverse human rights impacts, but also actual or potential adverse

5 Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie', 21 March 2011, UN Doc. A/HRC/17/31, Annex.

6 UNGA, 'Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Note by the Secretary-General', 16 July 2018, UN Doc. A/73/163, paras 63-64.

7 UNGA Note by the Secretary-General (n. 6), para. 14 (c).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

impacts on conflict that the company may cause or contribute to through its own activities, or that may be directly linked to its operations, products or services'.[8] The requirement for heightened due diligence thus means that businesses need to include a greater focus on the *context* as well as people potentially and actually impacted in their assessments. Arguably, the same requirement for a holistic and context-oriented approach would apply to actual or potential adverse climate impacts that the company may cause or contribute to through its own activities, or that may be directly linked to its operations, products or services.

With higher risks, greater care is thus required by the company in question.[9] This is significant in relation to environmental harm given the preventative focus of due diligence in general and of heightened due diligence in particular.[10] If there is a high risk of environmental degradation and climate emissions, the company would need to consider impacts of environmental degradation as a core part of its business. Accordingly, corporations operating in conflict-affected areas would be under an obligation to identify and assess adverse climate impacts (as well as associated harm to human rights). In order to identify potential climate harms, impact assessments undertaken by corporations should be substantive and encompass direct, indirect, and cumulative climate emissions.[11]

The emphasis on stringent due diligence for states in the context of climate change and the associated duty to regulate private actors could also inform the understanding and application of Principle 10 of the ILC Principles on Protection of the Environment in Relation to Armed Conflicts – calling on states to take 'appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area affected by an armed conflict'.[12] In the context of armed conflicts and climate change, the

8 UNDP, 'Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide', 2022, 14, available at: <https://www.undp.org/sites/g/files/zskgke326/files/2022-06/UNDP_Heightened_Human_Rights_Due_Diligence_for_Business_in_Conflict-Affected_Context.pdf>; last access 30 June 2026.

9 Daniel Aguirre and Irene Pietropaoli, 'Heightened Human Rights Due Diligence in Practice: Prohibiting or Facilitating Investment in Conflict Affected Areas?' Journal of Human Rights Practice 15 (2023), 541-558 (543).

10 Aguirre and Pietropaoli (n. 9), 542: 'Accordingly, heightened HRDD is not a response to a crisis – it is a preventative mechanism.'

11 See e. g. ICJ, *Climate Change* (n. 1), Joint Declaration of Judges Bhandari and Cleveland, paras 11-17.

12 UNGA, 'Report of the International Law Commission: Seventy-Third Session (18 April-3 June and 4 July-5 August 2022)', 2022, UN Doc. A/77/10, Chapter V.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

above analysis indicates that stringent due diligence for states requires a greater focus on preventative measures in fragile contexts, and heightened requirements for continuous state monitoring and assessment of corporate due diligence regulations and measures.

 DOI 10.17104/0044-2348-2026-3-815

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

The Lived Experiences of Wars in a Climate Crisis

Britta Sjöstedt*
Lund University, Faculty of Law, Lund, Sweden
britta.sjostedt@jur.lu.se

Many of the states that are most vulnerable to climate change are also those which are most affected by armed conflict. Their environments are already fragile due to desertification, drought, ecosystem degradation, and biodiversity loss.[1] In such settings, armed conflict acts as a compounding stressor: war-related environmental destruction interacts with already strained ecosystems, amplifying vulnerabilities and accelerating degradation.

International Humanitarian Law (IHL) protects the natural environment through a combination of general rules governing the conduct of hostilities and specific provisions addressing environmental damage. The general rules on distinction (Arts 48 and 52 AP I), proportionality (Art. 51(5)(b) AP I), and precautions in attack (Art. 57 AP I) apply to the natural environment insofar as it constitutes a civilian object, while Articles 35(3) and 55 AP I specifically prohibit methods and means of warfare intended, or expected, to cause widespread, long-term and severe damage to the natural environment.[2] However, the specific environmental provisions of Articles 35(3) and 55 AP I establish a particularly high threshold for unlawfulness, prohibiting only damage that is widespread, long-term, and severe. More generally, the IHL framework remains primarily concerned with the direct, foreseeable, and reasonably quantifiable effects of military operations, leaving much cumulative, indirect, and long-term en-

* Britta Sjöstedt, senior lecturer, Law Faculty, Lund University.

1 ICRC, 'When Rain Turns to Dust Understanding and Responding to the Combined Impact of Armed Conflicts and The Climate and Environment Crisis on People's Lives', July 2020, <https://www.icrc.org/sites/default/files/topic/file_plus_list/rain_turns_to_dust_climate_change_conflict.pdf>, last access 2 July 2026.

2 See for instance, Michael Bothe, Carl Bruch, Jordan Diamond and David Jensen, 'International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities', Int'l Rev. of the Red Cross 92 (2010), 569-592, doi:10.1017/S1816383110000597; Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Brill/Nijhoff 2004), doi: 10.1163/9789047405344; Britta Sjöstedt, *The Role of Multilateral Environmental Agreements: A Reconciliatory Approach to Environmental Protection in Armed Conflict* (Hart 2020).

DOI 10.17104/0044-2348-2026-3-819 ZaöRV 86 (2026), 819-822

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

vironmental harm, including harm experienced in climate-vulnerable settings, outside its scope.[3]

In its 2025 Advisory Opinion on Climate Change Obligations, the International Court of Justice (ICJ) recognised that climate harm is cumulative, long-term, and potentially irreversible, which requires particularly stringent due diligence obligations. This supports a more demanding standard of care extending beyond the prevention of immediate or visible harm to encompass long-term and systemic environmental risks.[4] Under a systemic interpretation, as envisaged by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, this reasoning requires that the latter be interpreted in light of the former as part of a coherent legal order. A more stringent due diligence obligation therefore implies heightened levels of precaution and foresight in the assessment of environmental risks in armed conflict, particularly in states vulnerable to climate change.

First, this may affect proportionality assessments. As scientific knowledge about environmental fragility and climate impacts expands, environmental harm becomes increasingly foreseeable. Because proportionality assessments in accordance with Article 51(5)(b) AP I consider only foreseeable consequences, greater awareness of environmental vulnerability may alter how such harm is weighed against the anticipated military advantage of an attack.[5] In fragile ecosystems, the destruction of wetlands, forests, or other carbon sinks may have consequences extending far beyond the immediate battlefield.

Second, a more demanding due diligence standard may shape the interpretation of the obligation to take feasible precautions in attack. As knowledge about climate impacts increases, what counts as feasible under Article 57 AP I may evolve.[6] Military planners may be expected to consider environmental consequences more carefully when selecting targets, methods, and timing of attacks, including avoiding operations likely to trigger large-scale fires or damage water systems in drought-affected regions.

Third, greater attention to environmental fragility may influence how specific IHL rules are interpreted. The threshold in Articles 35(3) and 55

3 Britta Sjöstedt and Karen Hulme, 'Re-Evaluating International Humanitarian Law in a Triple Planetary Crisis: New Challenges, New Tools', Int'l Rev. of the Red Cross 105 (2023), 1238-1266, doi: 10.1017/S1816383123000449.

4 ICJ, *Obligations of States in Respect of Climate Change,* Advisory Opinion of 23 July 2025.

5 Stavros-Evdokimos Pantazopoulos, 'Navigating Legal Frontiers: Climate Change, Environmental Protection and Armed Conflict', Int'l Rev. of the Red Cross 106 (2024), 366-392, doi: 10.1017/S1816383124000134.

6 Pantazopoulos (n. 5).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

AP I could be reassessed in light of the cumulative environmental effects in already vulnerable ecosystems. This also intersects with the protection of objects indispensable to the survival of the civilian population under Article 54 AP I and Article 14 AP II. While traditionally linked to food and water infrastructure, this category may also encompass ecosystems that sustain life in climate-stressed environments, such as wetlands regulating water cycles or forests stabilising local climates.

More broadly, the Martens Clause, reflected in Article 1(2) AP I, reminds us that even where specific rules are incomplete, warfare remains governed by the principles of humanity and the dictates of public conscience. This becomes particularly significant in climate-vulnerable and conflict-affected settings, where ecosystems are already under severe stress from desertification, drought, biodiversity loss, and environmental degradation. In such contexts, wartime environmental destruction is not experienced as an isolated or temporary harm, but as part of an accumulating process that threatens the ecological conditions necessary for survival, livelihoods, cultural continuity, and social stability. Armed conflict may intensify already existing ecological insecurity through worsening drought, contamination of scarce water resources, collapse of agricultural cycles, displacement from increasingly uninhabitable territories, and the erosion of community resilience.

Climate-related environmental destruction therefore challenges the application of IHL because its effects are cumulative and intergenerational.[7] The destruction of ecosystems that sustain human life raises questions not only of proportionality and precautions, but also of compatibility with the principles of humanity. From this perspective, lived experiences of environmental stress become legally significant.[8] Lived experiences matter because environmental destruction is often experienced not merely as material loss, but as a disruption of identity, belonging, and ways of life. Concepts such as solastalgia capture the distress associated with the degradation of familiar environments,[9] while scholarship and jurisprudence in particular from the Global South increasingly emphasise the relational dimensions of environmental

7 Dieter Fleck, 'The Martens Clause and Environmental Protection in Relation to Armed Conflicts', GoJIL 10 (2020), 243-266, doi: 10.3249/1868-1581-10-1-FLECK.

8 Juan David Castro Villadiego, *Los derechos de la naturaleza en Colombia: análisis histórico, ético y jurídico* (Universidad Externado de Colombia 2024), doi: 10.60909/BDIGITAL/HANDLE.001.12004; Eduardo Gudynas, *Derechos de la naturaleza: ética biocéntrica y políticas ambientales* (Primera edición peruana, Programa Democracia y Transformación Global 2014).

9 Lindsay P. Galway, Thomas Beery, Kelsey Jones-Casey and Kirsti Tasala, 'Mapping the Solastalgia Literature: A Scoping Review Study', International Journal of Environmental Research and Public Health 16 (2019), 2662-2686, doi:10.3390/ijerph16152662.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

harm.[10] In this sense, damage to ecosystems may also be understood as affecting cultural continuity, social cohesion, and intergenerational relationships, particularly for Indigenous peoples and other communities whose identities are closely tied to specific landscapes. Read in light of these developments and the ICJ's articulation of stringent environmental due diligence obligations in its 2025 Advisory Opinion, the Martens Clause supports a broader and more precautionary understanding of environmental protection in armed conflict, particularly in climate-fragile contexts. Thus, the conduct of hostilities should take greater account of environmental fragility and the compounded risks of warfare in climate-vulnerable settings, ensuring that legal frameworks better reflect the realities of environmental harm experienced in contemporary conflicts.

10 Belkis Florentina Izquierdo Torres and Lieselotte Viaene, 'Una Im-Posibilidad Legal. El Territorio-Ser Viviente, Víctima Del Conflicto Armado Colombiano. Algunas Reflexiones Desde Un Diálogo Colaborativo Interdisciplinar', EUNOMÍA. Revista en Cultura de la Legalidad 27 (2024), 72-101, doi:10.20318/eunomia.2024.9001.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

NATO's Responsiveness to Climate Change

Madara Melnika*
European University Institute, Florence, Italy
madara.melnika@eui.eu

International legal debates on accountability and liability for conflict-related greenhouse gas emissions would increase their practical persuasiveness by acknowledging the governance processes already underway within national forces and international organisations such as North Atlantic Treaty Organization (NATO). The integration of the worldviews, interpretations, and vocabulary developed in these processes would bridge the gap between climate law, international humanitarian law, and military worldviews regarding their priorities.

The Alliance's 2022 Strategic Concept states that NATO should become the leading international organisation in understanding and adapting to the impact of climate change on security.[1] In 2021, the Climate Change and Security Agenda[2] and Climate Change and Security Action Plan[3] set out NATO's goals to increase Allied *awareness* of climate change in NATO's strategic environment, NATO's assets and general security, to *adapt* to climate change, to *contribute* to mitigation through the assessment of emissions and energy demand and consumption, and, finally, to enhance international *outreach*. These pledges might be seen as a way for an institution to remain relevant and agile, following the keywords of the time. Likewise, this might have been a matter of reputation, as it foregrounds the military sector's internal accountability and participation in global regulatory processes. However, the underlying reasons are much deeper, significantly increasing the normative weight of this plan and the instruments associated with it.

In military discourse, climate change is a threat multiplier. It both adds to the operational stress and transforms the broader security environment by increasing insecurity and intensifying conflict risks. Armed forces that do not

* PhD Scholar (EUI), LL.M. Human Rights and Social Justice (UConn), LL.M. in Comparative, European and International Laws (EUI).

1 NATO 202 Strategic Concept (adopted by Heads of State and Government at the Madrid Summit), 29 June 2022, paras 19, 46.

2 NATO, *Climate Change and Security Agenda* (endorsed by NATO Foreign Ministers, March 2021).

3 NATO, *Climate Change and Security Action Plan* (agreed by Heads of State and Government, 14 June 2021).

DOI 10.17104/0044-2348-2026-3-823

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

want to suffer the impacts of supply chain disruptions, excessive heat-related deaths among their personnel, or threats to military equipment and weapon systems caused by permafrost thaw or other climate-related hazards must adapt to the changing operational and global environment and incorporate its considerations into mission planning. Exceedingly more often, the military also gets involved in responses to environmental hazards such as wildfires and flooding, distorting its main missions. Therefore, climate change inescapably transforms the field in which the military operates, requiring adaptation and awareness.

Following the logic of threat multiplication, the sector's contribution to climate change adds to the threats, resulting in a feedback loop of causation and adaptation. This contribution is massive, swelling to at least 5.5 % of global emissions.[4] Strategic mitigation within the military, provided it is compatible with operational effectiveness or even enhances it, would break the vicious circle and, in the long term, help reduce climate-change-related pressures on global society and the military alike.

The need for climate-impacting transformation is also reinforced by other factors. Military reliance on non-renewable energy[5] requires a constant and secure supply, which can accordingly lead to dependency on one's enemies or to paralysis of action, including battlefield vulnerabilities.[6] Fossil-fuel-related energy infrastructure is also an easy target. It is also costly: historical examples show that the additional security measures taken to prevent sabotage of fossil fuel shipments, along with supply chain hurdles, raised the final gasoline prices to as high as $400 per gallon.[7] Finally, green transition-related changes in civilian infrastructure, if not accompanied by a military transition, might lead to the sector's isolation and, accordingly, increased difficulties in procuring fossil fuels. That especially applies to long-term military planning, as the procurement of traditional vehicles might lock in carbon emissions for decades. Therefore, the discourse on energy security might also encompass

4 Stuart Parkinson, Scientists for Global Responsibility (SGR) with Linsey Cottrell, Conflict and Environment Observatory (CEOBS), *Estimating the Military's Global Greenhouse Gas Emissions*, November 2022, 8, available at <https://ceobs.org/wp-content/uploads/2022/11/SGRCEOBS-Estimating_Global_MIlitary_GHG_Emissions_Nov22_rev.pdf>, last access 17 June 2026.

5 Oliver Belcher, Patrick Bigger, Ben Neimark and Cara Kennelly, 'Hidden Carbon Costs of the "Everywhere War": Logistics, Geopolitical Ecology, and the Carbon Boot-Print of the US Military', Transactions of the Institute of British Geographers (2019), 1-16 (3).

6 Neta C. Crawford, *Pentagon Fuel Use, Climate Change, and the Costs of War* (Brown University 2019), 4-5.

7 Nathan Hodge, 'U.S.'s Afghan Headache: $400-a-Gallon Gasoline: Military Air Drops Fuel Barrels to Avoid Dangerous Convoys', Wall Street Journal, 6 December 2011, <https://www.wsj.com/articles/SB10001424052970204903804577080613427403928>, last access 17 June 2026.

 DOI 10.17104/0044-2348-2026-3-823

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

not only the protection of critical infrastructure but also the enhancement of energy efficiency within military forces through common standards, reduced dependence on fossil fuels, and the implementation of energy-efficient solutions.

In response to these and other considerations, NATO has adopted multiple institutional incentives and instruments, both scientific and normative.

The first among these is energy transition. The NATO Energy Security Centre of Excellence (ENSEC COE), accredited in 2012, has produced an extensive selection of scientific outputs. While the Centres of Excellence, as independent military organisations, primarily serve their sponsoring states, the delegations of tasks by NATO's Supreme Allied Command Transformation (SACT) ensure the synergy and collaboration between COEs and NATO's overall needs.[8] Accordingly, alongside other projects, the ENSEC COE has contributed to the development of the NATO Operational Energy Concept, tested innovative energy production and distribution systems, integrated smart microgrids and researched the optimisation of sustainability and energy efficiency of special railway vehicles.[9] More comprehensively, the allies' drive to increase the energy efficiency of their military forces was cemented by the adoption of the Green Defence Framework in 2014.[10]

The years 2021 to 2023 saw the Alliance's direct climate terminology grow. In line with the Climate Change and Security Agenda and the Climate Change and Security Action Plan, in 2022,[11] 2023,[12] and 2024,[13] NATO released its Climate Change and Security Impact Assessments (Secretary General's Reports). The Compendium of Best Practice,[14] published in 2023, provides concrete examples of emission reduction policies and procedures introduced by the Allies. Simultaneously, Greenhouse Gas Emissions Mapping and Analytical Methodology[15] provides guidelines and tools for calculating emissions from civilian and military facilities. Finally, the Climate

8 Supreme Allied Commander Transformation, *NATO-Accredited Centres of Excellence 2026 Catalogue* (Supreme Allied Commander Transformation 2026), 5.

9 Supreme Allied Commander Transformation (n. 8), 36-37.

10 NATO, *Green Defence Framework* (approved by the North Atlantic Council), February 2014.

11 NATO, Climate Change and Security Impact Assessment, 28 June 2022.

12 NATO, Climate Change and Security Impact Assessment, 11 July 2023.

13 NATO, Climate Change and Security Impact Assessment, 9 July 2024.

14 NATO, Climate Change and Security Action Plan: Compendium of Best Practice, July 2023.

15 NATO, The NATO Greenhouse Gases Emission Mapping and Analytical Methodology, 11 July 2023.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Change and Security Centre of Excellence (CCASCOE)[16] was accredited in 2024.

None of these documents, outputs, or pledges has a binding force in a traditional sense. The practical consequences will depend on the authority of the initiatives and the priorities of states' departments of defence. However, the underlying arguments of interoperability, the changing operational environment, financial costs, and energy risks lend confidence that climate-change- and energy-transition-related incentives and targets will not merely wither away, even in post-2022 circumstances. This is supported by the fact that multiple member states' defence departments have issued guidelines on environmental protection and climate change that include references to NATO's climate terminology. Finally, empirical scholars have also observed adaptation and mitigation processes.[17] As the underlying rationale for these transformations is a pragmatic need to maintain a competitive edge and capabilities, they align with allies' military interests.

All in all, these normative and scientific instruments highlight that the relationship between the climate system and military strategy does not centre on a one-directional act of pollution, but rather on reciprocal, multidimensional interactions, informed by adaptation needs, awareness, and targeted scientific research. This entry point allows us to reframe the requirements for emission targets, pre-action carbon cost assessments, and increased awareness of the principle of proportionality as operational interests, rather than as contestable external pressure. This shift in argumentation, which connects the military success and climate change regime rather than treating them as mutually exclusive interests, might help prevent some of the excessive climate harm, both from everyday action and specific attacks.

Furthermore, the scientific achievements of the COEs, alongside the Secretary General's guidelines for emission assessment and the compendium of best practices, showcase the sector's potential. In these practical cases, operational effectiveness has already been balanced with climate needs, indicating that they constitute the industry's minimum acceptable standard. Some scholars have noted that these best practices should be taken into account in interpreting the term 'appropriate' measures for the prevention, mitigation, and remediation of peace operations under Principle 7 of the Protection of the Environment in Relation to Armed Conflicts (PERAC) Principles.[18]

16 NATO Climate Change and Security Centre of Excellence (CCASCOE), <ccascoe.org>, last access 25 April 2026.

17 Rita Floyd, 'NATO and Climate Change', Defence Studies 25 (2025), 707-714.

18 Mario Pasquale Amoroso, 'Fighting in a Warming World: The Emergence of Climatic Considerations in the Conduct of Hostilities under International Humanitarian Law', RECIEL 35 (2026), 1-12 (6).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

However, this line of argumentation should also extend to broader military activities, including conflict.

Accordingly, a sensitivity towards the military's doctrine and scientific achievements, transformed into a demand to live up to the best available standards in line with the sector's own interests, might lead to a more effective, pre-emptive reduction of climate harm.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

Climate Adaptation in a Changing Peacebuilding Environment

Leon Seidl*
Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany
seidl@mpil.de

If the climate crisis is a conflict driver, then conflict-resolution cannot ignore it. This is the basic premise of including climate adaptation in environmental peacebuilding. Climate adaptation might serve to reduce the instability caused by the climate crisis in post-conflict settings and can foster cooperation between hostile actors.[1] However, the dynamics of peacebuilding are undergoing profound changes. As a result, local actors, such as local Non-Governmental Organisations (NGOs) and social movements, will play an increasingly important role in promoting climate adaption as a peacebuilding measure. For international law, this may lead to an increasing importance of human rights in this space, at the expense of traditional climate law, in particular the United Nations Framework Convention on Climate Change (UNFCCC) Regime. At the same time, for legal scholarship, there is a need to reflect on how human rights will be received in and can be adapted to local peacebuilding settings.

Traditionally, the main promoters of climate adaptation in peacebuilding have been European donor states, the United Nations, and international NGOs.[2] In terms of international law, these actors have primarily drawn on the climate regime of the UNFCCC, promoting measures such as the Reducing Emissions from Deforestation and Forest Degradation Programme.[3] But all three groups have seen their influence in peacebuilding diminish in recent times. On the whole, international actors have lost influence in peacebuilding as a result of the 'local turn', with local governments and non-state actors

* Research Fellow at the Max Planck Institute.

1 On the aims of environmental peacebuilding, see Daniëlla Dam-de Jong and Britta Sjöstedt, 'The International Legal Dimensions of Environmental Peacebuilding', in: Daniëlla Dam-de Jong and Britta Sjöstedt (eds), *Research Handbook on International Law and Environmental Peacebuilding* (Edward Elgar Publishing 2023), 3-4.

2 See e. g. German Foreign Office, 'Climate, Peace, Security: Three Pillars of German Foreign Policy' (2024); Accordingly, most legal research has focused on them, see e. g. the contributions in Daniëlla Dam-de Jong and Britta Sjöstedt (eds) (n. 1).

3 'REDD+ as a Peacebuilding Strategy', Alliance Bioversity International & CIAT, 1 September 2017, available at: <https://alliancebioversityciat.org/stories/redd-peacebuilding-strategy-what-are-opportunities-sustainable-food-production>, last access 30 June 2026.

DOI 10.17104/0044-2348-2026-3-829

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

taking the spotlight.[4] Displacing the traditional heavyweights, new international actors such as Qatar, Oman, and China, have asserted themselves as mediators and participants of peace processes. More recently, both the United Nations and international NGOs have been severely hamstrung by funding cuts. At the same time, the need for climate adaptation is greater than ever, in the face of a rapidly accelerating climate crisis. What, then, are the consequences for how international law is applied in post-conflict settings?

With the UNFCCC's traditional promoters diminishing in relevance, the climate law regime will likely lose influence in post-conflict settings. The new international mediation actors bring with them different normative priorities, which do not appear to include climate adaptation.[5] As a result, international legal scholarship should focus more on local actors, in particular local NGOs and social movements.[6] This will likely entail a shift in the dominant discourse on international norms in peacebuilding, away from the UNFCCC and towards human rights. Social movements in climate activism, transitional justice, and beyond have long made use of human rights as a strategic tool.[7] At the same time, climate movements have been critical of the UNFCCC process for its perceived lack of ambition, inclusiveness and urgency.[8] This shift also aligns with developments in international, regional, and domestic fora, where the human rights dimension of the climate crisis has become increasingly important.[9]

---

4 Caroline Hughes, Joakim Öjendal and Isabell Schierenbeck, 'The Struggle versus the Song – the Local Turn in Peacebuilding: An Introduction', TWQ 36 (2015), 817-824 (817).

5 Teresa Whitfield, 'Diversified Mediators, Mandates and Ambitions', in: Teresa Whitfield (ed.), Accord – an international review of peace initiatives: Issue 30, (Conciliation Resources, February 2024), 32, available at: <https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/Accord_30_Still_Time_to_Talk_-_Adaptation_and_innovation_in_peace_mediation_0.pdf>, last access 30 June 2026.

6 Similar for conflict studies, Jan Sändig, Natalia Dalmer, Tobias Ide and Inselm Vogler, 'From Climate Conflicts to Environmental Peacebuilding: Exploring Local Dimensions', Environment and Security 2 (2024), 3-20 (3).

7 David Backer, 'Civil Society and Transitional Justice: Possibilities, Patterns and Prospects', Journal of Human Rights 2 (2003), 297-313 (297); Neil Stammers, 'Human Rights and Social Movements: Theoretical Perspectives', Revue interdisciplinaire d'études juridiques 75 (2015), 67-89 (67); Cecilia Mabeldott, 'Civil Society Narratives of Climate Justice: Subjects, Causes, and Solutions', Critical Policy Studies 20 (2026), 1-30 (1).

8 Corrie Grosse and Brigid Mark, 'A Colonized COP: Indigenous Exclusion and Youth Climate Justice Activism at the United Nations Climate Change Negotiations' in: Benjamin J. Richardson (ed.), *From Student Strikes to the Extinction Rebellion: New Protest Movements Shaping our Future* (Edward Elgar Publishing 2020), 146-170.

9 See, ICJ, *Obligations of States in Respect of Climate Change,* Advisory Opinion of 23 July 2025, 369-404; ECtHR, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, judgment of 9 April 2024, 53600/20; German Federal Constitutional Court, *Neubauer et al. v. Germany,* Decision of 24 March 2021, 1 BvR 2656/18.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Nevertheless, there are important challenges that require attention. First, there is a disconnect between social movements in the climate and peacebuilding contexts, respectively. Second, social movements may not always be inclined to draw on human rights for their activism. We must keep in mind that social movements are not necessarily or inherently benign actors, and may also be exclusionary or oppressive in themselves.[10] Furthermore, radical local actors may be suspicious of human rights due to their connection to mainstream international law and thus global capitalism.[11] Finally, local actors may simply not have the capacity to implement climate adaptation measures.[12] Thus, human rights are by no means a panacea for climate-adaptive peacebuilding.

But this does not mean that international legal scholarship should turn its back on the issue. Rather, what is required is a new approach to the post-conflict role of international climate law in general and climate-related human rights in particular. Human rights cannot be imposed externally on peace processes. Instead they can be a tool for local actors to wield, if they so desire. In the process, they will be contested, adapted to local needs, and shaped by local norms.[13] What is needed from international legal scholarship are ways to make sense of this phenomenon, and of its repercussions on the international stage.

10 Sändig, Dalmer, Ide and Vogler (n. 6), 13.

11 Paul Gready and Simon Robins, 'Rethinking Civil Society and Transitional Justice: Lessons from Social Movements and "New" Civil Society', The International Journal of Human Rights 21 (2017), 956-975 (964).

12 Sändig, Dalmer, Ide and Vogler (n. 6), 13.

13 Stammers (n. 7), 78.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

The Enlightened Uncanny and International Law

Moritz Vinken*
Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany
vinken@mpil.de

In times in which many consider the international legal order existentially threatened, the topic of 'Armed Conflict and Climate' reasonably elicits a sentiment of profound unease. This sentiment arguably arises in three respects: First, in respect of the apparent absurdity of discussing climate protection in the context of armed conflicts, when even the prohibition of the use of force and core obligations of international humanitarian law are not being respected, even overtly flaunted. Second, the unease with regard to the already manifestly unsatisfactory solutions that international law has come to offer in response to the climate crisis alone and the core distributional questions it raises. And third and finally, the unease experienced in light of the realisation that the current flagrant violations of the most fundamental norms of international law in many respects appear to us like a 'mere' repetition of horrendous pasts – despite of the discipline's continued vehement efforts to prevent their reoccurrence. Only the first of these different sources of 'unease' relates specifically to the thematic interlinkage of 'Armed Conflict and Climate'. It however decisively accentuates the other two sources of 'unease' which are more generally reflective of international legal scholarship's current bewilderment, if not dystopian anxiety,[1] with the recent radicality in which the impotence of their normative frameworks has come to light.

These sources of unease, I believe, can be better understood in light of what the philosopher Juliane Rebentisch has recently theorised regarding the feeling of the *uncanny* (*das Unheimliche*).[2] The concept of the uncanny is primarily associated with the work of Freud and Heidegger. For them, the feeling of the *uncanny* is a sensation akin to, but more moderate than, 'fear' (Heidegger's *Angst*) in relation to the strange and inexplicable repeated occurrence of a phenomenon which is considered improbable and extraordi-

* PhD candidate and Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

1 Marko Milanovic, 'Dystopian International Law', AJIL 120 (2026), 107-130.

2 Juliane Rebentisch, *Das ökologisch Unheimliche – The Ecological Uncanny* (Materialverlag HFBK Hamburg 2025).

DOI 10.17104/0044-2348-2026-3-833

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

nary but which due to its recurrence becomes simultaneously weirdly familiar. A central element of this theorisation of the feeling of the *uncanny* is that it arises as an expression of superstitious attitudes, an expression of a lack of enlightenment.

Rebentisch's core observation in the context of climate change, however, is that today the feeling of the *uncanny* has changed sides: The feeling of the uncanny no longer manifests as an expression of superstitious attitudes, but rather as a by-product of scientific enlightenment. This alters the status of the feeling itself: from a symptom of a certain superstition and backwardness to a symptom of progressive enlightenment. According to Rebentisch, what categorically distinguishes the 'enlightened' uncanniness of the climate crisis from its pre-enlightened manifestations is that we now *know*, based on scientific evidence, that the extreme weather events we are experiencing are ultimately 'effects of human agency and human history, the abysmal nature of which lies in the historically novel combination of a loss of control and predictability'.[3] I believe the observations made by Rebentisch in the context of climate change can be abstracted from the specific context of climate change and extended to other fields which have been both subject of pronounced phenomena of *scientisation* as well as affected by the emergence of global risk society.

It seems to me, that the sentiment of *unease* pervading the discipline of international law, particularly in the context of somewhat daring thematic hybrids such as 'Armed Conflict and Climate', can be understood as an analogous manifestation of this enlightened feeling of the uncanny: The discipline's currently acute sentiment of *unease* is nothing else than a feeling of *uncanny* in the face of the discipline's familiar and yet somewhat inexplicable impotence to effectively address the unprecedented yet recurring, legally-assessable yet out-of-control ecological and humanitarian catastrophes.

Rebentisch indicates that one dimension of the uncanny experience – and paradoxically also of the *enlightened uncanny* – is a deep intellectual uncertainty, a felt 'crisis of the epistemic standpoint', which undermines the position of the epistemic subject and leads it to question all certainties.[4] Nothing else also lies behind the unease pervading the international legal discipline: It is a discipline which is acutely doubting its own relevance, struggling to find ways to reposition itself in the face of events that contradict its core precepts which it has scientifically and normatively reconstructed.

Particularly in the context of climate change Rebentisch observes that in order to overcome the experienced crisis of the epistemic standpoint, the

3 Rebentisch (n. 2), 13.

4 Rebentisch (n. 2), 15 et seq.

 DOI 10.17104/0044-2348-2026-3-833

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

feeling of the enlightened uncanny (as opposed to its pre-enlightened version) is not, and ought not be, set aside and ignored but is increasingly explored as a force of change serving as a basis for the development of 'a different form of being-in-the-world'.[5]

Specifically, Rebentisch observes that this embracing of the uncanny has led to a re-discovery of forms of knowledge and beliefs which were disregarded by Western anthropocentric modernity. Forming an alliance with the latest climate science, these disregarded systems of thought come to unsettle the convictions and constructs of Western modernity that have given rise to the feeling of enlightened uncanny.[6]

We observe a similar tendency in public and private international legal scholarship in relation to climate change with increasing attention being devoted to eco-centric approaches and indigenous cosmologies in the face of the ecological uncanny. But the increasing attention to such indigenous knowledge systems in international law today goes far beyond the specific issue of climate change and environmental protection. Not least, the intersection of the law of armed conflict, transitional justice, and environmental protection has proved to be a fruitful ground for these and other explorations of 'different forms of being-in-the-world' for international law.

The large majority of international legal scholarship that engages with topics that elicit a particularly strong feeling of 'enlightened uncanny', such as 'Armed Conflict and Climate', however, does not resort to such pronounced attempts of epistemic re-situation. Instead, they cling to variations of 'established' methods despite of others' – or even secretly their own – sobering recourse to doomsday metaphors in the description of the state of international law. Thus, while the majority of authors are haunted by the enlightened uncanny, they *choose* not to emancipate themselves from the international law of western modernity.

To employ one of these pervasive doomsday metaphors, namely that of the slowly but surely sinking Titanic, most choose not to abandon ship and its materials and resources altogether. Neither do they choose to construct a new ship and its composites by employing radically new materials nor to leave the idea of the ship behind altogether by jumping on the iceberg as it scrapes by. Instead, they cling to the ship that is the current international legal order, either by trying to reinforce the hull with the strongest metal plating found at the core of the ship (i. e. by trying to re-mobilise the most foundational principles of the existing international legal order) or by committing to ensure that at least the rising water levels in the hull of the

5 Rebentisch (n. 2), 20 et seq.
6 Rebentisch (n. 2), 22 et seqq.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

international legal ship are reported so that appropriate measures of rescue might be devised (i. e. the strengthening the procedural reporting and assessment frameworks so characteristic of the contemporary international law of cooperation). If they go as far as envisioning the construction of a new ship, (for instance by envisaging a new collective security framework) they do so with the clear intention of building on the salvageable historic materials of the currently sinking ship of the modern international legal order.

While these reactions to the enlightened uncanny in international legal scholarship are somewhat more timid than those observed by Rebentisch in the context of climate change, it seems to me that it would be overly hasty to conclude that these approaches simply ignore the sentiment of the enlightened uncanny. Instead, they are testimony of a different form of exploration of the feeling of the uncanny. The courage of embracing the uncanny here lies not in developing radically 'different forms of being-in-the-world' but in a continued commitment to the structure of the modernist international legal argument:[7] It is because they still believe in parts of the utopian (or normative) promises of the current international legal order that they refuse to apologetically abandon ship at a time of its flooding by uncanny 'monsters'.[8]

7 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006).

8 Anne Peters, International Law and Its Scholarship in the Time of Monsters (6 May 2025). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2025-05, available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5242721>, last access 30 June 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Abhandlungen

Die EU auf dem Weg zu einer resilienten Sicherheits- und Verteidigungspolitik

Paul Gragl*
Universität Graz, Graz, Österreich/Austria
paul.gragl@uni-graz.at

Abstract 837
Keywords 838
I. Einleitung: Vom Ende der Geschichte zu mehr Resilienz 838
II. Resilienz aus Strategischer Autonomie 841
1. Versuch einer Begriffsbestimmung und der notwendige Nexus von Innen- und Außenpolitik 841
2. Die Friedensdividende und Abhängigkeiten als Problem 843
3. Strategische Autonomie in der Sicherheits- und Verteidigungspolitik 845
III. Strukturelle Probleme und Lösungsansätze in der GSVP 847
1. Die sicherheits- und verteidigungspolitische Handlungsfähigkeit der Union im Allgemeinen: Die Crux des Intergouvernementalismus 847
2. Primärrechtskonformer Umgang mit dem Einstimmigkeitsprinzip 848
a) Optionen nach Art. 31 EUV 849
b) Evolutivklausel und Beistandspflicht 854
c) Der Innen-Außen-Nexus von Unionswerten und das Einstimmigkeitsprinzip 858
3. Aus- und Umwege unterhalb des Primärrechts 860
a) Verteidigungsagentur und Ständige Strukturierte Zusammenarbeit 861
b) Kommissar für Verteidigung und Raumfahrt 862
c) Neue Finanzierungsansätze 863
d) Binnenmarktregelungen und Industriepolitik 865
IV. Schlussfolgerungen 866
Summary: The EU's Path Toward a Resilient Security and Defence Policy 867
Keywords 868

Abstract

Die Welt hat sich in den letzten Jahren aufgrund des russischen Angriffskrieges gegen die Ukraine und das zunehmend aggressivere Verhalten der USA gegenüber Europa und der Europäischen Union (EU) geopolitisch massiv gewandelt. Kants Vernunftidee einer in Freundschaft verbundenen

* Professor für Europarecht an der Universität Graz.

DOI 10.17104/0044-2348-2026-3-837 ZaöRV 86 (2026), 837-868

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Welt von völkerrechtsfreundlichen Staaten mag wohl noch für die EU und ihre Mitgliedstaaten selbst gelten, außerhalb jedoch scheint Hobbes' Naturzustand einer internationalen Anarchie zu lauern. Dieser Beitrag untersucht daher, wie die Union im Rahmen ihrer eigenen Rechtsordnung ihre sicherheits- und verteidigungspolitische Resilienz steigern kann, um in einer solchen veränderten Welt weiterhin autonom existieren und Entscheidungen treffen zu können. Ohne eine echte Unionskompetenz im Bereich der Verteidigung ist dies nur durch einen geschickten primärrechtskonformen Umgang mit dem Einstimmigkeitsprinzip bzw. durch sekundärrechtliche Aus- und Umwege in andere, verteidigungsnahe Kompetenzbereiche möglich.

Keywords

GASP – GSV – Resilienz – Unionsrecht – Einstimmigkeitsprinzip – Verteidigung

I. Einleitung: Vom Ende der Geschichte zu mehr Resilienz

Ich beginne diesen Beitrag mit einem dreimaligen „spätestens": Spätestens seit dem Zeitraum zwischen dem Anfang der völkerrechtswidrigen russischen Vollinvasion der Ukraine und dem Beginn der zweiten Amtszeit von Donald Trump ist die Welt im Wandel. Spätestens seit diesem Zeitraum scheint sich auch die Weltgeschichte wieder zu beschleunigen, wie der ehemalige Hohe Vertreter der Europäischen Union (EU) für Außen- und Sicherheitspolitik, Josep Borell, im Strategischen Kompass für Sicherheit und Verteidigung der Union gleich eingangs festhält.[1] Dies drückt sich, gerade für Europa, nicht nur in der auffallend feindlichen Rhetorik der neuen US-amerikanischen Nationalen Sicherheitsstrategie vom November 2025,[2] sondern auch in Gestalt der völkerrechtswidrigen Angriffe der USA auf Venezuela im Januar 2026 und auf den Iran im Februar 2026 sowie der fortdauernd erklärten Absicht, Grönland (als Bestandteil Dänemarks) annektieren zu wollen, aus. Und spätestens seit der Rückkehr des Krieges nach Europa und den anhaltenden Drohungen gegen die territoriale Integrität eines EU-Mitgliedstaa-

1 Europäischer Auswärtiger Dienst, A Strategic Compass for Security and Defence: For a European Union that Protects Its Citizens, Values and Interests and Contributes to International Peace and Security, 24. März 2022, 4.

2 National Security Strategy of the United States of America, November 2025, <https://www.whitehouse.gov/wp-content/uploads/2025/12/2025-National-Security-Strategy.pdf>, zuletzt besucht 13. Januar 2026.

 DOI 10.17104/0044-2348-2026-3-837

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

tes[3] scheint das mit dem Fall der Berliner Mauer ausgerufene und seither vielzitierte „Ende der Geschichte" nun tatsächlich zu einem Ende gekommen zu sein[4] – obwohl zu korrigieren bleibt, dass Francis Fukuyamas „Ende der Geschichte" in dieser Form grob missverstanden wurde und er die Rückkehr der Unvernunft in Form von Autokratien niemals ausgeschlossen hatte. Gemeint hatte er damit vielmehr eine (nicht unumstrittene)[5] Deutung Hegels[6] durch Alexandre Kojève,[7] dem – als kleine Randbemerkung – ein wenn auch marginaler intellektueller Einfluss auf das Projekt der europäischen Einigung nachgesagt wird.[8] Nach dieser Interpretation komme die Vernunft durch den Verlauf der Geschichte zu sich selbst, womit ihr gedanklicher Endpunkt, das Ideal der modernen liberalen Demokratie, nicht weiter verbesserungsfähig und dementsprechend alle großen politischen Fragen entschieden wären.[9] Das Ende der Geschichte bezeichnet damit eine Denkweise, mit der man sich zu einem gewissen Zeitpunkt zurückwendet und die Geschichte in einer allgemeinen Retrospektive gedanklich summiert.[10] Das war zur Zeitenwende 1989 eben die Kulmination der Weltgeschichte im westlichen Lebensmodell, das – abseits all seiner ebenso vorhandenen Unzulänglichkeiten – auch heute noch immer am meisten Freiheit, Gleichheit und Wohlstand zu versprechen scheint.

Wie Fukuyama in einem Essay von 2007 aber bereits erläutert (und damit die wesentliche Brücke zur Problemstellung des vorliegenden Beitrags schlägt), hatte er als Leitmodell für das Ende der Geschichte auch keineswegs Nationalstaaten im Sinne, sondern gerade die EU, welche durch ihre eigenwillige Architektur Konzepte wie staatliche Souveränität und traditionelle Machtpolitik transzendiert.[11] Was er dabei nicht ausspricht, wohl aber impli-

3 Grönland ist 1985 zwar aus der damaligen Europäischen (Wirtschafts-)Gemeinschaft ausgeschieden, verblieb aber dennoch ein territorialer Bestandteil des Königreichs Dänemark.

4 Vgl. Ben Sasse, 'The End of the End of History: Reimagining U. S. Foreign Policy for the 21st Century', Texas National Security Review 2 (2019), 102-112 (106).

5 So z. B. Kurt Mager, 'Das Ende der Geschichte bei Francis Fukuyama: Zur Problematik seines philosophischen Ansatzes', Perspektiven der Philosophie 29 (2003), 207-227.

6 Georg Wilhelm Friedrich Hegel, *Phänomenologie des Geistes* (Meiner 1988), 127-136; Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (Meiner 2017), §§ 4, 4A, 21A, 33A.

7 Alexandre Kojève, Hegel: Eine Vergegenwärtigung seines Denkes. Kommentar zur "Phänomenologie des Geistes" (Suhrkamp 1975), 48-89.

8 Siehe z. B. Christoph Kletzer, 'Alexandre Kojève's Hegelianism and the Formation of Europe', Cambridge Yearbook of European Legal Studies 8 (2006), 133-151.

9 Francis Fukuyama, *The End of History and the Last Man* (Penguin 2020), xi-xii.

10 Siehe Barry Cooper, *The End of History: An Essay on Modern Hegelianism* (University of Toronto Press 1984), 4.

11 Francis Fukuyama, 'The History at the End of History', Project Syndicate, 29. März 2007, <https://www.project-syndicate.org/commentary/the-history-at-the-end-of-history>, zuletzt besucht 13. Januar 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

zit mitdenkt, ist die angedachte Verwirklichung der Idee Kants[12] eines friedlichen Völkerbundes oder einer sogar kosmopolitischen Entität in Gestalt der Union, welche für sich und ihre Mitgliedstaaten für immer des Krieges entsagt und den Weg des Friedens durch das Recht geht.[13]

Die russische Invasion der Ukraine und die zunehmende Abkehr der USA vom Völkerrecht haben uns aber auch gezeigt, dass dieses kantianische Bild nur noch für die Welt innerhalb der Union gilt. Ohne als politischer Philosoph zu gelten,[14] hat Borell eine seiner Reden im Oktober 2022 damit beschlossen, dass wir, als Europäerinnen und Europäer, zu kantianisch und nicht genug hobbesianisch seien. Wir müssten also anerkennen, dass Kants „Ewiger Friede" in der Welt außerhalb Europas nur noch eine Illusion sei. Stattdessen müssten wir uns auf Hobbes' Naturzustand einstellen, in dem internationale Kooperation lediglich aufgrund von gegenseitigen und transaktionellen Vorteilsgewährungen stattfinde,[15] und nicht aufgrund einer „inneren" vernunftbasierten Rechtsüberzeugung. Wenn die EU nun ihr friedliches kantianisches Lebensmodell – unser aller Lebensmodell eines liberal-demokratischen Rechtsstaates am Ende der Geschichte – und die Völkerrechtsordnung nach 1945[16] in einer Welt der bloßen Machtpolitik verteidigen und aufrechterhalten will, so ist es nun höchste Zeit, von abstrakten und beschönigenden Bedrohungsanalysen zu überlebensnotwendigem sicherheitspolitischen und militärischen Handeln überzugehen.[17] Die militärische Verteidigung nach außen ist dementsprechend essenziell für den Erhalt der eigenen Werte nach innen. Mit anderen Worten muss die Union nach außen mehr Hobbes wagen, um den Frieden Kants und das Ende der Geschichte Hegels, Kojèves und Fukuyamas nach innen zu gewährleisten.

Die zentrale Frage dieses Beitrages lautet also, wie der Weg der EU zu einer resilienten Sicherheits- und Verteidigungspolitik aussieht bzw. ob sie diesen Weg bereits erfolgreich beschritten hat oder, falls dies nicht der Fall

12 Siehe Immanuel Kant, 'Zum Ewigen Frieden', in: Preußische Akademie der Wissenschaften (Hrsg.), *Gesammelte Schriften*, Bd. 8 (Akademie der Wissenschaften 1912), 341 ff.

13 Siehe statt vieler Luigi Caranti, *The Kantian Federation* (Cambridge University Press 2022), 19 ff.

14 Joris van den Riet und Femke Klaver, 'The EU and Russian Aggression: Perspectives from Kant, Hobbes, and Machiavelli', European Papers 8 (2023), 1523-1537 (1524-1525).

15 Europäischer Auswärtiger Dienst, EU Ambassadors Annual Conference 2022: Opening Speech by High Representative Josep Borrell, 10. Oktober 2022.

16 Denn am Spiel stehen gerade jene Prinzipien, auf denen internationale Beziehungen aufbauen, nicht zuletzt jene der Charta der Vereinten Nationen und jene der Schlussakte von Helsinki; vgl. Europäischer Auswärtiger Dienst, Strategic Compass 2022 (Fn. 1), 4.

17 Siehe Ludger Kühnhardt, Das politische Denken der Europäischen Union: Supranational und zukunftsoffen (UTB 2022), 100.

 DOI 10.17104/0044-2348-2026-3-837

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

sein sollte, welche Schritte dafür noch notwendig sind. Dafür werde ich zunächst diskutieren, was Resilienz überhaupt bedeutet und wie diese aus dem noch diffusen Konzept der „Strategischen Autonomie" der Union gewonnen werden kann (II.); danach widme ich mich den strukturellen Problemen der unionalen Gemeinsamen Sicherheits- und Verteidigungspolitik (GSVP), welche dieser Resilienz im Wege stehen, allem voran das Einstimmigkeitsprinzip; und zeige schließlich, wie man damit sowohl innerhalb als auch unterhalb des Primärrechts umgehen kann (III.).

II. Resilienz aus Strategischer Autonomie

1. Versuch einer Begriffsbestimmung und der notwendige Nexus von Innen- und Außenpolitik

Der Begriff der „Resilienz" ist derzeit allgegengewärtig, in einer Zeit der Krisen ja geradezu das Gebot der Stunde.[18] So findet sich dieses Wort sowohl als Substantiv als auch Adjektiv („resilient") in zahlreichen rezenten Dokumenten der Union, z. B. etwa dem bereits erwähnten Strategischen Kompass der Union von 2022, dem dazugehörigen Fortschrittsbericht von 2024,[19] aber auch bereits der Globalen Strategie in der Gemeinsamen Außen- und Sicherheitspolitik[20] von 2016, wobei uns jedoch alle diese Referenzen eine Definition dieses Begriffs schuldig bleiben.[21] Im Schrifttum findet sich hingegen die durchaus hilfreiche Beschreibung von Resilienz als einem Versprechen von Beherrschbarkeit der eingetretenen Gewissheitsverluste, diverser Ängste und eines zunehmend disruptiven Wandels durch eine verlässliche Krisen- und Konfliktverarbeitungskompetenz.[22]

In einem rechtlichen Kontext wird dementsprechend auf die Verbindung von paradoxen Elementen in der Reaktion auf Krisen hingewiesen, und zwar

18 Benno Zabel, 'Recht und Resilienz. Eine Kritik' in: Gunnar Folke Schuppert und Martin Repohl (Hrsg.), *Resilienz. Beiträge zu einem Schlüsselbegriff postmoderner Gesellschaften* (Nomos 2023), 27-54 (27).

19 Europäischer Auswärtiger Dienst, Annual Progress Report on the Implementation of the Strategic Compass for Security and Defence, 18. März 2024.

20 Europäischer Auswärtiger Dienst, Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy, 28. Juni 2016.

21 Ein Hinweis auf die Bedeutung von Resilienz durch Cyberabwehrfähigkeit im digitalen Umfeld gibt lediglich Art. 10 der VO 2024/2847/EU v. 23. Oktober 2024 über horizontale Cybersicherheitsanforderungen für Produkte mit digitalen Elementen und zur Änderung der Verordnungen (EU) Nr. 168/2013 und (EU) 2019/1020 und der Richtlinie (EU) 2020/1828 (Cyberresilienz-Verordnung), ABl. L 2024/2847, 1 (34).

22 Zabel (Fn. 18), 27 und 53.

DOI 10.17104/0044-2348-2026-3-837

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

die gleichzeitige „Stabilität“ und „Elastizität“,[23] „Starrheit“ und „Beweglichkeit“,[24] und „Rigidität“ und „Flexibilität“[25] von Rechtsordnungen, durch welche Spannungszustände ausgehalten, Steuerungsleistungen aufrechterhalten und der Fortbestand der fraglichen Rechtsordnung selbst gesichert werden können.[26] Denn eine zu starre Rechtsordnung zerbricht an der Entwicklung der sich stets wandelnden Lebenswelt, eine zu flexible verflüchtigt sich hingegen in die Beliebigkeit alltäglicher Politik.[27] Damit lässt sich Resilienz in einem rechtlichen Kontext wohl am besten als druckableitende Flexibilität innerhalb normativer Rigidität verstehen. In diesem Sinne erlaubt sie die tatsächliche Wirksamkeit und damit kontinuierliche Anwendbarkeit des Steuerungsanspruchs des Rechts in konkreten Krisensituationen bzw. sein anschließendes „Zurückspringen“ (lat. *resilire*) in den Normalzustand des *status quo ante*.[28]

Übertragen auf die aktuellen Bedrohungen der Union durch Russland bzw. die USA bedeutet dies, dass das Unionsrecht dann als resilient gilt, wenn es sich gegen widerstrebende systemfremde Kräfte zu behaupten weiß, und zwar durch sowohl unnachgiebiges Standhalten gegen reale Widerstände als auch elastisches Anpassen und flexibles Reagieren darauf. Resilienz steht dementsprechend für die normative Kraft des Rechts gegenüber außergewöhnlichen Herausforderungen der Faktizität:[29] „Die Norm erweist ihre Resilienz im Ausnahmefall“,[30] und zwar durch die Fähigkeit der Union, in Krisenzeiten gleichzeitig deren außenpolitische Interessen zu verfolgen und deren Werte nach innen hin zu bewahren.[31]

Auf den ersten Blick erscheinen diese beiden Dimensionen der externen und internen Widerstands- und Regenerationsfähigkeit als wenig kohärent, denn es erschließt sich nicht sofort, inwiefern der Aufbau und die Konsolidierung einer resilienten Sicherheits- und Verteidigungspolitik einerseits und die Sicherung der grundlegenden Unionswerte gegenüber unionsrechtswid-

23 Jochen Rozek, ‘Verfassungsrevision’ in: Josef Isensee und Paul Kirchhof (Hrsg.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland: Band XII* (3. Aufl., C. F. Müller 2014), § 257, Rn. 5.

24 Andreas Voßkuhle, ‘Der Wandel der Verfassung und seine Grenzen’, JuS 59 (2019), 417-423 (417).

25 Konstantin Chatziathanasiou, *Verfassungsstabilität* (Mohr Siebeck 2019), 9 ff.

26 Insbesondere Tristan Barczak, *Der nervöse Staat* (2. Aufl., Mohr Siebeck 2021), 606.

27 Paul Kirchhof, ‘Die Identität der Verfassung’ in: Josef Isensee und Paul Kirchhof (Hrsg.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland: Band II* (3. Aufl., C. F. Müller 2004), § 21, Rn. 41.

28 Barczak (Fn. 26), 608.

29 Barczak (Fn. 26), 612.

30 Josef Isensee, ‘Resilienz von Recht im Ausnahmefall’ in: Kai von Lewinski (Hrsg.), *Resilienz des Rechts* (Nomos 2016), 33-56 (43).

31 Europäischer Auswärtiger Dienst, A Global Strategy (Fn. 20), 15.

 DOI 10.17104/0044-2348-2026-3-837

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

rigen Handlungen der Mitgliedstaaten zusammenhängen. Ich werde in diesem Beitrag daher zeigen, dass eine resiliente Rechtsunion nach innen eine notwendige Vorbedingung für die Abwehr externer Gefahren darstellt.[32] Ein effektives Verständnis von Resilienz sollte daher nicht zwischen der Innen- und Außenpolitik der Europäischen Union unterscheiden, sondern vielmehr davon ausgehen, dass alle Handlungen, die Individuen, Mitgliedstaaten und Institutionen gegen den rechtlichen Besitzstand der Union richten, für deren Resilienz bedeutsam sind.[33] Ich nenne diese Dimension der Diskussion daher auch im Weiteren den „Nexus von Innen- und Außenpolitik" (oder auch bloß „Innen-Außen-Nexus").[34]

2. Die Friedensdividende und Abhängigkeiten als Problem

Europa hat die Friedensdividende – d. h. die Einsparung durch Kürzung der Militärausgaben und die Nutzung der dabei frei gewordenen Mittel für andere Zwecke[35] – seit dem Ende des Kalten Krieges durch die Auslagerung dreier wesentlicher Bereiche durchaus geschickt genutzt, um den aktuellen Wohlstand herzustellen und weiterhin zu garantieren. Jedoch hat es sich dadurch gleichzeitig in drei Abhängigkeiten begeben, welche der Resilienz der Union und der Mitgliedstaaten äußerst abträglich waren und noch immer sind:

Erstens ist die Union wirtschaftlich vom chinesischen Markt abhängig, was Importe, Technologietransfer, Investments und günstige Produkte angeht.[36] Doch ist auf China kein Verlass, da es als autoritäres System auch in einer ideologischen Rivalität zum demokratischen Westen steht.[37] Ich erwähne diesen Bereich der Vollständigkeit halber, werde ihn an dieser Stelle aus Platzgründen aber nicht weiterverfolgen.

---

32 Annegret Bendiek, 'Gemeinsame Außen- und Sicherheitspolitik der EU: von der Transformation zur Resilienz', Studie der Stiftung Wissenschaft und Politik 19 (2017), 5-33 (5 f.).

33 Bendiek (Fn. 32), 16.

34 Siehe für eine breitere und tiefere Auseinandersetzung mit der Verbindung von Innen- und Außendomäne des Unionsrechts, Christina Eckes, *EU Powers Under Pressure: How the EU's External Actions Alter Its Internal Structures* (Oxford University Press 2019).

35 Herbert Wulf, 'Friedensdividende' in: Hans J. Gießmann und Bernhard Rinke (Hrsg.), *Handbuch Frieden* (VS Verlag 2011), 138-148 (138).

36 Siehe statt vieler Thomas Christiansen, 'EU-China-Beziehungen' in: Werner Weidenfeld, Wolfgang Wessels und Funda Tekin (Hrsg.), *Europa von A bis Z: Taschenbuch der europäischen Integration* (16. Aufl., Springer 2023), 297-302.

37 Europäischer Rat, Schlussfolgerungen der Tagung vom 29. und 30. Juni 2023, EUCO 7/23, Rn. 30, demzufolge China "gleichzeitig ein Partner, ein Konkurrent und ein systemischer Rivale ist".

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Wesentlicher ist im vorliegenden Zusammenhang jedoch, dass die europäischen Staaten über Jahrzehnte hinweg fossile Energie aus Russland bezogen und sich dadurch ebenfalls der Abhängigkeit eines autoritären Regimes ausgesetzt haben.[38] Obwohl die Mitgliedstaaten der Union seit dem Beginn der russischen Vollinvasion der Ukraine noch immer nicht vollständig energieautark von Russland sind, hat die Union hier zumindest zunehmende Resilienz gezeigt, indem sie daran arbeitet, ihre Energieversorgung zu diversifizieren,[39] die Einfuhr von fossilen Energieträgern aus Russland bis Ende 2027 vollständig einzustellen[40] und gleichzeitig den eng mit dem Staat verbundenen russischen Energiesektor mit restriktiven Maßnahmen für die Aggression gegen die Ukraine zu belegen.[41]

Zentral ist im Kontext dieses Beitrages aber die dritte und letzte Abhängigkeit, und zwar die Auslagerung der europäischen Sicherheit – und das bereits seit der Gründung des Nordatlantische Vertragsorganisation (NATO) 1949 – an die Vereinigten Staaten von Amerika, welche seit dem zweiten Amtsantritt von Trump und den bereits erwähnten ständigen Drohungen gegen Grönland nicht mehr als verantwortungsbewusster transatlantischer Partner zu betrachten sind. Ein formeller Austritt der USA aus der NATO wäre zwar rechtlich dank des 2019 verabschiedeten und 2024 erneut vorgelegten „NATO Support Act"[42] weiterhin nicht unilateral durch den Präsidenten möglich, sondern würde weiterhin die Zustimmung des Kongresses erfordern. Doch sind erstens politische Mehrheiten stets volatil und trägt zweitens auch das ständige Infragestellen der in Art. 5 des Nordatlantikvertrages verankerten Beistandspflicht durch Trump zu einer faktischen Erosion dieser

38 Torbjörn Becker und Anders Åslund, 'The EU's Dependence on Russian Energy – A Force that Divides or Unites the Union?' in: Antonina Bakardjieva Engelbrekt, Per Ekman, Anna Michalski und Lars Oxelheim (Hrsg.), *The Borders of the European Union in a Conflictual World: Interdisciplinary European Studies* (Palgrave Macmillan 2024), 147-175 (150-153).

39 Vgl. Mitteilung der Europäischen Kommission, REPower EU: gemeinsames europäisches Vorgehen für erschwinglichere, sichere und nachhaltige Energie, COM(2022) 108 final, 8. März 2022.

40 VO (EU) 2026/261 des Europäischen Parlaments und des Rates vom 26. Januar 2026 zur Einstellung der Einfuhren von russischem Erdgas und zur Vorbereitung der Einstellung von Einfuhren von russischem Öl, zur Verbesserung der Überwachung potenzieller Energieabhängigkeiten und zur Änderung der Verordnung (EU) 2017/1938, ABl. L 2026/261.

41 So etwa zuletzt zur Preisobergrenze für russisches Rohöl Beschluss 2025/1495/GASP v. 18. Juli 2025 zur Änderung des Beschlusses 2014/512/GASP über restriktive Maßnahmen angesichts der Handlungen Russlands, die die Lage in der Ukraine destabilisieren, ABl. L 2025/1495, und VO 2025/1494/EU v. 18. Juli 2025 zur Änderung der Verordnung (EU) 833/2014 über restriktive Maßnahmen angesichts der Handlungen, die die Lage in der Ukraine destabilisieren, ABl. L 2025/1494.

42 NATO Support Act of 2019, H. R. 676, 116th Congress; NATO Support Act of 2024, H. R. 7387, 118th Congress.

 DOI 10.17104/0044-2348-2026-3-837

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Rechtspflicht bei, deren Nichterfüllung im Ernstfall man wohl zumindest in Betracht ziehen muss. Zudem wäre die NATO als Organisation (zwar nicht formell, aber doch funktionell) als gescheitert zu betrachten, wenn die USA tatsächlich Grönland angriffen und annektierten. Tritt dieser Fall tatsächlich ein, so stehen die Union und ihre Mitgliedstaaten sicherheitspolitisch alleine und wohl verloren da, wenn sie in diesem Bereich nicht rechtzeitig resilient genug werden.

3. Strategische Autonomie in der Sicherheits- und Verteidigungspolitik

Eine resiliente Sicherheits- und Verteidigungspolitik kann die Europäische Union daher auch nur verfolgen, wenn sie jetzt „entscheidende Schritte zum Aufbau unserer europäischen Souveränität" übernimmt, wie es etwa die Staats- und Regierungschefs der Mitgliedstaaten bei ihrer Tagung in Versailles im März 2022 ausgedrückt haben.[43] Gemeint ist mit dieser Souveränität – in einem staatstheoretisch wohl verträglicheren Jargon – die „strategische Autonomie" der Union und ihrer Mitgliedstaaten, welche diese politisch, institutionell und materiell dazu befähigen soll, in ihrer Interdependenz mit anderen Akteuren das Wohlergehen ihrer Bevölkerung sicherzustellen und selbstbestimmte Entscheidungen auch effektiv umzusetzen.[44] So muss sich die Union, wenn sie diese Ziele erreichen will, in einer zunehmend multipolaren Welt auch militärisch verteidigen und behaupten können, wozu ihr Strategischer Kompass von 2022 beitragen soll.[45] Das Weißbuch der Kommission zur Zukunft der Europäischen Verteidigung vom März 2025 bestätigt diesen Zugang gleich anfangs mit den Worten, dass „der einzige Weg, wie wir den Frieden sicherstellen können, darin besteht, diejenigen abzuschrecken, die uns schaden wollen".[46] Das ist auch nur folgerichtig, wenn wir den über Jahrhunderte hinweg entwickelten Gehalt und Gegenstand von Souveränität (oder Autonomie in einem politisch-

43 Europäischer Rat, Informelle Tagung der Staats- und Regierungschefs, Erklärung von Versailles, 11. März 2022, Rn. 7. Siehe auch Emmanuel Macron, 'Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souveraine, unie, démocratique', Rede an der Sorbonne, 26. September 2017.

44 Niklas Helwig und Ville Sinkkonen, 'Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term', European Foreign Affairs Review 27 (2022), 1-19 (3 f.).

45 Europäischer Auswärtiger Dienst, Strategic Compass 2022 (Fn. 1), 23.

46 Europäische Kommission, Joint White Paper for European Defence Readiness 2030, JOIN(2025) 120 final, 19 March 2025, 1 (Übersetzung durch den Verfasser).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

rechtlichen Sinne) auch weiterhin in der militärischen Handlungs- bzw. Verteidigungsfähigkeit des eigenen Territoriums verortet betrachten wollen. Diese Fähigkeiten sind nicht beiläufige Attribute, sondern nach dem tradierten Verständnis von Hoheitsgewalt elementar für Souveränität und selbstbestimmtes Handeln.[47]

Wesentlich ist jedoch, dass die Union zu dieser sicherheits- und verteidigungspolitischen Resilienz nur auf Grundlage ihrer eigenen Rechtsordnung finden kann,[48] wenn sie sich auch weiterhin als *Rechtsunion*, d. h. als nicht-staatliches Äquivalent eines rechtsstaatlich geordneten und damit die politische Macht einhegenden Systems,[49] versteht, das rechtlich nicht willkürlich handelt – wie der Gerichtshof der Europäischen Union (EuGH) in den letzten Jahren vermehrt in seiner Rechtsprechung hervorhebt.[50] Diese Vorgangsweise wirft jedoch beträchtliche Probleme auf, da die Territorialverteidigung der Union und ihrer Mitgliedstaaten zunächst in keinen der primärrechtlich ausgewiesenen Ermächtigungstatbestände für militärisches Handeln der Union fällt. Zwar kann sie nach Art. 42 Abs. 1 Vertrag über die Europäische Union (EUV) auf ihre militärische Operationsfähigkeit „bei Missionen *außerhalb* der Union zur Friedenssicherung, Konfliktverhütung und Stärkung der internationalen Sicherheit" zurückgreifen. Doch zu erörtern bleibt, welche weiteren rechtlichen Möglichkeiten das Unionsrecht bietet, um über diese Perspektive hinaus *nach innen* strategisch autonom und resilient zu werden, und welche rechtlichen Probleme sich dabei auftun, damit die Union von einem „militärischen Wurm" (wie der damalige belgische Außenminister Mark Eyskens die passive Rolle der Union am Vorabend des Zweiten Golfkrieges 1991 bemängelte)[51] zu einem etwas beeindruckenderen Lebewesen heranwachsen kann.

---

47 Jelena von Achenbach, 'Verteidigungspolitische Souveränität' in: Till Patrick Holterhus und Ferdinand Weber (Hrsg.), *Handbuch Europäische Souveränität. Zur inneren und äußeren Selbstbehauptung der Europäischen Union* (Mohr Siebeck 2024), 461-485 (464).

48 Frank Hoffmeister, 'Strategic Autonomy in the European Union's External Relations Law', CML Rev. 60 (2023), 667-699 (672 f.).

49 Armin von Bogdandy, Strukturwandel des öffentlichen Rechts. Entstehung und Demokratisierung der europäischen Gesellschaft (Suhrkamp 2022), 52-57.

50 So z. B. rezent in EuGH, *Royal Football Club Seraing SA*, Urteil v. 1. August 2025, Rs. C-600/23, ECLI:EU:C:2025:617, Rn. 69; EuGH, *I. R.O und F. J. L. R.*, Urteil v. 8. April 2025, Rs. C-292/23, ECLI:EU:C:2025:255, Rn. 66; EuGH, *Parlament/Rat,* Urteil v. 14. Juli 2022, Rs. C-743/19, ECLI:EU:C:2022:569, Rn. 35.

51 Filippo Andreatta und Lorenzo Zambernardi, 'The European Union and Theories of International Relations' in: Christopher Hill, Michael Smith und Sophie Vanhoonacker (Hrsg.), *International Relations and the European Union* (4. Aufl., Oxford University Press 2023), 45-63 (60).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

III. Strukturelle Probleme und Lösungsansätze in der GSVP

1. Die sicherheits- und verteidigungspolitische Handlungsfähigkeit der Union im Allgemeinen: Die Crux des Intergouvernementalismus

„Handlungsfähigkeit" bezeichnet grundsätzlich die Fähigkeit, bewusste und beabsichtigte Handlungen zu setzen.[52] In den sicherheits- und verteidigungspolitischen Bereich weitergedacht bedeutet dies, dass die Union aufhören muss, sich mittels bloß schrittweiser und bedächtiger Anpassung unbeholfen durch existenzielle Krisen durchzuschlagen. Stattdessen muss sie endlich aktiv ihre eigene Zukunft gestalten, und dies frei von Zwang und Aggression.[53]

Trotz dieser Ambitionen ist wohlbekannt, dass die Wurzel vieler sicherheits- und verteidigungspolitischer Handlungsprobleme der Union darin liegt, dass die GSVP keine genuine Unionszuständigkeit im Sinne des Art. 2 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) darstellt und als „integraler Bestandteil der Gemeinsamen Außen- und Sicherheitspolitik [GASP]" (Art. 42 Abs. 1 EUV) der Entscheidungsgewalt der Mitgliedstaaten und damit ihrer bloß intergouvernementalen Kooperation durch einstimmige Beschlussfassung im Europäischen Rat oder im Rat der Europäischen Union unterliegt (Art. 24 Abs. 1 UAbs. 2 S. 2 EUV sowie Art. 31 Abs. 1 UAbs. 1 S. 1 EUV; explizit Art. 42 Abs. 4 S. 1 EUV), auf welche ich gleich noch detaillierter eingehen werde. Trotz der fortschreitenden judikativen Integration der GASP durch den EuGH[54] in die Gesamtunionsverfassung bleibt diese (zusammen mit der GSVP) dennoch getrennt von den supranational determinierten Bereichen des Unionsrechts[55] und damit auch weiterhin den nationalen Interessen der Mitgliedstaaten verhaftet, welche mitunter inkongruent sind.[56]

Dieser unionsrechtliche Sonderstatus der GASP im Allgemeinen und der GSVP im Besonderen mag zwar in der weiterhin bestehenden Souveränität der Mitgliedstaaten in Gestalt ihrer Entscheidungs- und Handlungshoheit

52 Siehe z. B., by Gertrude Elizabeth Margaret Anscombe, *Intention* (Basil Blackwell 1957), 1 und passim; Donald Davidson, *Essays on Actions and Events* (Clarendon Press 1980), 43-61.

53 Europäische Kommission (Fn. 46), 2.

54 EuGH, *Rosneft*, Urteil v. 28. März 2017, Rs. C-72/15, ECLI:EU:C:2017:236, Rn. 58-81; EuGH, *KS and KD*, Urteil v. 10. September 2024, Rs. C-29/22 P, ECLI:EU:C:2024:725, Rn. 113-138; EuGH, *Neves 77*, Urteil v. 10. September 2024, Rs. C-351/22, ECLI:EU:C:2024:723, Rn. 34-61.

55 Panos Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press 2013), 25-35.

56 Andreatta und Zambernardi (Fn. 51), 60.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

sowie Letztentscheidungsbefugnis begründet liegen, welcher auf internationaler Ebene nun einmal die *intergouvernementale* Zusammenarbeit in militärischen Angelegenheiten entspricht.[57] Doch für eine auf strategische Autonomie aufbauende sicherheits- und verteidigungspolitische Resilienz ist dieser *status quo* zunächst einmal alles andere als zuträglich. Hinzu kommt auch noch die Änderungsfestigkeit dieses Sonderstatus, welcher nur durch eine ordentliche Vertragsänderung nach Art. 48 Abs. 2 bis 5 EUV in die Supranationalität bzw. eine qualifizierte Mehrheit überführt werden könnte.[58] Aufgrund der aktuellen politischen Aussichtslosigkeit eines solchen Unterfangens, d. h. der Ausweitung von Mehrheitsentscheidungen durch Vertragsänderung,[59] werde ich diese Option hier nicht weiterverfolgen und stattdessen auf jene Möglichkeiten eingehen, welche *de lege lata* bestehen.

2. Primärrechtskonformer Umgang mit dem Einstimmigkeitsprinzip

Entscheidungsfindung per Einstimmigkeit ist historisch gesehen der ursprüngliche Abstimmungsmodus in internationalen Organisationen, der allen beteiligten Staaten oder Akteuren ein grundsätzliches Vetorecht einräumt, mittels dessen die staatliche Souveränität in sensiblen Politikbereichen gewahrt werden kann. Jedoch führt die Notwendigkeit, zu einer Übereinstimmung zu kommen, im Idealfall einer harmonischen horizontalen Kooperation unter den Staaten, zu einem Bündnis und damit zum Gegenteil eines Vetos. Denn man will und muss sich miteinander verständigen.[60] Einstimmigkeit führt so durch erhöhte Legitimität auch zu wirksamer Umsetzung der beschlossenen Maßnahmen.[61] Dies war ebenso im Bereich der GASP geplant, in der – am Ende der Geschichte – nationale Interessen schließlich in gesamteuropäischen Interessen aufgehen, ein einheitliches Auftreten nach Außen und damit letztendlich eine gemeinsame Außen- und Sicherheitspolitik mög-

57 Siehe Jelena von Achenbach, *Europäisierte Verteidigung* (Mohr Siebeck 2025), 20.

58 Vgl. hierzu Europäisches Parlament, Proposal for the Amendment of the Treaties, Resolution v. 22. November 2023, P9_TA(2023)0427, Rn. 21 f. sowie die Änderungsvorschläge zu Art. 24, 31 und 42 EUV.

59 Siehe hierzu jedoch eingehend Hubert Isak, 'Primärrechtsreform: Reformbedarf und Perspektiven aus rechtswissenschaftlicher Sicht', EuR-Beiheft 1 (2025), 23-43 (35-38).

60 Siehe Arnold J. P. Tammes, *Hoofstukken van internationale organisatie* (Martinus Nijhoff 1951), 7; sowie Luuk van Middelaar, *Vom Kontinent zur Union: Gegenwart und Geschichte des vereinten Europa* (Suhrkamp 2016), 89.

61 Marta Arpio, 'The Impact of War (in Ukraine) on the EU' in: Inge Govaere, Sacha Garben und Eleanor Spaventa (Hrsg.), *The Impact of War (in Ukraine) on the EU* (Hart Publishing 2024), 293-301 (299).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

lich werden sollten (wie dies z. B. Art. 32 und Art. 34 EUV vorgeben).[62] Idealerweise wäre das Einstimmigkeitsprinzip in diesem Fall bei jeder Entscheidungsfindung zur Formsache und damit zum Konsens geworden, da sich die Mitgliedstaaten bei ihren Entscheidungen an gemeinsam verfolgten intrinsischen Werten, und nicht bloß extrinsischen Interessen orientiert hätten.[63] Nehmen jedoch einzelne Mitgliedstaaten, wie etwa Ungarn in den letzten Jahren im Europäischen Rat bzw. Rat, die außen-, sicherheits- und verteidigungspolitischen Entscheidungen der gesamten Union in Geiselhaft,[64] so beginnt das Verfallsstadium der Einstimmigkeit, in dem diese zu einer konfrontativ ausgelegten und gelebten Verfahrensregel erstarrt.[65] Gerade deshalb entwickelte sich Ungarn aufgrund seines obstruktiven Verhaltens in den letzten Jahren zu einem regelrechten Katalysator für die Suche nach Umgehungsstrategien des Einstimmigkeitsprinzips.[66]

a) Optionen nach Art. 31 EUV

Die mangelnde Effizienz der GASP/GSVP führte im Rahmen der letzten Vertragsreformen schließlich zu einer sanften Abfederung des starren Einstimmigkeitsprinzips in Gestalt des heutigen Art. 31 EUV,[67] welcher zu diesem Zweck drei Optionen anbietet:

(i) Erstens ermöglicht Art. 31 Abs. 1 UAbs. 2 EUV es den Mitgliedstaaten, sich bei Abstimmungen *konstruktiv zu enthalten*. Das bedeutet, dass sie zwar

62 Siehe Jannika Jahn, 'Art. 32 EUV' in: Eberhard Grabitz, Meinhard Hilf und Martin Nettesheim (Hrsg.), *Das Recht der Europäischen Union* (87. Ergänzungslieferung, C. H. Beck 2026), Rn. 3; Werner Kaufmann-Bühler, 'Art. 34 EUV', in: Eberhard Grabitz, Meinhard Hilf und Martin Nettesheim (Hrsg.), *Das Recht der Europäischen Union* (87. Ergänzungslieferung, C. H. Beck 2026), Rn. 2.

63 Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1998), 175.

64 Patrick Müller und Peter Slominski, 'Ungarn, der EU-Rechtstaatlichkeitsmechanismus und Russlands Krieg gegen die Ukraine: die politische Geiselnahme außenpolitischer Entscheidungen', Integration 46 (2023), 259-273.

65 Tammes (Fn. 60), 7; van Middelaar (Fn. 60), 89.

66 Kai-Olaf Lang, 'Mitgestaltung und Selbstbehauptung im Krisenfunktionalismus. Die Mitgliedstaaten in der Polykrise' in: Raphael Bossong und Nicolai von Ondarza (Hrsg.), *Stand der Integration: Zehn zentrale politische Projekte der EU und wie sie die Union verändern* (Stiftung Wissenschaft und Politik 2024), 124-133 (127).

67 Zur Genese dieser Bestimmung, siehe Thomas Ramopoulos und Lorant Havas, 'Article 31 TEU' in: Manuel Kellerbauer, Marcus Klamert und Jonathan Tomkin (Hrsg.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2. Aufl., Oxford University Press 2024), Rn. 1; Werner Kaufmann-Bühler und Nikolaus Meyer-Landrut, 'Art. 31 EUV' in: Eberhard Grabitz, Meinhard Hilf und Martin Nettesheim (Hrsg.), *Das Recht der Europäischen Union* (87. Ergänzungslieferung, C. H. Beck 2026), Rn. 1-6.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

nicht verpflichtet sind, den Beschluss durchzuführen, ihn aber dennoch als für die Union bindend betrachten müssen und dessen Zweck im Geiste gegenseitiger Solidarität nicht frustrieren dürfen. Im Fall der von der Union geplanten militärischen Unterstützungsmission der Ukraine durch die Ausbildung von ukrainischem Militärpersonal[68] wählte Ungarn zumindest nicht den Weg der Fundamentalopposition durch ein Veto, sondern enthielt sich bisher zwei Mal – d. h. sowohl bei der Annahme des ersten Beschlusses als auch bei dessen Änderung zwei Jahre später – konstruktiv seiner Stimme, um diese sicherheits- und verteidigungspolitische Maßnahme für die Union *in toto* und die übrigen Mitgliedstaaten nicht zu verunmöglichen.[69] Das Problem bleibt dabei jedoch, dass ein solches Blockadeverhalten intern massive Ressourcen bindet, indem es die anderen Mitgliedstaaten bzw. die Union dazu zwingt, entweder ebenfalls eine konfrontative Haltung einzunehmen oder dem blockierenden Staat in anderen Politikbereichen entgegenzukommen. Gerade in diesem Bereich wird der bereits erwähnte Innen-Außen-Nexus wieder relevant, wenn man bedenkt, dass der damalige ungarische Premierminister Orbán beim Europäischen Rat am 19. Dezember 2024 seine Zustimmung zur Verlängerung der restriktiven Maßnahmen gegen Russland, welche im Januar 2025 ausgelaufen wären, verweigerte, um damit die wegen der ungarischen Verstöße gegen die Rechtsstaatlichkeit eingefrorenen EU-Gelder[70] freizupressen.[71] Solange man dem blockierenden Mitgliedstaat also transaktionell etwas im Austausch für seine Zustimmung oder konstruktive Enthaltung geben kann, mag diese außenpolitische Strategie funktionieren. Doch kann der Erfolg dieser Strategie, erstens und rein konsequentialistisch, nicht immer garantiert werden und erfolgt ein solches Vorgehen, zweitens und deontologisch, unter Preisgabe der unionalen Werte nach Art. 2 EUV, welche in den Worten von Generalanwältin *Ćapeta* ausdrücken, was „eine gute Gesellschaft ist".[72]

---

68 Beschluss 2022/1968/GASP v. 17. Oktober 2022 über eine militärische Unterstützungsmission der Europäischen Union zur Unterstützung der Ukraine (EUMAM Ukraine), ABl. L 270/85, geändert durch Beschluss 2024/2876/GASP v. 8. November 2024, ABl. L 2024/2876.

69 N. N., 'Ungarn hat nicht für die EU-Ausbildungsmission in der Ukraine gestimmt', Ungarn heute, 18. Oktober 2022, <https://ungarnheute.hu/news/ungarn-hat-nicht-fuer-eu-ausbildungsmission-in-der-ukraine-gestimmt-41881/>, zuletzt besucht 13. Januar 2026.

70 Durchführungsbeschluss 2022/2506/EU v. 15. Dezember 2022 über Maßnahmen zum Schutz des Haushalts der Union vor Verstößen gegen die Grundsätze der Rechtsstaatlichkeit in Ungarn, ABl. L 325/94.

71 N. N., 'Ungarn verliert Anspruch auf EU-Hilfen', Süddeutsche Zeitung, 1. Januar 2025, <https://www.sueddeutsche.de/politik/eu-ungarn-rechtsstaatlichkeit-li.3175183>, zuletzt besucht 13. Januar 2026.

72 EuGH, *Kommission/Ungarn*, Schlussanträge der Generalanwältin Tamara Ćapeta v. 5. Juni 2025, Rs. C-769/22, ECLI:EU:C:2025:408, Rn. 157.

 DOI 10.17104/0044-2348-2026-3-837

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Ein weiteres Beispiel für den Umgang mit dem Instrument der konstruktiven Enthaltung stellt Österreich dar, das 1955 mit dem Bundesverfassungsgesetz über die Neutralität[73] erklärte, keinem militärischen Bündnis beizutreten und die Errichtung militärischer Stützpunkte fremder Staaten auf seinem Gebiet nicht zuzulassen. Dementsprechend lange und komplex sind sowohl die politische als auch die rechtliche Debatte, ob und wieweit sich Österreich als EU-Mitgliedstaat im Rahmen seines eigenen Verfassungsrechts in die GSVP einbringen darf.[74] So trägt Österreich insgesamt zwar die restriktiven Maßnahmen der Union gegen Russland mit, enthielt sich aber bisher konstruktiv aus neutralitätspolitischen Gründen bei der Finanzierung von Waffenlieferungen an die Ukraine aus der Friedensfazilität[75] der Union.[76] Problematisch ist dieses Vorgehen gleichwohl dahingehend, als die österreichische Neutralität als Quelle rechtlicher Pflichten durch die Mitgliedschaft in der Europäischen Union und die Schaffung des Art. 23j Bundes-Verfassungsgesetz (B-VG), durch welchen Österreich ohne neutralitätsrechtliche Beschränkungen aus verfassungsrechtlicher Sicht an der gesamten GASP/GSVP mitwirken kann, weitgehend weggefallen ist und daher einen beachtlichen Raum für die Neutralitätspolitik eröffnet hat. Das bedeutet, dass Österreich seine konstruktive Enthaltung als bloßes politisches Mittel nutzt, um sich innerstaatlich keiner Debatte zum Status seiner Neutralität stellen zu müssen, sein Handeln also allein eine Frage der Neutralitäts*politik*, und nicht des Neutralitäts*rechts* ist.[77] Mit anderen Worten dürfte und könnte Österreich die GASP/GSVP der Union viel weitgehender unterstützen als es zurzeit bereit ist. Verfassungsrechtlich ist demgemäß auch die unionsrechtliche Pflichterfüllung, die Transporte der für die Ukraine bestimmten Waffen über österreichisches Staatsgebiet zuzulassen, unproblematisch, weil die österreichische Neutralität seit dem Beitritt zur Union ohnehin bloß auf einen kleinen Kern reduziert ist, nämlich keinem Militärbündnis beizutreten bzw.

73 Bundesverfassungsgesetz vom 26. Oktober 1955 über die Neutralität Österreichs (BVG Neutralität), BGBl. Nr. 211/1955.

74 Zu dieser Debatte, siehe statt vieler Andreas Th. Müller, 'Der rechtliche Rahmen der österreichischen Neutralität im Wandel', in: Martin Senn und Jodok Troy (Hrsg.), *Österreichs Neutralität: Recht, Politik und Gesellschaft – Eine Debatte* (transcript 2025), 97-112; Franz Cede und Ralph Janik, *Auslaufmodell Neutralität? Geschichte und Gegenwart eines österreichischen Mythos* (Michael Wagner Verlag 2025).

75 Beschluss 2022/338/GASP v. 28. Februar 2022 über eine Unterstützungsmaßnahme im Rahmen der Europäischen Friedensfazilität für die Bereitstellung militärischer Ausrüstung und Plattformen, die dazu konzipiert sind, tödliche Gewalt anzuwenden, für die ukrainischen Streitkräfte, ABl. L 60/1.

76 Siehe im Überblick Paul Gragl, 'Art. 31 EUV' in: Thomas Jaeger und Karl Stöger (Hrsg.), *Kommentar zu EUV/AEUV* (Manz 2025), Rn. 13.

77 Siehe Müller (Fn. 74), 101-103.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

keinem fremden Staat die Errichtung eines militärischen Stützpunktes auf österreichischem Territorium zu erlauben.[78]

Insgesamt funktioniert das Instrument der konstruktiven Enthaltung daher noch, insbesondere im Hinblick auf das unionale Vorgehen gegenüber der russischen Aggression gegen die Ukraine,[79] obwohl man dessen grundsätzliche Mängel als bloßes Hilfswerkzeug vis-à-vis politisch unwilligen Staaten nicht unterschätzen sollte. Denn der inhärente Konstruktionsfehler dieses Abstimmungsmechanismus bleibt, dass sich die Union auf den guten Willen einzelner Mitgliedstaaten verlassen muss, welcher jedoch aus innenpolitischen Gründen niemals garantiert und dementsprechend jederzeit willkürlich verweigert werden kann. Eine erste resilienzsteigernde Abhilfe dagegen verabschiedete die Union schließlich am 12. Dezember 2025 in Gestalt einer Verordnung, durch welche jeglicher Transfer der bereits eingefrorenen russischen Vermögenswerte verboten wird.[80] Kompetenzrechtliche Grundlage dieser Verordnung bildet Art. 122 AEUV zum Beschluss von der Wirtschaftslage angemessenen Maßnahmen, falls es – wie es seit der russischen Invasion der Ukraine auch tatsächlich der Fall ist – zu gravierenden Schwierigkeiten in der Versorgung mit bestimmten Waren, vor allem im Energiebereich, kommt. Im Zusammenhang mit dem vorliegenden Problem der ansonsten im Außenbereich erforderlichen Einstimmigkeit wurde Art. 122 AEUV aber nicht zufällig gewählt, denn für auf diese Bestimmung gestützte Maßnahmen entscheidet der Rat schließlich mit qualifizierter Mehrheit.[81] In diesem Sinne konnte die Union hier durchaus rechtliches Geschick zeigen, um ihre Resilienz sowohl nach innen als auch nach außen zu steigern und eine Freigabe der eingefrorenen russischen Vermögenswerte nach einem möglichen zukünftigen Veto eines Mitgliedstaates im GASP-Kontext verhindern.

(ii) Zweitens erlaubt Art. 31 Abs. 2 UAbs. 1 EUV bereits *qualifizierte Mehrheitsentscheidung*en im Bereich der GASP, z. B. in Form von Durchführungsbeschlüssen von zuvor einstimmig im Europäischen Rat erlassenen Beschlüssen über die strategischen Interessen und Ziele der Union (erster Spiegelstrich); Vorschlägen der Hohen Vertreterin der Union für Außen- und Sicherheitspolitik, welche diese auf Ersuchen des Europäischen Rates dem

78 Theo Öhlinger, 'BVG Neutralität' in: Karl Korinek et al. (Hrsg.), *Österreichisches Bundesverfassungsrecht* (17. Lieferung, Verlag Österreich 2022), Rn. 38.

79 Siehe auch Petra Mahnič, 'Constructive Abstention in EU Foreign and Security Policy' in: Frank Hoffmeister und Lorant Havas (Hrsg.), *The High Representative of the Union for Foreign Affairs and Security Policy as a Legal Actor* (Brill 2025), 24-40 (24).

80 VO 2025/2600/EU v. 12. Dezember 2025 über Sofortmaßnahmen zur Bewältigung der durch die Handlungen Russlands im Zusammenhang mit dem Angriffskrieg gegen die Ukraine verursachten ernsthaften wirtschaftlichen Schwierigkeiten, ABl. L 2025/2600.

81 Thomas Müller, 'Art. 122 AEUV' in: Thomas Jaeger und Karl Stöger (Hrsg.), *Kommentar zu EUV/AEUV* (Manz 2025), Rn. 11.

 DOI 10.17104/0044-2348-2026-3-837

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Rat zur Festlegung einer Aktion oder eines Standpunktes der Union unterbreitet (zweiter Spiegelstrich); und Durchführungsbeschlüssen, mit denen eine Aktion oder ein Standpunkt der Union festgelegt wird (dritter Spiegelstrich). Von dieser Möglichkeit hat der Rat im Kontext des russischen Angriffskrieges gegen die Ukraine in den letzten Jahren auch weitgehend Gebrauch gemacht, vor allem im Hinblick auf die Verhängung und Verlängerung restriktiver Maßnahmen.[82] Doch lässt sich aus der Angabe dieser Rechtsgrundlage nicht zwingend darauf schließen, dass die betreffenden Beschlüsse auch tatsächlich mit Mehrheit verabschiedet wurden, da die Praxis in der GASP auch bei Durchführungsbeschlüssen eher in Richtung einstimmiger Beschlussfassung geht.[83]

Diese Eröffnung der grundsätzlichen Möglichkeit von Mehrheitsentscheidungen durch den Rat im Bereich der GASP stellt jedoch kein Allheilmittel dar, um ausscherende Mitgliedstaaten effektiv zu umgehen und eine unionale Resilienz nach außen zu garantieren. Denn erstens verlagern solche Durchführungsbeschlüsse das Problem lediglich in den Europäischen Rat, wo die dafür grundlegende Entscheidung noch immer einstimmig getroffen werden muss.[84] Zweitens ermöglicht Art. 31 Abs. 2 UAbs. 2 EUV mit seinem „Notbremsmechanismus" den Mitgliedstaaten, aus wesentlichen, aber explizit zu nennenden Gründen der nationalen Politik, einen mit qualifizierter Mehrheit zu fassenden Beschluss abzulehnen. Und drittens sind qualifizierte Mehrheitsentscheidungen gemäß Art. 31 Abs. 4 EUV für Beschlüsse mit militärischen oder verteidigungspolitischen Bezügen explizit ausgeschlossen.

(iii) Drittens und letztens ermöglicht die Passerelle-Klausel des Art. 31 Abs. 3 EUV den *Übergang zu qualifizierten Mehrheitsentscheidungen* im Rat in anderen als den zuvor genannten Fällen. Laut einem Bericht des Europäischen Parlaments über die Umsetzung von Passerelle-Klauseln vom 1. Juni 2023 hat der Rat im Rahmen der Folgemaßnahmen zu den Schlussfolgerungen der 2022 zu Ende gegangenen Konferenz zur Zukunft Europas zum ersten Mal seit vielen Jahren wieder eingehend über eine mögliche Aktivierung solcher Klauseln diskutiert. Da eine Mehrheit der Mitgliedstaaten ihre Bereitschaft bekundet hat, Passerelle-Klauseln in bestimmten Bereichen fallweise zu nutzen,[85] hat der Rat sodann eine Prüfung der Anwendung

82 So etwa Durchführungsbeschluss 2024/2760/GASP v. 24. Oktober 2024 zur Durchführung des Beschlusses 2014/512/GASP über restriktive Maßnahmen angesichts der Handlungen Russlands, die die Lage in der Ukraine destabilisieren, ABl. L 2024/2760.

83 Kaufmann-Bühler und Meyer-Landrut (Fn. 67), Rn. 31.

84 Art. 24 Abs. 1 UAbs. 2 S. 2 EUV.

85 Europäisches Parlament, Bericht über die Umsetzung von Passerelle-Klauseln in den EU-Verträgen, A9-0208/2023, 1. Juni 2023. Siehe auch Europäisches Parlament, Entschließung vom 11. Juli 2023 zur Umsetzung von Passerelle-Klauseln in den EU-Verträgen, 2022/2142 (INI), Rn. 13-16.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

der Klausel in Art. 31 Abs. 3 EUV eingeleitet.[86] Bisher wurde jedoch noch kein förmlicher Beschluss über ihre Aktivierung gefasst.

Doch auch in diesem Zusammenhang tauchen ähnliche bzw. gleichgelagerte Probleme wie zuvor auf: Erstens wird auch hier das Problem bloß auf den Europäischen Rat verlagert, welcher gemäß Art. 31 Abs. 3 EUV zuerst einstimmig einen Beschluss erlassen muss, in dem der Übergang auf die qualifizierte Mehrheitsentscheidung vorgesehen ist. Zweitens ist weiterhin unklar, ob diese spezielle Passerelle-Klausel die Anwendung der in der allgemeinen Passerelle-Klausel Art. 48 Abs. 7 EUV genannten Vorgaben ausschließt (und ob damit die nationalen Parlamente der Aktivierung von Art. 31 Abs. 3 EUV zustimmen müssen oder nicht).[87] Und drittens ist die Aktivierung dieser Passerelle-Klausel gemäß Art. 31 Abs. 4 EUV ebenso für Beschlüsse mit militärischen oder verteidigungspolitischen Bezügen explizit ausgeschlossen.

Mag das Einstimmigkeitsprinzip in der Praxis durch den Verzicht auf förmliche Abstimmungen und durch den politischen Druck auf kleinere Mitgliedstaaten in Richtung einer tatsächlichen Angleichung der nationalen Außenpolitiken hin auch bereits relativiert worden sein, so erfolgt diese Politikkonvergenz dennoch weiterhin unter dem ständig drohenden Damoklesschwert eines Vetos. Die sich daraus ergebende notwendige Konsenssuche erklärt dementsprechend auch, weshalb die Union in ihren außen-, Sicherheits- und verteidigungspolitischen Entscheidungen stets nur reagiert anstatt die Weltpolitik selbst proaktiv mitzugestalten.[88] Eine echte sicherheits- und verteidigungspolitische Resilienz der Union ist auf dieser Grundlage wohl nur schwer zu erreichen.

b) Evolutivklausel und Beistandspflicht

Ein qualitativer Sprung der Integration in der Verteidigungspolitik und der Territorialverteidigung der Union ist in der Evolutivklausel[89] des Art. 42

86 Rat der Europäischen Union, Folgemaßnahmen zu den Vorschlägen und damit zusammenhängenden konkreten Maßnahmen, die im Bericht über die endgültigen Ergebnisse der Konferenz zur Zukunft Europas enthalten sind, Dokument 16054/23, 7. Dezember 2023, Rn. 16.

87 Für echte Spezialität, siehe Hans-Joachim Cremer, 'Art. 31 EUV' in: Christian Calliess und Matthias Ruffert (Hrsg.), *EUV/AEUV* (6. Aufl., C. H. Beck 2022), Rn. 18; zurückhaltender Kaufmann-Bühler und Meyer-Landrut (Fn. 67), Rn. 37 f.

88 Daniel Thym, '§ 18 GASP und äußere Sicherheit' in: Andreas von Arnauld und Marc Bungenberg (Hrsg.), *Enzyklopädie Europarecht, Bd. 12: Europäische Außenbeziehungen* (2. Aufl., Nomos 2022), Rn. 23.

89 Hans-Joachim Cremer, 'Art. 42 EUV' in: Christian Calliess und Matthias Ruffert (Hrsg.), *EUV/AEUV* (6. Aufl., C. H. Beck 2022), Rn. 9.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Abs. 2 EUV angelegt,[90] welche in Sachen Resilienzsteigerung durchaus vielversprechend erscheint. Evolutiv ist diese Bestimmung deshalb, weil sie – in zwei Phasen – zuerst die schrittweise Festlegung der GSVP als gemeinsame Verteidigungspolitik indiziert, welche sodann zu einer gemeinsamen Verteidigung führt, sobald der Europäische Rat dies einstimmig beschlossen hat. Darauf empfiehlt dieser den Mitgliedstaaten, einen dementsprechenden Beschluss im Einklang mit ihren verfassungsrechtlichen Vorschriften zu erlassen. Aus diesem Wortlaut ergeben sich zwei wesentliche Elemente dieser Bestimmung, die es nun auszulegen gilt: erstens ihr materiell-rechtlicher Gehalt und zweitens ihre verfahrensrechtlichen Bedingungen. Als dritten Punkt werde ich schließlich noch auf die Beistandspflicht des Art. 42 Abs. 7 EUV als Zwischenphase zwischen gemeinsamer Verteidigungspolitik und gemeinsamer Verteidigung eingehen.

(i) *Materiell-rechtlich* interessant ist die begriffliche Unterscheidung zwischen „gemeinsamer Verteidigungspolitik" einerseits und „gemeinsamer Verteidigung" andererseits, welche notwendigerweise – insbesondere durch den Hinweis auf das Tätigwerden des Europäischen Rates zur Aktivierung der zweiten – nicht dasselbe meinen können. Die Abgrenzung bleibt schwierig, ist aber nicht unmöglich.[91] Das Schrifttum versteht unter der „gemeinsamen Verteidigungspolitik", welche im Primärrecht nicht näher definiert wird, „jedenfalls alle Maßnahmen, die dem Aufbau einer koordinierten Selbstverteidigung gegenüber bewaffneten Angriffen von außen auf das Unionsgebiet dienen oder mit ihm zusammenhängen, solange nicht das Stadium einer ‚gemeinsamen Verteidigung' erreicht wird".[92] Ich verstehe diese erste Phase daher als den zurzeit bestehenden *status quo* der gemeinsamen unionalen Verteidigungspolitik, die auf geltendem Primärrecht und dem zu erlassenden oder bereits erlassenen Sekundärrecht[93] beruht, also in die GSVP eingebettet ist und diese längst verwirklicht.[94] Der Begriff der zweiten Phase, d. h. jener der „gemeinsamen Verteidigung", bleibt ebenso undefiniert, markiert aber aufgrund der besonderen verfahrensrechtlichen Bestimmungen hinsichtlich ihrer Realisierung (auf die ich sogleich genauer eingehen werde), ein *Plus* gegenüber der gemeinsamen Verteidigungspolitik, ja geradezu ihre Endstufe.

90 von Achenbach, *Europäisierte Verteidigung* (Fn. 57), 236.

91 Cremer, 'Art. 42 EUV' (Fn. 89), Rn. 7 f.

92 Rudolf Geiger und Lando Kirchmair, 'Art. 42 EUV' in: Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur und Lando Kirchmair (Hrsg.), *EUV/AEUV-Kommentar* (7. Aufl., C. H. Beck 2023), Rn. 7.

93 Siehe dazu ausführlicher Abschnitt III. 3. unten.

94 Ebenso Sebastian von Kielmansegg, *Die Verteidigungspolitik der Europäischen Union: eine rechtliche Analyse* (Boorberg 2005), 124-146; Heintschel von Heinegg, 'Art. 42 EUV' in: Matthias Pechstein, Carsten Nowak und Ulrich Häde (Hrsg.), *Frankfurter Kommentar EUV/GRC/AEUV* (2. Aufl., Mohr Siebeck 2023), Rn. 21.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Es muss sich dabei deshalb um eine deutliche Intensivierung der sicherheits- und verteidigungspolitischen Integration handeln, welche z. B. erreicht wäre, wenn die gemeinsame Territorialverteidigung der Union supranational organisiert wäre, man vom Einstimmigkeitsprinzip abweichen bzw. das Primärrecht grundlegend reformieren würde, oder eigene Streitkräfte der Union geschaffen würden.[95] Das Erreichen einer solchen Integrationsstufe würde, zumindest einmal *prima facie*, auch für eine gesteigerte Resilienz der Union in sicherheits- und verteidigungspolitischen Fragen sprechen.

(ii) Die Annahme, dass diese zweite Phase einen weitergehenden Integrationsschritt darstellen würde, der zu mehr Resilienz führen kann, ergibt sich nur folgerichtig aus den ebenso in Art. 42 Abs. 2 EUV verankerten *verfahrensrechtlichen Bedingungen* für dessen Verwirklichung: Durch ein erleichtertes und von den komplexeren Bedingungen des Art. 48 EUV abweichendes Verfahren zur Vertragsänderung könnte – wie bereits zuvor kurz erwähnt – durch einen einstimmigen Beschluss des Europäischen Rates und eine darauffolgende Ratifikation durch die Mitgliedstaaten[96] eine genuine unionale Verteidigung hergestellt werden. Doch die Stolpersteine auf dem Weg dahin liegen wiederum auf der Hand: Erstens würde zunächst im Lichte des für diesen Beitrag ursächlichen Problems – der obstruktiven Politik blockadewilliger Mitgliedstaaten – die zentrale Frage wiederum auf die Ebene des Europäischen Rates verschoben, der unter der Vorgabe des Einstimmigkeitsprinzips wohl nicht immer handeln könnte. Zweitens bleibt ungelöst, ob die Errichtung einer gemeinsamen Verteidigung auch mit dem neutralen Status gewisser Mitgliedstaaten kompatibel wäre. Und drittens können auch andere, nicht neutralitätsrelevante mitgliedstaatliche Verfassungsbestimmungen, wie etwa in Deutschland, dem Übergang zu einer gemeinsamen Verteidigung entgegenstehen.

Zur zweiten Frage hinsichtlich neutralitätsrechtlicher Fragen ist z. B. für Österreich eine verfassungsrechtskonforme Lösung durchaus denkbar: Denn zum Ersten wurde argumentiert, dass die Union bereits durch die Einführung der Beistandspflicht in Art. 42 Abs. 7 EUV zu einem echten Verteidigungsbündnis (obgleich abgemildert durch die irische Klausel) wurde,[97] was bedeutet, dass die Aktivierung von Art. 42 Abs. 2 EUV im Hinblick auf die Qualität der Union als Verteidigungsbündnis ohne Belang wäre. Zum Zweiten verweist auch Art. 42 Abs. 2 UAbs. 2 EUV auf die irische Klausel, was die praxisnahe

95 Geiger und Kirchmair (Fn. 92), Rn. 8 f.; von Kielmansegg (Fn. 94), 199 f.; Elisabeth Rossa, *Die Finalität europäischer Verteidigung* (Mohr Siebeck 2025), 62.

96 In Deutschland wäre hierfür der Erlass eines Zustimmungsgesetzes nach Art. 59 Abs. 2 S. 1 GG notwendig, in Österreich die Genehmigung durch den Nationalrat bzw. die Zustimmung durch den Bundesrat gemäß Art. 50 Abs. 4 B-VG.

97 So z. B. Öhlinger (Fn. 78), Rn. 33; Michael Schilchegger, 'Die österreichische Neutralität nach Lissabon', ZÖR 66 (2011), 5-24 (16 f. und 20 f.).

 DOI 10.17104/0044-2348-2026-3-837

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Möglichkeit unterschiedlicher Solidarbeiträge im Verteidigungsfall und damit eines asymmetrischen Verteidigungsbündnisses eröffnet.[98] Und zum Dritten erfordern die in Art. 42 Abs. 2 EUV erwähnten „verfassungsrechtlichen Vorschriften" in Österreich nach Art. 50 Abs. 4 BVG ein erhöhtes Präsenz- und Konsensquorum im Parlament, welche regelmäßig für Verfassungsänderungen notwendig sind. Da es sich beim Bundesverfassungsgesetz Neutralität um kein Grundprinzip der österreichischen Bundesverfassung handelt, dessen Änderung nach Art. 44 Abs. 3 B-VG obligatorisch einer Volksabstimmung zu unterziehen wäre, ist eine solche hier auch nicht vorzunehmen. Durch die Schaffung einer gemeinsamen Verteidigung würde der österreichische Neutralitätsstatus somit implizit durch materielle Derogation beendet.[99] Einer echten sicherheits- und verteidigungspolitischen Resilienz der Union steht in diesem Fall nur fehlender politischer Wille entgegen.

Hinsichtlich der dritten Frage und somit anderen verfassungsrechtlichen Hindernissen auf dem Weg zu einer gemeinsamen Verteidigung sei im Hinblick auf Deutschland auf den wehrverfassungsrechtlichen Parlamentsvorbehalt[100] verwiesen, aufgrund dessen jeder militärische Einsatz deutscher Soldaten eines vorherigen zustimmenden konstitutiven Parlamentsbeschlusses bedarf.[101] Damit ist auch für die Begründung einer gemeinsamen Verteidigung nach Art. 42 Abs. 2 EUV vor der Beschlussfassung im Europäischen Rat ein Beschluss des Bundestages erforderlich.[102] Ist dieser nicht gegeben, so darf sich die Bundesrepublik Deutschland – so das Bundesverfassungsgericht ausdrücklich im *Lissabon*-Urteil – verfassungsrechtlich nicht an einer solchen Vertragsänderung beteiligen.[103] Dies ist eine legitime und durchaus hohe verfassungsrechtliche Hürde auf dem Weg zu einer potenziellen gemeinsamen Verteidigung, doch scheint sie (zumindest) rechtlich nicht unüberwindbar, da es hier letztendlich bloß auf den politischen Willen der im Bundestag vertretenen Parteien ankommt.

---

98 Kirsten Schmalenbach, 'Unionsrecht und Neutralität' in: Stefan Griller, Arno Kahl, Benjamin Kneihs und Walter Obwexer (Hrsg.), *20 Jahre EU-Mitgliedschaft Österreichs* (Verlag Österreich 2016), 290-312 (309 f.).

99 Andreas Th. Müller, 'Artikel 23j' in: Benjamin Kneihs und Georg Lienbacher (Hrsg.), *Rill-Schäfer-Kommentar Bundesverfassungsrecht* (Gesamtwerk inkl. 33. Lieferung, Verlag Österreich 2024), Rn. 18.

100 Siehe dazu erstmals BVerfGE 90, 286 – *Out-of-Area-Einsätze*, 12. Juli 1994, insbesondere Rn. 381 ff.; weiter konkretisiert in BVerfGE 108, 34 – *AWACS-II*, 7. Mai 2008, Rn. 161 ff. und BVerfGE 140, 160 – *Pegasus*, 23. September 2015, Rn. 189 ff.

101 Christian Calliess, 'Art. 24 Abs. 2 GG' in: Günter Dürig, Roman Herzog und Rupert Scholz (Hrsg.), *Grundgesetz: Kommentar* (108. Ergänzungslieferung, C. H. Beck 2025), Rn. 78.

102 Werner Kaufmann-Bühler, 'Art. 42 EUV' in: Eberhard Grabitz, Meinhard Hilf und Martin Nettesheim (Hrsg.), *Das Recht der Europäischen Union* (87. Ergänzungslieferung, C. H. Beck 2026), Rn. 75.

103 BVerfGE 123, 267 – *Lissabon*, 30. Juni 2009, Rn. 391.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

(iii) Die bereits erwähnte und in Art. 42 Abs. 7 EUV grundgelegte Beistandspflicht, welche die Mitgliedstaaten einem angegriffenen Mitgliedstaat schulden, zeugt von einem nunmehr erhöhten Resilienzstandard der Union und der Mitgliedstaaten – gerade im Hinblick auf ihre erste und bisher einzige Aktivierung. Frankreich berief sich am 16. November 2015 nach den Terroranschlägen in Paris bewusst auf diese Bestimmung (und nicht auf die Solidaritätsklausel des Art. 222 AEUV, der explizit Terrorismus als Bedrohung erwähnt), um durch die Entlastung der bereits in Mali stationierten Streitkräfte durch die Streitkräfte anderer Mitgliedstaaten einen Auslandseinsatz gegen die in Syrien aufhältigen Terroristen des sogenannten Islamischen Staates durchführen zu können.[104] Doch nicht nur aufgrund dieses praktischen Beispiels, sondern gerade vielmehr wegen der Genese dieser Bestimmung im Konvent (der sie der „gemeinsamen Verteidigung" zuordnete) wird die Beistandsklausel heute nicht als ein Aspekt der gemeinsamen Verteidigungspolitik, sondern bereits als vorweggenommener Teil einer gemeinsamen Verteidigung betrachtet,[105] und zwar als genuin territorial bezogene Verteidigungsfunktion.[106] Sie bildet also eine Brücke in eine zukünftige gemeinsame Verteidigung, erschöpft sich aber gleichzeitig nicht darin: Denn erstens fällt die Bündnisklausel nicht unter die Bedingung eines förmlichen Beschlusses des Europäischen Rates (was gleichzeitig aufgrund des Wegfalls eines institutionellen Einstimmigkeitserfordernisses die Entscheidungsfindung und damit die unionale Resilienz im Falle eines bewaffneten Angriffes stärkt); und zweitens deckt sie sich nicht gänzlich mit einer gemeinsamen Verteidigung, welche auch weitergehende Aspekte beinhalten kann, so etwa die rechtliche Verpflichtung der Mitgliedstaaten, sich an militärischen Einsätzen zu beteiligen, oder den Aufbau eines eigenständigen, integrierten militärischen Instrumentariums durch Kampftruppen und Unterstützungsverbände mit integrierter Kommandostruktur.[107]

c) Der Innen-Außen-Nexus von Unionswerten und das Einstimmigkeitsprinzip

Im Rahmen des bereits erwähnten Innen-Außen-Nexus ergibt sich eine weitere Möglichkeit, die sicherheits- und verteidigungspolitische Resilienz

104 Hubert Isak, 'Art. 42 EUV' in: Thomas Jaeger und Karl Stöger (Hrsg.), *Kommentar zu EUV/AEUV* (Manz 2020), Rn. 91/1.

105 Cremer, 'Art. 42 EUV' (Fn. 89), Rn. 8. Gegen diese Ansicht Waldemar Hummer, 'Art. 42 EUV' in: Christoph Vedder und Wolff Heintschel von Heinegg (Hrsg.), *Europäisches Unionsrecht: Handkommentar* (2. Aufl., Nomos 2018), Rn. 32.

106 von Achenbach, 'Verteidigungspolitische Souveränität' (Fn. 47), 465.

107 Cremer, 'Art. 42 EUV' (Fn. 89), Rn. 9.

 DOI 10.17104/0044-2348-2026-3-837

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

der Union angesichts mit Entscheidungsblockaden drohender Mitgliedstaaten zu steigern. So zeigt sich gerade anhand des Beispiels Ungarn deutlich, dass das innere und äußere Werteverständnis oftmals Hand in Hand gehen. Denn bekanntermaßen korrelierten in diesem Mitgliedstaat unter dem mittlerweile abgewählten Ministerpräsidenten Orbán ein massiver Verfall des Rechtsstaates mit einem wachsenden Widerstand gegen die Bemühungen der Union, die russische Aggression gegen die Ukraine zu bekämpfen.[108] Um hier die Geiselnahme außenpolitischer Entscheidungen durch einen solchen Mitgliedstaat in Zukunft zu verhindern, ist es denkbar, ihm im Rat wegen der anhaltenden und schwerwiegenden Verletzungen der in Art. 2 EUV genannten Werte im Rahmen des Verfahrens nach Art. 7 Abs. 2 und 3 EUV die Stimmrechte zu entziehen. Dies würde gleichzeitig Reformdruck nach innen ausüben und eine resiliente Sicherheits- und Verteidigungspolitik nach außen wahren.[109]

Zwei gewichtige Gründe sprechen aus Gründen der Resilienz jedoch gegen die Praktikabilität des Verfahrens nach Art. 7 EUV: Erstens gestaltet sich das dreistufige Verfahren als äußerst behäbig. So wurde zwar bereits per Entschließung des Europäischen Parlaments vom 12. September 2018 ein Verfahren nach Art. 7 Abs. 1 EUV gegen Ungarn eingeleitet,[110] das aber bloß den Rat zur Feststellung aufforderte, dass die eindeutige Gefahr einer schwerwiegenden Verletzung der in Art. 2 EUV genannten Werte besteht. Dem ist der Rat bisher jedoch nicht nachgekommen.[111] Die Feststellung, dass nunmehr tatsächlich eine schwerwiegende und anhaltende Verletzung dieser Werte besteht, würde letztendlich nach Art. 7 Abs. 2 EUV eine einstimmige Entscheidung (ohne den betreffenden Mitgliedstaat)[112] im Europäischen Rat erfordern,[113] der darauffolgende Stimmrechtsentzug nach Art. 7 Abs. 3 EUV eine qualifizierte Mehrheit im Rat. Obgleich es bereits vereinzelt Meldungen

108 Siehe etwa Sonja Priebus und Ellen Bos, 'Die ungarische Ratspräsidentschaft 2024: Zwischen permanenten politischen Konflikten und professioneller inhaltlicher Arbeit', Südosteuropa Mitteilungen (2025), 59-76; Müller und Slominski (Fn. 64); Patrick Müller und David Gazsi, 'Populist Capture of Foreign Policy Institutions: The Orbán Government and the De-Europeanization of Hungarian Foreign Policy', J. Common Mkt. Stud. 61 (2023), 397-415; Claudia Wiesner, 'Der Krieg gegen die Ukraine – eine Neuordnung Europas?', integration 45 (2022), 322-333 (326 ff.).

109 Müller und Slominski (Fn. 64), 111 ff.

110 Europäisches Parlament, Entschließung zu einem Vorschlag, mit dem der Rat aufgefordert wird, im Einklang mit Artikel 7 Absatz 1 des Vertrags über die Europäische Union festzustellen, dass die eindeutige Gefahr einer schwerwiegenden Verletzung der Werte, auf die sich die Union gründet, durch Ungarn besteht, 2017/2131(INL), 12. September 2018.

111 Helene Hayden, 'Art. 7' in: Thomas Jaeger und Karl Stöger (Hrsg.), *Kommentar zu EUV/AEUV* (Manz 2024), EUV Rn. 42.

112 Siehe Art. 7 Abs. 5 EUV i. V. m. Art. 354 AEUV.

113 Wobei hier je nach politischer Lage Gegenstimmen zu erwarten sind.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

darüber gibt, dass die Mitgliedstaaten nunmehr langsam ihre Geduld mit Ungarn verlieren,[114] erscheint ein Stimmrechtsentzug unter diesen verfahrensrechtlichen Bedingungen jedenfalls noch immer nicht als realistisch – vor allem auch im Hinblick auf die Abwahl der Orbán-Regierung im April 2026 und die Hoffnung auf Besserung der Lage im Land.

Zweitens ist die Durchführung eines solchen Verfahrens auch inhaltlich politisch höchst aufgeladen, was freilich mit den erschwerten verfahrensrechtlichen Vorgaben einhergeht. Da es sich um das eingriffsintensivste Mittel des Unionsrechts handelt, ist es – gerade im Hinblick darauf, dass auch im laufenden Verfahren gegen Ungarn bisher keine weiteren Schritte unternommen wurden – äußerst unwahrscheinlich, dass die anderen Mitgliedstaaten diese auch wirklich einmal zu Ende führen (wollen). Die sogenannte „nuklearere Option" des Art. 7 EUV ist damit wohl endgültig zu einer bloßen „Gesprächsrunde" geworden.[115] In diesem Sinne würde dieses Verfahren auch wenig zur sicherheits- und verteidigungspolitischen Resilienz der Union beitragen, wenn man es bei außenpolitischen Meinungsverschiedenheiten, gepaart mit dem Vorhandensein schwerwiegender und anhaltender Verletzungen der Unionswerte in einem Mitgliedstaat, ständig heranziehen müsste, um dem betreffenden Mitgliedstaat seine Stimmrechte zu entziehen.

3. Aus- und Umwege unterhalb des Primärrechts

Die aktuelle Praxis zeigt, dass gerade auch Rechtsentwicklungen unterhalb des Primärrechts zu Aspekten der Resilienzsteigerung *qua* Integration führen können, ohne dass dadurch eine Änderung der Unionsverträge bzw. ein Übergang vom intergouvernementalen zum supranationalen Handlungs- und Entscheidungsmodus stattfindet.[116] Die folgenden Beispiele, die keine Vollständigkeit beanspruchen, sollen daher kurz demonstrieren, wie das zentrale Hindernis der sicherheits- und verteidigungspolitischen Resilienz der Union – das Einstimmigkeitsprinzip – ebenso kreativ durch den Erlass diverser Rechtsakte zumindest im Ansatz besser gehandhabt werden kann.

114 Sandor Zsiros, 'EU Countries "Losing Patience" as Hungary Grilled on Pride March and Rule of Law', Euronews, 27 May 2025, <https://www.euronews.com/my-europe/2025/05/27/eu-countries-losing-patience-as-hungary-grilled-on-pride-march-rule-of-law>, zuletzt besucht 13. Januar 2026.

115 Siehe Ramona Coman und Pauline Thinus, 'Article 7 TEU on the Agenda of the Council's Rotating Presidency: Still a "Nuclear Option" or Rather "a Talking Shop"?' in: Ramona Coman und Vivien Sierens (Hrsg.), *EU Council Presidencies in Times of Crises* (Palgrave Macmillan 2024), 265-300.

116 von Achenbach, *Europäisierte Verteidigung* (Fn. 57), 20.

 DOI 10.17104/0044-2348-2026-3-837

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

a) Verteidigungsagentur und Ständige Strukturierte Zusammenarbeit

Die primärrechtlich angelegten, aber sodann darunter auf Grundlage von Gemeinsamen Aktionen bzw. Beschlüssen operierenden Einrichtungen der Europäischen Verteidigungsagentur (EVA) (Art. 45 EUV) und der Ständigen Strukturierten Zusammenarbeit (SSZ)[117] (Art. 46 EUV) können der Union und den Mitgliedstaaten grundsätzlich mehr sicherheits- und verteidigungspolitische Resilienz verleihen. So unterstützt die EVA kooperative europäische Verteidigungsprojekte,[118] während die SSZ zu einer Interoperabilität im Wehrbereich und Synchronisierung der nationalen Streitkräftestrukturen führen soll.[119] Beide sollen damit einen Beitrag zu einer besseren Verteidigungsfähigkeit der Union im Ganzen leisten.

Ein klarer Vorteil beider Konstruktionen ergibt sich daraus, dass weder die Verteidigungsagentur noch die SSZ den Hemmungen des Einstimmigkeitsprinzips unterliegen, da – und hier kommt der gleichzeitige Nachteil zum Vorschein – die Teilnahme an beiden freiwillig ist.[120] Abgefedert wird dieser Nachteil zwar durch die Tatsache, dass zurzeit alle Mitgliedstaaten an der Arbeit der Verteidigungsagentur teilnehmen[121] bzw. sich alle Mitgliedstaaten bis auf Malta an der SSZ beteiligen,[122] doch ist ein späteres Ausscheiden einzelner Mitgliedstaaten und eine damit einhergehende Reduktion der unionalen Gesamtresilienz nicht ausgeschlossen.

Aus der Perspektive einer angestrebten erhöhten sicherheits- und verteidigungspolitischen Resilienz der Union sind sowohl die Einrichtung der EVA als auch jene der SSZ zu begrüßen. So ist die EVA organisationsrechtlich tief in die Unionsstrukturen eingebettet, womit sie eng mit dem Militärstab, dem

117 In der relevanten Literatur bzw. im Beschluss selbst findet sich dafür auch das englische Akronym "PESCO" für "Permanent Structured Cooperation".

118 Siehe Gemeinsame Aktion 2004/551/GASP v. 12. Juli 2004 über die Einrichtung der Europäischen Verteidigungsagentur, ABl. L 245/17, zuletzt wesentlich geändert durch Beschluss 2015/1835/GASP v. 12. Oktober 2015 über die Rechtsstellung, den Sitz und die Funktionsweise der Europäischen Verteidigungsagentur, ABl. L 266/55.

119 Siehe Beschluss 2017/2315/GASP v. 11. Dezember 2017 über die Begründung der Ständigen Strukturierten Zusammenarbeit (PESCO) und über die Liste der daran teilnehmenden Mitgliedstaaten, ABl. L 331/57.

120 Siehe Art. 45 Abs. 2 S. 1 EUV bzw. Art. 46 Abs. 1 EUV. Im Hinblick auf die SSZ ist zudem zu erwähnen, dass nach ihrer Begründung für weitere Beschlussfassungen im Rat wiederum Einstimmigkeit gilt (Art. 46 Abs. 6 EUV) und die damit einhergehenden Einschränkungen nicht gänzlich abgelegt werden können.

121 Siehe Website der Europäischen Verteidigungsagentur, <https://eda.europa.eu/>, zuletzt besucht 13. Januar 2026.

122 Siehe Art. 2 des SSZ-Beschlusses (Fn. 119) sowie Beschluss (GASP) 2023/1015 des Rates vom 23. Mai 2023 zur Bestätigung der Beteiligung Dänemarks an der SSZ und zur Änderung des Beschlusses (GASP) 2017/2315 über die Begründung der Ständigen Strukturierten Zusammenarbeit (SSZ) und über die Liste der daran teilnehmenden Mitgliedstaaten, ABl. L 136/73.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

EU-Militärausschuss und der Kommission verbunden ist sowie dem Rat und den Verteidigungsministerien der Mitgliedstaaten zuarbeitet, die im Rahmen des EVA-Lenkungsausschusses zwei Mal jährlich zusammentreten.[123] Insgesamt hat sie mit ihren Maßnahmen für eine substanzielle Verbesserung der Fähigkeiten der Mitgliedstaaten beigetragen.[124] Dennoch benötigt sie weiterhin eine erhöhte Wirksamkeit in ihrer Interaktion mit den Mitgliedstaaten, da sowohl die Harmonisierung der verwendeten Waffensysteme als auch eine einheitliche militärische Ausbildung noch immer fehlen.[125] Ebenso ist die Bilanz der SSZ als durchwachsen zu bewerten: Zwar befinden sich zurzeit 75 sicherheits- und verteidigungsrelevante Projekte in der Entwicklungsphase,[126] doch bleibt ihr Erfolg davon abhängig, ob und wie weit sich die Mitgliedstaaten in ihrem Rahmen engagieren. Denn es sind letztlich die Mitgliedstaaten, welche Strukturreformen ihrer Streitkräfte umsetzen können, was unional aber nur koordiniert und angeleitet werden kann.[127]

b) Kommissar für Verteidigung und Raumfahrt

Dementsprechend rechtlich interessanter und realpolitisch effektiver für die unionale Resilienz scheinen die neuartigen Finanzierungsmöglichkeiten und Regeln im Bereich des Binnenmarktes und zur Stärkung der industriellen Wettbewerbsfähigkeit zu sein, welche ich in den folgenden Unterabschnitten besprechen werde. Dies umso mehr, als die Union keine genuine Rechtsetzungskompetenz im Bereich der Sicherheits- und Verteidigungspolitik besitzt und Art. 4 Abs. 2 EUV bzw. Art. 346 Abs. 1 AEUV weiterhin die Unberührtheit der nationalen Sicherheit bzw. der wesentlichen Sicherheitsinteressen der Mitgliedstaaten gegenüber dem Unionsrecht betonen. Womöglich ist es daher richtig, dass die Mitgliedstaaten in der weiteren Entwicklung ihrer militärischen Fähigkeiten durch die nun zu besprechenden Initiativen durchaus einen Teil ihrer Unabhängigkeit verloren haben,[128] doch lässt sich gleich-

123 Werner Kaufmann-Bühler, 'Art. 45 EUV' in: Eberhard Grabitz, Meinhard Hilf und Martin Nettesheim (Hrsg.), *Das Recht der Europäischen Union* (87. Ergänzungslieferung, C. H. Beck 2026), Rn. 22.

124 Hubert Isak, 'Art. 45 EUV' in: Thomas Jaeger und Karl Stöger (Hrsg.), *Kommentar zu EUV/AEUV* (Manz 2020), Rn. 21.

125 Siehe Isak (Fn. 124), Rn. 21; Kaufmann-Bühler (Fn. 123), Rn. 22.

126 Siehe Website der SSZ unter dem Reiter 'Projects', <https://www.pesco.europa.eu/>, zuletzt besucht 13. Januar 2026.

127 Thym (Fn. 88), Rn. 69.

128 So etwa Tine Elisabeth Brøgger, 'A "Europe of Defence"? The Establishment of Binding Commitments and Supranational Governance in European Security and Defence', Rev. D'intégration Eur. 47 (2025), 403-422 (404).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

zeitig argumentieren, dass diese in den letzten Jahren erlassenen Rechtsakte nicht direkt auf die nationale Sicherheit der Mitgliedstaaten abzielen, sondern vielmehr auf die nationale Sicherheit der Ukraine, und indirekt auf die Sicherheit (und damit Resilienz) der Union als Ganzes.[129]

Politisch verantwortlich ist dafür auf unionaler Ebene vorrangig *Andrius Kubilius*, der seit 1. Dezember 2024 amtierende erste Kommissar für Verteidigung und Raumfahrt. Dass es jetzt erstmals einen Kommissar mit dem Portfolio „Verteidigung" gibt, spricht dafür, dass die Union nunmehr erkannt hat, dass sie mit einer völlig neuen geopolitischen Realität konfrontiert ist und dementsprechend ihre sicherheits- und verteidigungspolitische Resilienz steigern muss, vor allem durch eine gewachsene Stellung der Kommission in der GSVP. Dies geschieht insbesondere auf Grundlage zweier Elemente, und zwar auf Grundlage von durch die Kommission initiierten Rechtsakten im Bereich (i) neuer Finanzierungsansätze und (ii) der Stärkung der eigenen unionalen Verteidigungsindustrie.[130] Betrachten wir nun also die beiden Punkte genauer, wobei zu beachten ist, dass diese komplementär angelegt sind und sich Rüstungsfinanzierung und Marktintegration gegenseitig ergänzen.[131]

c) Neue Finanzierungsansätze

Das allgemeinste Instrument der neuen unionalen Rüstungsfinanzierung findet sich in Gestalt des *Europäischen Verteidigungsfonds*,[132] der bereits seit 2021 zur Finanzierung der Rüstungsentwicklung auf Grundlage der Industriepolitik (Art. 173 Abs. 3 AEUV) und der Verteidigungsforschung (Art. 182 Abs. 4, Art. 183 und Art. 188 Abs. 2 AEUV) beiträgt. Der Fonds kann durch die geplante Integration der Mitgliedstaaten in einem gemeinsamen „Verteidigungsbinnenmarkt" in Forschung und Produktion durchaus als resilienzfördernd betrachtet werden,[133] zumal die betreffende Verordnung auf Basis der genannten Bestimmungen mit qualifizierter Mehrheitsentschei-

129 Ramses A. Wessel, 'The Progressive Framing of a Common Defence Policy', EU Law Live, 8. September 2025, <https://eulawlive.com/op-ed-the-progressive-framing-of-a-common-defence-policy/>, zuletzt besucht 13. Januar 2026.

130 Daniel Calleja, 'The Impact of War on EU Law and Policy' in: Inge Govaere, Sacha Garben und Eleanor Spaventa (Hrsg.), *The Impact of War (in Ukraine) on the EU* (Hart Publishing 2024), 303-312 (309 f.).

131 Siehe von Achenbach, *Europäisierte Verteidigung* (Fn. 57), 163 f.

132 VO 2021/697/EU v. 29. April 2021 zur Einrichtung des Europäischen Verteidigungsfonds und zur Aufhebung der Verordnung (EU) 2018/1092, ABl. L 170/149.

133 Siehe statt vieler Ester Sabatino, 'The European Defence Fund: A Step Towards a Single Market for Defence?', Rev. D'intégration Eur. 44 (2022), 133-148.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

dung im Rat erging.[134] Die gewählte Vorgangsweise zur Einrichtung des Verteidigungsfonds ist sowohl aus rechtlicher als auch resilienzspezifischer Sicht äußerst interessant, da das Unionsrecht bekanntermaßen weder über eine verteidigungspolitische Kompetenznorm verfügt noch zur Finanzierung „von Maßnahmen mit militärischen oder verteidigungspolitischen Bezügen" (Art. 41 Abs. 2 UAbs. 1 EUV) ermächtigt ist. Der Umweg über die Kompetenzgrundlagen[135] der Industriepolitik bzw. der Forschungsförderung ist demgemäß als kreative Lösung zur Resilienzsteigerung außerhalb der intergouvernementalen GASP/GSVP zu betrachten,[136] obgleich dies im Hinblick auf eine dadurch mögliche Erosion der primärrechtlichen Haushaltsregeln durchaus auch kritisch zu betrachten ist.[137]

Ähnlich – jedoch gestützt auf diverse GASP-Bestimmungen – dient die sogenannte *Europäische Friedensfazilität*[138] von 2021 der Finanzierung von militärischen und verteidigungspolitischen Maßnahmen, konkret von Waffenlieferungen an die Ukraine. Durch diese Umlagefinanzierung werden die zu zahlenden Anteile der Mitgliedstaaten nach ihrer volkswirtschaftlichen Leistungsfähigkeit berechnet, was das ansonsten häufig schwerfällige Zustandekommen des notwendigen Konsenses im Rat befördert.[139] Problematisch erwies sich hier die stets drohende ungarische Blockadehaltung hinsichtlich der Mittelauszahlungen an die Ukraine sowie der Vorwurf, dass sich die Friedensfazilität als haushaltsexternes Instrument der politischen Kontrolle des Europäischen Parlaments entziehe.[140] Ergänzt wird die allgemeine Friedensfazilität erstens durch die sogenannte *Ukraine-Fazilität*,[141] welche – gestützt auf Art. 212 AEUV und damit die primärrechtliche Kompetenzgrundlage zur Rechtsetzung im Bereich der wirtschaftlichen, finanziellen und technischen Zusammenarbeit mit Drittländern – die weitere finanzielle Unterstützung der Ukraine koordiniert und effizient in einem einzigen Instrument zusammen-

134 Siehe Art. 16 Abs. 3 EUV.

135 Zur fortschreitenden Supranationalisierung der GSVP, siehe auch ausführlicher Armin Steinbach, 'The Supranational Turn of EU Defence Policy', CML Rev. 62 (2025), 1635-1674.

136 Welche jedoch nicht immer unkritisch hingenommen wird, wie das noch anhängige Organstreitverfahren 2 BvE 9/21 einer Bundestagsfraktion gegen die Zustimmung der Bundesregierung zu dieser Verordnung zeigt.

137 Für eine ausführliche Analyse, siehe von Achenbach, *Europäisierte Verteidigung* (Fn. 57), 167 ff.

138 Beschluss 2021/509/GASP v. 22. März 2021 zur Einrichtung einer Europäischen Friedensfazilität und zur Aufhebung des Beschlusses (GASP) 2015/528, ABl. L 102/14.

139 von Achenbach, *Europäisierte Verteidigung* (Fn. 57), 188 f.

140 Jannika Jahn, 'Art. 41 EUV' in: Eberhard Grabitz, Meinhard Hilf und Martin Nettesheim (Hrsg.), *Das Recht der Europäischen Union* (87. Ergänzungslieferung, C. H. Beck 2026), Rn. 28.

141 VO 2024/792/EU v. 29. Februar 2024 zur Einrichtung der Fazilität für die Ukraine, ABl. L 2024/792.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

führt; sowie zweitens durch den in diesem Rahmen operierenden Kooperationsmechanismus bei Darlehen und außerordentlicher Makrofinanzhilfe.[142] Diese Rechtsgrundlage ist aufgrund der damit möglichen qualifizierten Mehrheitsentscheidung im Rat aus Perspektive des Resilienzaufbaus geschickt gewählt, aufgrund des militärischen Charakters der Zusammenarbeit jedoch dogmatisch jedenfalls nicht ganz sauber, weil der Zweck von Art. 212 AEUV die entwicklungspolitische Zusammenarbeit mit Drittländern ist.[143] Gespeist werden diese Finanzhilfen zum Teil auch aus unerwarteten und außerordentlichen Einnahmen, die sich durch Zinserträge von immobilisierten Vermögenswerten der russischen Zentralbank ergeben.[144] Diese Vorgangsweise erweist sich somit durch die Nutzung der sich aus dem Vermögen des Aggressors ergebenden finanziellen Gewinne zugunsten des Opfers aus zweifacher Hinsicht als sicherheits- und verteidigungspolitisch resilient, wobei die hierfür gewählte Rechtsgrundlage innerhalb der GASP unproblematisch ist.

d) Binnenmarktregelungen und Industriepolitik

Wie bereits erwähnt sind neue Finanzierungsansätze und die Stärkung der unionalen Rüstungsindustrie über Regelungen des Binnenmarktes im weiteren Sinne eng miteinander verzahnt. So wurden in den letzten Jahren zahlreiche Gesetzgebungsakte erlassen, um die Reaktionsfähigkeit der technologischen und industriellen Basis der europäischen Verteidigung „European Defence Technological and Industrial Base" (EDTIB) zu stärken, so etwa durch die sogenannte *ASAP*-Verordnung zur Förderung der Munitionsproduktion,[145] welche – gestützt auf Art. 114 und Art. 173 Abs. 3 AEUV – durch finanzielle Unterstützungsinstrumente die rechtzeitige Verfügbarkeit von maßgeblichen Verteidigungsgütern sicherstellen sollte. Als kurzfristig angelegte Maßnahme ist die Verordnung inzwischen am 30. Juni 2025 außer Kraft getreten und in längerfristig angelegten Programmen aufgegangen.

142 VO 2024/2773/EU v. 24. Oktober 2024 zur Einrichtung des Kooperationsmechanismus bei Ukraine-Darlehen und zur Bereitstellung einer außerordentlichen Makrofinanzhilfe für die Ukraine, ABl. 2024/2773.

143 Marcus Klamert und Stefan Mayr, 'Auswärtiges Handeln' in: Marcus Klamert (Hrsg.), *Europarecht: Jahrbuch 2025* (Neuer Wissenschaftlicher Verlag im Verlag Österreich 2025), 423-442 (440).

144 Siehe Beschluss 2024/577/GASP v. 12. Februar 2024 zur Änderung des Beschlusses 2014/512/GASP über restriktive Maßnahmen angesichts der Handlungen Russlands, die die Lage in der Ukraine destabilisieren, ABl. L 2024/577; Beschluss 2024/1471/GASP v. 21. Mai 2024 über die Zuweisung der Beträge des Finanzbeitrages zur Europäischen Friedensfazilität gemäß dem Beschluss (GASP) 2024/1470, ABl. L 2024/1471.

145 VO 2023/1525/EU v. 20.Juli 2023 zur Förderung der Munitionsproduktion (ASAP [Act on Supporting Ammunition Production]), ABl. L 185/7.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Ebenso auf Art. 173 Abs. 3 AEUV beruht die sogenannte *EDIRPA*-Verordnung zur Stärkung der europäischen Verteidigungsindustrie durch gemeinsame Beschaffung,[146] wobei die gewählte Rechtsgrundlage nicht näher erläutert wird. Lediglich Erwägungsgrund 13 der Verordnung erwähnt kurz, dass es in Anbetracht der aktuellen geopolitischen Herausforderungen und des damit verbundenen Strukturwandels notwendig ist, die Anpassung der Produktionskapazitäten der EDTIB zu beschleunigen, im Einklang mit Art. 173 AEUV ihre Wettbewerbsfähigkeit und Effizienz zu steigern und so zur Stärkung und Reform der Kapazitäten der Verteidigungsindustrie der Mitgliedstaaten beizutragen.[147]

Die sogenannte *SAFE*-Verordnung zur Stärkung der europäischen Verteidigungsindustrie[148] hingegen wurde auf Art. 122 AEUV gestützt, welcher als Kompetenzgrundlage für Maßnahmen fungiert, die „im Geiste der Solidarität zwischen den Mitgliedstaaten" dann notwendig sind, wenn „gravierende Schwierigkeiten in der Versorgung mit bestimmten Waren" auftreten (Abs. 1). Auch hier sei angemerkt, dass die Wahl dieser Kompetenzgrundlage für den verfolgten Zweck wohl nicht unumstritten bleiben und in Zukunft sicherlich die Frage aufwerfen wird, inwiefern das Prinzip der begrenzten Einzelermächtigung noch gilt oder ob man, angesichts der Besonderheiten der Union als zunehmend eigenständig auftretender politischer Akteurin, mit einer konstitutionelleren Betrachtungsweise der Union ein weiteres Verständnis von Kompetenzen anlegen muss.[149] Die Wahl der zu verwendenden Kompetenzgrundlagen im Bereich der internen Politiken mag im Sinne einer erhöhten sicherheits- und verteidigungspolitischen Resilienz der Union durchaus klug gewesen sein; kompetenzrechtlich verbleiben hier freilich noch Fragen für weitere Forschung.

IV. Schlussfolgerungen

Die Union und ihre Mitgliedstaaten scheinen die Zeichen der Zeit zumindest im Ansatz erkannt zu haben und versuchen mit den ihnen zur Verfügung

146 VO 2023/2418/EU v. 18.Oktober 2023 über die Einrichtung eines Instruments zur Stärkung der europäischen Verteidigungsindustrie durch gemeinsame Beschaffung (EDIRPA [European Defence Industry through Common Procurement]), ABl. L 2023/2418.

147 Markus Senn, 'Art. 173 AEUV' in: Thomas Jaeger und Karl Stöger (Hrsg.), *Kommentar zu EUV/AEUV* (Manz 2025), Rn. 42/1.

148 VO 2025/1106/EU v. 27. Mai 2025 zur Festlegung des Instruments "Sicherheitsmaßnahmen für Europa (SAFE [Security Action for Europe])" durch die Stärkung der europäischen Verteidigungsindustrie, ABl. L 2025/1106.

149 Ich danke den Gutachter:innen für diesen Hinweis.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

stehenden Mitteln der russischen Aggression und den US-amerikanischen Drohungen entgegenzuwirken und damit ihre eigene Resilienz zu stärken. Die von mir oben dargestellten Lösungsansätze und Instrumente haben teilweise auch das Potenzial, die GSVP langfristig zu einer noch engeren Verteidigungsunion auszubauen. Doch fehlt es noch immer am dafür notwendigen politischen Willen, die Union auch in einen ernstzunehmenden geopolitischen Akteur zu transformieren, da militärische Stärke auch weiterhin ein wesentlicher Faktor der internationalen Beziehungen bleiben wird. Ohne diese Stärke wird sich die EU in Sachen Krieg und Frieden mit der Rolle eines ohnmächtigen Spielzeugs im Wettkampf der Mächtigen innerhalb und außerhalb Europas zufriedengeben müssen[150] – und womit sie ihren eingeschlagenen Lebensweg zum Ende der Geschichte hin keineswegs weiterverfolgen kann.

Denn wenn, wie nunmehr Russland, weitere Aggressoren wie die USA das Völkerrecht beugen, manipulieren und geradezu mit Füßen treten, so ist jegliche Rede von einem weltweiten ewigen Frieden Kants und dem Ende der Geschichte im Sinne von Kojève-Fukuyama wohl nichts weiter als müßige Utopie. Die Vision von Hobbes' internationaler Anarchie absolut souveräner Staaten scheint obsiegt zu haben, während Kants Vernunftidee einer in Freundschaft verbundenen Welt von völkerrechtsfreundlichen Staaten im Rückzug begriffen ist – aber zumindest soweit noch in Europa in der Form der EU besteht. Auch im Sinne der sozialen Theorie der internationalen Beziehungen Alexander Wendts ist die Union als kantianische Insel in einem hobbesianischen Ozean zu verstehen,[151] die sich nur durch weitere Stärkung ihrer sicherheits- und verteidigungspolitischen Resilienz vor dem Untergang bewahren kann.

Summary: The EU's Path Toward a Resilient Security and Defence Policy

In the last couple of years, the world has undergone profound geopolitical changes in the shadow of Russia's war of aggression against Ukraine and the increasingly aggressive stance of the United States towards Europe and the

150 Dan Krause, 'Die Handlungsfähigkeit der Europäischen Union in der Außen- und Sicherheitspolitik' in: Dan Krause (Hrsg.), *Europäische Sicherheit: Die EU auf dem Weg zu strategischer Autonomie und Europäischer Verteidigungsunion?* (Verlag Barbara Budrich 2020), 13-36 (31).

151 Siehe Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press 1999), 246 ff.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

European Union. Kant's idea of a world united in friendship among states respectful of international law may still be valid for and within the EU and its Member States themselves, but outside of them, Hobbes' idea of the state of nature as an international anarchy seems to prevail. This article therefore examines how the Union, on the basis of its own legal order, can enhance its security and defence resilience in order to continue to exist and to make decision autonomously in a massively changed world. Without a genuine Union competence in the field of defence, this might only possible through a skillful, primary law-compliant handling of the unanimity principle, or through secondary law detours and adaptations in other, defence-related areas of competence.

Keywords

resilience – CFSP – CDSP – unanimity – neutrality – strategic autonomy

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Participation as an Obligation? Rethinking Investment Practices Through the Right to Development

Muhammad Asif Khan*
Centre for Human Rights Erlangen-Nuremberg (CHREN),
Friedrich Alexander University-Erlangen Nuremberg, Nuremberg, Germany
ursasifkhan@yahoo.co.uk; *asif.khan@fau.de*

Abstract 869
Keywords 870
I. Introduction 870
II. Reframing Development in International Investment Law 873
1. Participation as an Obligation? 876
2. From Protection to Participation: Embedding Participation in Investment Governance 879
3. From Consultation to Participation: Embedding the Right to Development in Impact Assessments 881
III. Reorienting Investment Law Through Public Participation: A Participatory Impact Assessment Model 883
1. Access to Information as a Right and a Precondition for Participation 886
2. Embedding Community Consent in Investment Decision-Making 889
3. Legal Remedies for Denied Participation 892
IV. Conclusion 894

Abstract

This article explores how the Right to Development can serve as a normative and procedural framework for reorienting International Investment Law (IIL) toward greater human rights compliance. Focusing on the foundational principle of the Right to Development, i. e. public participation, it proposes a Right to Development-based impact assessment model aimed at reshaping investment practices to better reflect the interests and agency of affected communities. Drawing on legal instruments from international environmental law, particularly the Aarhus Convention and the Escazú Agreement, the article highlights how existing procedural guarantees

* Visiting Research Fellow, Centre for Human Rights Friedrich Alexander University-Erlangen Nuremberg (CHREN); Associate Professor, NUST Law School, National University of Science and Technology Islamabad.

DOI 10.17104/0044-2348-2026-3-869 ZaöRV 86 (2026), 869-896

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

can inform and strengthen participatory obligations in the investment context. The proposed framework elevates non-binding concepts such as the Social License to Operate into enforceable obligations grounded in international law. The framework is particularly relevant in high-risk, resource-intensive sectors, where the lack of community participation has exacerbated rights violations.

Keywords

Business and Human Rights – Human Rights Law – Investment Law and Human Rights – Public Participation – Right to Development

I. Introduction

Economic development and human rights are often portrayed as competing objectives. In international economic governance, development has frequently equated with economic growth, foreign investment and the expansion of markets, whereas human rights are viewed as external constraints capable of limiting these objectives. This tension is particularly evident in IIL, where state measures adopted to protect the environment or the rights of affected communities have often been viewed as constraints on investor protection and economic development.[1] This opposition is neither inevitable nor conceptually necessary. Economic development ultimately aims to promote human well-being, while the effective enjoyment of human rights often depends upon a certain degree of economic security and material prosperity. As *Franklin Roosevelt* aptly noted 'true individual freedom cannot exist without economic security and independence. Necessitous men are not free men'.[2] However, while economic development remains a vital component of human development, it is not, by itself, a sufficient condition. Economic

1 See Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009); Lorenzo Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (Routledge 2012); Surya Deva and Tara Van Ho, 'Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism', The Journal of World Investment & Trade 24 (2023), 398-436; See also ICSID, *Bear Creek Mining Corporation v. Peru*, award of 30 November 2017, case no. ARB/14/21, concerning community opposition to a mining project.

2 Franklin Delano Roosevelt, Message to Congress on the State of the Union (11 January 1944), <https://www.fdrlibrary.org/fr/address-text?utm>, last access 23 June 2026.

 DOI 10.17104/0044-2348-2026-3-869

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

development that is not aligned with human rights standards fails to protect the basic freedoms of individuals.[3] Therefore, development must be understood as a multidimensional process encompassing economic, social, political, and cultural dimensions, all of which should respect and promote human rights.

The Declaration on the Right to Development and the Draft Covenant on the Right to Development (Draft Covenant) adopted by the Human Rights Council provide a normative framework for this multidimensional understanding of development.[4] Although the Draft Covenant is not a binding instrument, it draws heavily upon existing obligations under international human rights and environmental law, including the right to self-determination, and seeks to provide greater procedural clarity for the implementation of these obligations in development processes. In this setting, the Draft Covenant offers a possible starting point for aligning IIL more closely with International Human Rights Law (IHRL). Building on this premise, the article explores how public participation, one of the procedural guarantees embedded within the Right to Development framework, can reshape and inform investment practices (mainly stakeholder consultations) in order to strengthen human rights compliance in transnational economic activity. In particular, Article 21 of the Draft Covenant calls for the establishment and implementation of legal frameworks for human rights and environmental impact assessments. Building on this provision, the article proposes the integration of public participation into impact assessment, due diligence and project approval processes, thereby giving greater normative content to, and complementing, existing non-binding concepts such as the Social License to Operate.[5]

Although concepts such as the Social License to Operate have gained prominence in investment practice, they remain largely non-binding and lack a coherent legal foundation within International Investment Law.[6] This arti-

3 See Amartya Sen, *Development as Freedom* (Oxford University Press 1999).

4 UNGA Res 41/128 of 4 December 1986, A/RES/41/128; United Nations Human Rights Council, Draft International Covenant on the Right to Development of 4 September 2023, with commentaries A/HRC/54/50/Add.1. The draft covenant is currently debated at the UN General Assembly.

5 See e. g. Temple Stoellinger, Steven Smutko and Jessica M. Western, 'Collaboration Through NEPA: Achieving a Social License to Operate on Federal Public Lands', Public Land and Resources Law Review 39 (2018), 203-252 (203, 210); Karin Buhmann, 'Public Regulators and CSR: The Social Licence to Operate', Journal of Business and Ethics 136 (2016), 699-714 (699).

6 Leila Choukroune and Lorenzo Cotula, '"Local Communities" and the Development Conundrum: Where International Investment Law Meets Human Rights and Businesses', Business & Human Rights Journal 9 (2024), 270-293.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

cle does not contend that contemporary IIL already imposes a general obligation of public participation derived from the Right to Development. Rather, it proceeds from the observation that participatory rights and procedural guarantees are recognised across human rights and environmental regimes in specific contexts. Building upon these developments, as well as the Declaration on the Right to Development and the Draft Covenant, the article argues that participation should assume a more central role in development processes and examines how this understanding may inform future investment practices and impact assessment processes.

Against this backdrop, the article proposes a Right to Development-based impact assessment framework, anchored primarily in one of its core principles, i. e. public participation. This component is selected not only for its centrality to the Right to Development, but also for its procedural specificity and direct applicability to investment-related decision-making. Public participation emphasises the active, free, and meaningful involvement of affected communities – particularly those that are structurally vulnerable, such as indigenous populations and informal workers in sectors like mining and industrial agriculture.[7] While other Right to Development principles – such as equality, equitable resource distribution, and self-determination – remain foundational, public participation offers a concrete procedural mechanism through which development outcomes can be shaped by those most impacted. This approach also directly addresses one of the most persistent shortcomings of contemporary investment governance, i. e. the exclusion of rightsholders from substantive engagement. By legally grounding public participation within a Right to Development framework, the proposed model gives normative weight to the currently non-binding practise of Social License to Operate. In doing so, it helps translate community legitimacy from a discretionary business practice into a rights-based practise, aligned with the state responsibility to protect and corporate responsibility to respect human rights.[8] Ultimately, the integration of this component offers a targeted and actionable pathway for reconciling development imperatives with human rights protection in the context of foreign investment.

Given that the Draft Covenant is currently under consideration by the United Nations General Assembly and has not yet acquired binding force, this article explores how its participatory framework could inform invest-

7 Choukroune and Cotula (n. 6).

8 See, Human Rights Council Report of 21 March 2011, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 [Hereinafter UNGPs].

 DOI 10.17104/0044-2348-2026-3-869

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

ment governance if eventually adopted. In doing so, it draws upon established practices of public participation developed under international environmental law, particularly the Aarhus Convention and the Escazú Agreement, to examine their application in the investment context.[9] The framework proposed here does not seek to provide an exhaustive model of implementation. Rather, it offers a conceptual basis for incorporating public participation into investment law, drawing upon existing legal standards, state practice, and scholarly literature. In doing so, it also seeks to provide greater normative content to existing non-binding concepts such as the Social License to Operate by linking them to rights-based approaches recognised in international law.[10]

The article is structured in two main parts. Part II outlines the normative foundations of the Right to Development and explains its relevance for rethinking investment law beyond traditional human rights approaches. Part III advances a participatory impact assessment framework grounded in the Right to Development, demonstrating how public participation – both as a procedural right and a development principle – can be operationalised to enhance the legitimacy, accountability, and human rights alignment of international investment practices. Part IV offers a conclusion.

II. Reframing Development in International Investment Law

International Investment Agreements (IIAs) are not inherently designed to uphold human rights of individuals and communities affected by investment activities or to ensure environmental protection.[11] Instead, their architecture is primarily geared toward protecting foreign investors. Contemporary IIAs emphasise guarantees such as protection against expropriation,[12] Fair and Equitable Treatment (FET), non-discrimination, and Most-Favoured-Nation (MFN) treatment – often backed by Investor-State Dispute Settlement

9 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, 2161 UNTS 447, 38 ILM 517 (entered into force 30 October 2001) (Aarhus Convention); Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean of 4 March 2018 (entered into force 21 April 2021) (Escazú Agreement).

10 See UNGPs (n. 8).

11 See Ilias Bantekas, 'The Human Rights and Development Dimension', Fla. J. Int'l. L. 31 (2020), 339-361.

12 See Kenneth Vandevelde, 'The Political Economy of a Bilateral Investment Treaty', AJIL 92 (1998), 621-641 (631).

DOI 10.17104/0044-2348-2026-3-869 ZaöRV 86 (2026)

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

(ISDS) mechanisms. These investor protections are reinforced by features of domestic legal systems that favour foreign investors, such as corporate restructuring,[13] and the principle of separate corporate legal personality.[14] The latter is further strengthened by private international law rules, which generally recognise and protect the separate corporate personality conferred under the law of incorporation, thereby compounding the legal asymmetries between investors and host communities.

While IIAs are often justified on the grounds that they promote economic development – particularly through attracting Foreign Direct Investment (FDI),[15] there is no conclusive empirical evidence demonstrating a causal relationship between IIAs and increased FDI, let alone improvements in domestic governance or human rights protection.[16] The investment law regime has not even demonstrated a positive impact on domestic governance within developing countries.[17] In fact, the concept of development within the investment law regime has been largely marginalised, often overlooked by states, arbitral tribunals, and national legal systems.[18] Even where arbitral tribunals have acknowledged development, such as requiring a contribution to economic development for an investment to qualify

13 Xuan Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law', JIEL 24 (2021), 157-179 (174). Corporate restructuring refers to the legal reorganisation of a corporate entity, for example, by creating separate subsidiary companies for different projects or moving assets between jurisdictions. By confining high-risk projects to legally distinct, asset-poor subsidiaries, parent companies can exploit the 'corporate veil' to insulate themselves from the financial and legal consequences of human rights or environmental harms.

14 Shao (n. 13), 173-174. 'The principle of separate corporate legal personality is a foundational legal concept that treats a company (e. g., a subsidiary or parent corporation) as a distinct "person" in the eyes of the law, separate from its owners, shareholders, and other companies in its corporate group. This legal separation, often referred to as the "corporate veil", allows complex corporate structures to shield ultimate owners and decision-makers from liability for harms caused by their overseas operations.

15 See e. g. Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022); See also Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (5th edn, Cambridge University Press 2021).

16 See e. g. Surbhi Gupta, Arun Kumar Attree, Ranjana Thakur and Vishal Garg, 'Interlinkages Between Bilateral Investment Treaties and FDI Flows to Emerging Economies: Evidence from BRICS', Journal of Advances in Management Research 21 (2024), 667-687; Josef C. Brada, Zdenek Drabek, Ichiro Iwasaki, 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis', Journal of Economic Surveys 35 (2021), 34-70; Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?', World Development 3 (2005), 1567-1585.

17 Jonathan Bonnitcha and Zoe P. Williams, 'The Impact of Investment Treaties on Domestic Governance in Developing Countries', L. & Pol'y 46 (2024), 140-169.

18 See Sonia E. Rolland, 'Considering Development in the Implementation of Panel and Appellate Body Reports', Trade, Law and Development 4 (2012), 150-199 (150).

 DOI 10.17104/0044-2348-2026-3-869

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

under an IIA,[19] the focus remains narrowly economic, ignoring the broader social, environmental, and cultural dimensions.[20] This reductionist approach not only undermines holistic conceptions of development but also facilitates the so-called 'race to the bottom', where states dilute labour, health, and environmental regulations to attract investment.[21] The result is often social harm without legal remedy, especially in Global South states, where communities are frequently excluded from investment decision-making and bear the brunt of resulting disruptions.[22]

Recent developments in ISDS have shown tentative recognition of human rights concerns. In *Urbaser v. Argentina*,[23] the tribunal affirmed that investment treaties must be interpreted in harmony with IHRL and admitted a counterclaim based on the state's duty to ensure access to water.[24] In *Bear Creek v. Peru*, the tribunal acknowledged the investor's failure to secure a Social License to Operate and reduced compensation accordingly.[25] Yet in both cases, these considerations were possible only due to discretionary procedural elements, such as the breadth of the treaty clause[26] or the state's willingness to raise a counterclaim,[27] and remain exceptions rather than the rule. Moreover, Social License to Operate, while a welcome reference to community legitimacy, lacks a clear legal definition or enforceable standards in current arbitral practice. Without a coherent framework, it risks becoming a fluid or tokenistic gesture rather than a tool for substantive accountability. If investment tribunals are to integrate concepts like Social License to Operate into legal reasoning, they must do so with reference to normative standards that ensure legal precision and procedural legitimacy.

This is where the Right to Development becomes critical. As reaffirmed in the Draft Covenant, the Right to Development provides a robust legal and normative foundation for reframing investment governance. It links development to the rights of affected populations – particularly their right to active,

19 ICSID, *Salini Costruttori S. p.A and Italstrade S. p.A v Kingdom of Morocco*, decision on jurisdiction of 31 July 2001, case no. ARB/00/4, para. 52 (Salini).

20 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012), 66-67.

21 José Manuel Álvarez Zárate, ALCA y TLC con Estados Unidos: La Agenda de Negociacion sus Costos y Beneficios Frente a los Intereses Nacionales (Universidad Externado de Colombia 2004), 257.

22 Deva and Van Ho (n. 1), 401.

23 ICSID, *Urbaser S. A. v. The Argentine Republic*, award of 8 December 2016, case no. ARB/07/26, para. 1200.

24 ICSID, *Urbaser* (n. 23).

25 ICSID, *Bear Creek* (n. 1).

26 ICSID, *Bear Creek* (n. 1).

27 ICSID, *Bear Creek* (n. 1).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

free, and meaningful participation.[28] Unlike isolated invocations of human rights in arbitral awards, the Right to Development offers a comprehensive framework that treats participation not as a policy preference but as a legal obligation.[29] The following section outlines the key features of the Right to Development framework and argues that it provides the most coherent legal pathway to integrate public participation – and by extension, concepts like Social License to Operate – into the normative core of IIL.

1. Participation as an Obligation?

The Right to Development emerged as a legal and political response to the structural imbalances of the international economic order. Initially conceived during the push for a New International Economic Order (NIEO) in the 1970s,[30] the Right to Development was a Global South-led initiative intended to secure greater control over economic resources and global economic decision-making.[31] Its original emphasis on state sovereignty – particularly over natural resources – reflected the broader post-colonial struggle for economic self-determination.[32] However, while state-centric at the outset, the Right to Development has evolved into a framework that prioritises people-centred development, anchored in the principles of active, free, and meaningful participation by rightsholders.[33]

The operational definition of the Right to Development, as articulated by Arjun Sengupta, aptly incapsulates development as the progressive realisation of all human rights, accompanied by economic growth that is consistent with human dignity and equality.[34] This definition shifts the original state-centric approach of the Right to Development toward a people-centred understand-

28 United Nations Human Rights Council, Draft Covenant (n. 4).

29 Human Rights Council, Right to Development in International Investment Law of 26 June 2023, A/HRC/54/82.

30 Margot E. Salomon, 'International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice' in: Bård A. Andreassen and Stephen P. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (2nd edn, Intersentia 2010), 121-148 (126).

31 Peter Uvin, 'From the Right to Development to the Rights-Based Approach: How "Human Rights" Entered Development', Development in Practice 17 (2007), 597-606.

32 Margot E. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice', ICLQ 62 (2013), 31-54 (33).

33 Salomon, 'From NIEO', (n. 32).

34 Study on the Current State of Progress in the Implementation of the Right to Development submitted by Mr. Arjun K. Sengupta, independent expert, pursuant to Commission Resolution 1998/72 and General Assembly Resolution 53/155 of 27 July 1999, E/CN.4/1999/WG.18/2, para 47.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

ing in which individuals and communities are both agents and beneficiaries of development. Economic progress, while important, is legitimate only insofar as it enhances the capabilities and freedoms of rightsholders.

Participation is central to this reformulated understanding. The UN Declaration on the Right to Development explicitly identifies 'active, free and meaningful participation' as a constituent element of development itself, not merely as an ancillary procedural safeguard.[35] The Draft Covenant on the Right to Development reinforces this principle by making it a substantive part of the document. Article 4(1) affirms the Right to Development as a distinct human right covering civil, political, economic, social, cultural, and environmental dimensions, and conditions development on respect for the full spectrum of human rights. Crucially, the Draft Covenant clarifies that participation is not discretionary, it is a legal requirement shaping both the process and outcomes of development.[36] The recognition of participation as both a right and a duty under the United Nations (UN) Declaration and the Draft Covenant reflects a shift from state-centric sovereignty towards a more participatory and community-oriented conception of development governance.[37]

Beyond its recognition in specific instruments, ensuring participation acquires binding force for states through their broader human rights obligations. Where states have committed to norms such as Free Prior and Informed Consent (FPIC) under International Labour Organization (ILO) Convention No. 169,[38] public participation under the Aarhus and Escazú Agreements,[39] and the protection of the right to self-determination under common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), the obligations in these instruments collectively demonstrate a broader recognition that procedural engagement with affected communities is an essential means of protecting human rights and environmental interests in development contexts. Especially, investment projects routinely affect land, livelihoods, cultural rights, and environmental integrity; the failure to secure meaningful participation systematically increases the risk of rights violations. The United Nations Guiding Principles on

35 UN Declaration on the Right to Development (n. 4).

36 See Preamble and Articles 3(b), 3(f), 4(2), 5, and 16(2)(b) of the United Nations Human Rights Council, Draft Covenant (n. 4).

37 See e. g. Nicolaas Schrijver, 'Self-Determination of Peoples and Sovereignty Over Natural Wealth and Resources' in: United Nations, *Realizing the Right to Development* (United Nations 2013), 95-102.

38 International Labour Organization (ILO), C169 – Indigenous and Tribal Peoples Convention of 27 June1989, No.169.

39 Aarhus Convention (n. 9); Escazú Agreement (n. 9).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Business and Human Rights (UNGPs) acknowledge this reality by operationalising participation narrowly through 'consultation' as part of the corporate Human Rights Due Diligence (HRDD) process, to be enforced by the states.[40] Against this backdrop, the Right to Development framework, offers a more comprehensive procedural model by treating participation as a foundational element of development processes. Because investment practices form part of broader development processes and investment-related decisions frequently affect rights protected under existing human rights and environmental regimes, states cannot discharge their obligation to protect human rights without embedding effective participation into investment governance. Participation thus emerges not as a voluntary best practice, but as a procedural obligation for states to reconcile investment governance with IHRL.

A clear jurisprudential illustration of meaningful participation can be explained through the landmark decision of the African Commission on human and people's rights in *Endorois v. Kenya*.[41] The case concerned a tourism and conservation project in which the Endorois community was evicted from its ancestral lands without being informed, consulted, or involved in decision-making. The Commission held that Kenya had violated Article 22 of the African Charter, which explicitly protects the Right to Development, precisely because the project proceeded without the community's 'active, free, and meaningful participation'.[42] Crucially, the Commission articulated the procedural content of participation, it stated that the affected communities must be engaged early, provided with full, accessible, and culturally appropriate information, consulted in good faith, and afforded real influence over project design, implementation, and benefit-sharing.[43] This decision demonstrates that, under the Right to Development, participation is not equivalent to passive consultation but constitutes a structured, enforceable procedural obligation, which is comprised of encompassing prior engagement, informed decision-making, and the substantive ability to shape outcomes. As such, *Endorois* provides an operational blueprint that participation must be a procedural part of any development or investment projects. Admittedly, the *Endorois* decision arose within the specific framework of

40 Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', (2011) A/HRC/17/31. See particularly principle 18.

41 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, <https://www.refworld.org/jurisprudence/caselaw/achpr/2010/71724>, last access 15 July 2026.

42 *Centre for Minority Rights Development (Kenya)*, (n. 41), para. 283.

43 *Centre for Minority Rights Development (Kenya)*, (n. 41), para. 290.

 DOI 10.17104/0044-2348-2026-3-869

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Article 22 of the African Charter, which expressly protects the right to development. Its findings cannot therefore be mechanically generalised beyond that context. Nevertheless, the decision is instructive because it illustrates how the broad requirement of 'active, free, and meaningful participation' can be translated into concrete procedural obligations.

2. From Protection to Participation: Embedding Participation in Investment Governance

While there is a substantial body of scholarly literature advocating for a Human Rights-Based Approach (HRBA) to investment law,[44] this discourse has largely been ineffective in achieving meaningful integration of human rights within the investment law framework.[45] Traditional HRBAs – grounded in the language of individual entitlements and state obligations – have often been reactive in nature,[46] addressing violations only after they occur, rather than proactively embedding rights into the legal architecture of development and investment governance.[47] As a result, these approaches have often amounted to external critiques of investment law rather than internal constraints that shape its design, approval processes, and dispute-resolution mechanisms.

In contrast, the Right to Development framework offers a more comprehensive and potentially effective paradigm, one in which public participation

44 A human rights-based approach to investment law requires the systematic integration of IHRL norms into the interpretation, application, and adjudication of investment obligations. It entails ensuring that investment decisions, whether made by states, arbitral tribunals, or corporate actors, are assessed in light of their human rights impacts, and that human rights considerations form part of the legal reasoning in investment disputes. See e. g. Pierre-Marie Dupuy, Petersmann and Francioni (n. 1); Ursula Kriebaum, 'Foreign Investments & Human Rights – The Actors and Their Different Roles', Transnational Dispute Management 10 (2013), 1-18.

45 See e. g. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003). Rajagopal argues that while there is a substantial body of literature advocating for a human rights-based approach to investment law, it has not been effective in practice due to entrenched power structures and the prioritisation of economic over social justice; For more recent approaches see Cotula, (n. 1); and Sonia E. Rolland, 'Are Investment Agreements Human Rights-Compatible? Toward Systemic Reconciliation', YHRDLJ 18 (2016), 181-217.

46 See Máire Braniff and Paul Hainsworth, 'A Human Rights Based Approach to Development' in: Gerard McCann and Stephen McCloskey (eds), *From the Local to the Global: Key Issues in Development Studies* (3rd edn, Pluto Press 2015), 39-56.

47 Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', HRQ 27 (2005), 755-829.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

is not merely a procedural add-on but a constitutive component of lawful development. It positions human rights not as external limitations on development, but as constitutive elements of development itself – shaping both its processes and outcomes.[48]

This paradigm shift is evident in the Right to Development's insistence that development be understood as a comprehensive process that is indivisibly linked to the realisation of all human rights.[49] Scholars such as *Arjun Sengupta* have argued that the Right to Development-based approach challenges the status quo by pushing for a reorientation of development priorities.[50] Rather than viewing development purely through an economic lens, the Right to Development-based framework insists that development must be assessed on its impact on human rights and human dignity.[51] This approach demands a normative shift, where the success of development initiatives is measured not just by economic growth but by their ability to enhance the realisation of human rights.[52] Within this model, public participation emerges as the procedural mechanism through which development decisions must be made, ensuring that communities are not only informed of investment projects but are able to influence their design, implementation, and benefit sharing.

Moreover, the Right to Development-based approach addresses the limitations of traditional human rights approaches in dealing with the complexities of global development. As Uvin has pointed out, while human rights frameworks are crucial, they often lack the capacity to address systemic inequalities embedded in global economic structures.[53] The Right to Development-based approach, by contrast, tends to confront these structural issues directly, advocating for the equitable distribution of the benefits of development and the dismantling of barriers that perpetuate inequality.[54] This is particularly relevant in the context of IIL, where investment agreements often prioritise economic interests or investor protection over social justice and human

48 See particularly Articles 10-12 of the United Nations Human Rights Council, Draft Covenant (n. 4).

49 Arjun Sengupta, 'The Right to Development as a Human Right', Economic and Political Weekly 27 (2001), 2527-2536.

50 See e. g. Arjun Sengupta, 'The Human Right to Development', Oxford Development Studies 32 (2004), 179-203.

51 Sengupta, 'Human Right' (n. 50).

52 Stephen P. Marks, 'The Human Right to Development: Between Rhetoric and Reality', Harvard Human Rights Journal 17 (2004), 137-168.

53 Peter Uvin, *Human Rights and Development* (Kumarian 2004).

54 Bhupinder S. Chimni, 'The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels', The Law and Development Review 1 (2008), Article 2, doi: 10.2202/1943-3867.1007.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

rights.[55] Participation is therefore not a subsidiary safeguard but the central procedural requirement through which development can be assessed as rights-enhancing. This procedural centrality of participation is particularly significant for international investment law, which has historically privileged investor interests and economic efficiency over distributive justice and community agency.

3. From Consultation to Participation: Embedding the Right to Development in Impact Assessments

As established in the previous sections, the Right to Development offers a holistic and participatory approach that can reorient IIL toward human rights and inclusive development. A key mechanism for embedding such a framework into investment governance is the Human Rights Impact Assessment (HRIA). However, existing HRIA practices – particularly those conducted by business entities, as a corporate responsibility to respect human rights under the UNGPs – remain procedurally and substantively inadequate. This subsection critically evaluates these shortcomings and argues that the Right to Development-based approach provides a more effective and rights-consistent model for reforming impact assessments in the investment context.

Under Principle 18 of the UNGPs, businesses are expected to conduct HRDD processes, including 'meaningful consultation with potentially affected groups and other relevant stakeholders'.[56] This requirement implicitly acknowledges the participatory element of development, yet in practice, the application has been limited and inconsistent. According to the 2023 Corporate Human Rights Benchmark (CHRB), only 27 % of assessed companies demonstrated any engagement with rights-holders in their HRDD processes.[57] Furthermore, as noted by the UN Special Rapporteur on the Right to Development, Surya Deva, consultation alone cannot be equated with meaningful participation – particularly when such processes are unidirectional, lack accountability, and fail to shape substantive outcomes.[58] It is

55 Olivier De Schutter, 'The Role of Human Rights in Shaping International Regulatory Regimes', Social Research 79 (2012), 785-818.

56 Human Rights Council Report of 21 March 2011 (n. 8).

57 Corporate Human Rights Benchmark, 'Most companies fail to include rightsholders in their human rights due diligence processes', available at <https://www.worldbenchmarkingalliance.org/publication/chrb/findings/most-companies-fail-to-include-rightsholders-in-their-human-rights-due-diligence-processes/>, last access 1 January 2025.

58 Surya Deva, 'Role of Business in Realizing the Right to Development', Report of the Special Rapporteur on the Right to Development, A/78/160 (12 July 2023), A_78_160.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

therefore not surprising that most businesses are not ensuring the meaningful participation of 'peoples'.[59] This disconnect highlights the inadequacies of many corporate human rights practices, where even minimal consultations may not fulfil the criteria of meaningful participation, particularly in relation to 'peoples' whose rights are most directly impacted.[60] Consequently, this lack of substantive engagement calls into question the effectiveness and legitimacy of the HRIA as part of the HRDD processes adopted by business entities. Although, ensuring meaningful participation not only supports development objectives but also offers strategic value for businesses by promoting trust, mitigating risks, and fostering long-term sustainability.[61]

The Draft Covenant is ground-breaking in the sense that it imposes direct responsibilities on non-state actors, including corporations, aligning with the evolving discourse on corporate accountability in international law. Article 7 underscores the duty of both natural and legal persons to avoid participation in any action that undermines the right to development.[62] This provision amplifies the growing recognition that businesses are not merely economic actors but also key stakeholders in realising sustainable and inclusive development. For instance, the UNGPs impose a 'responsibility to respect' human rights on business entities,[63] whereas the Right to Development-based approach is a step forward and offers a robust tool for business entities to fulfil their HRDD obligations under 'responsibility to respect' as foreign investors, along with being an active stakeholder in the process of participatory development. Through the Right to Development-based approach, the responsibility of businesses extends beyond human rights compliance to actively fostering environments where the rights and aspirations of affected communities are respected and upheld.

---

59 Deva (n. 58).

60 Corporate Human Rights Benchmark (n. 57).

61 See Tensie Whelan and Carly Fink, 'The Comprehensive Business Case for Sustainability', Harvard Business Review, 21 October 2016, <https://hbr.org/2016/10/the-comprehensive-business-case-for-sustainability>, last access 1 January 2025.

62 The section provides that, 'Nothing in the present Convention may be interpreted as implying for any natural or legal person, people, group or State any right to engage in any activity or perform any act aimed at the destruction, nullification or impairment of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. To that end, States Parties agree that all natural and legal persons, peoples, groups and States have the general duty under international law to refrain from participating in the violation of the right to development.' Revised Draft Convention on the Right to Development, Human Rights Council, Working Group on the Right to Development, 23rd session, 16-20 May 2022, A/HRC/WG.2/23/2.

63 Human Rights Council Report of 21 March 2011 (n. 8).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Given the consistent non-compliance of business entities with the 'meaningful consultation' requirement under the UNGPs, the Right to Development-based approach offers a twofold solution, first, as an alternative tool for states, and second, as a more effective mechanism for integrating HRDD within corporate practices. The Draft Covenant reaffirms the established principle of international law that states have a duty to regulate the conduct of non-state actors, particularly transnational corporations, even without their explicit consent.[64] Thus, the Right to Development framework could be embedded within investment treaties, contracts and laws to ensure compliance with IHRL. However, despite the existence of state laws regulating extraterritorial corporate conduct, such laws rarely require incorporation of public participation.[65] In some cases certain national legislations do mandate public participation in environmental matters,[66] but they fall short of encompassing all the critical elements necessary for robust public engagement.[67] The Right to Development-based approach addresses these gaps by embedding participation within a broader procedural framework tied to development. Accordingly, the following section will propose a reconceptualised impact assessment model, grounded in the importance of public participation, capable of advancing both the legitimacy and the effectiveness of investment governance.

III. Reorienting Investment Law Through Public Participation: A Participatory Impact Assessment Model

As discussed in the previous sections, the traditional human rights approach has failed to create binding procedural safeguards for the communities

64 Article 11(c), United Nations Human Rights Council, Draft Covenant (n. 4).

65 See for example the German Due Diligence Legislation or the Modern Slavery Act in Australia. The recent Corporate Sustainability Directive for Due Diligence (CSDDD) by the European Union also does not mention any public participation. See also Global Justice Clinic at Erfurt University, 'Strengthening Stakeholder Engagement in the EU Corporate Sustainability Due Diligence Directive', Policy Briefing Paper, 12 June 2023.

66 See Dinah Shelton, Sylvia Bankobeza and Barbara Ruis, 'Information, Public Participation, and Access to Justice in Environmental Matters', in: Lal Kurukulasuriya and Nicholas A. Robinson (eds), *UN Environment Program Training Manual on International Environmental Law* (UNEP 2006), 79-86; See also David Banisar, Sejal Parmar, Lalanath de Silvia and Carole Excell, 'Moving from Principles to Rights: Rio 2012 and Access to Information, Public Participation, and Justice', Sustainable Development Law & Policy 12 (2012), 8-14.

67 Elena Petkova et al., Closing the Gap: Information, Participation, and Justice in Decision-Making for the Environment, (World Resource Institute 2002), 6.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

affected by transnational investment projects. The Right to Development-based approach, by contrast, operationalises human rights through participatory development principles.[68] These principles, if embedded into the legal design of investment law, can bridge the legitimacy gap in foreign investment governance and mitigate the structural imbalances that marginalise affected communities. Section III, now develops this argument by proposing a normative and operational model for Right to Development-based investment impact assessment, centred on public participation.

Participation generally refers to the involvement of the public and stakeholders in decisions that affect them.[69] In other words it enables the public to be heard and to affect decisions.[70] The principle of public participation has long been a cornerstone of public international law. Key human rights instruments, such as the International Covenant on Civil and Political Rights[71] and the American Convention on Human Rights,[72] underscore the importance of involving individuals in decisions that impact their rights and livelihoods. This principle has recently gained prominence in the context of sustainable development, where it is increasingly recognised as essential for ensuring that development processes are equitable and inclusive.[73] Public participation is not merely a procedural formality but a substantive requirement that can enhance the legitimacy and effectiveness of development and investment policies. It is a step forward from the connotation of 'meaningful consultations' as part of the HRDD processes mentioned in the UNGPs. Unlike the

68 Article 4(2) of the United Nations Human Rights Council, Draft Covenant (n. 4); See also OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2006), <https://www.ohchr.org/sites/default/files/Documents/Publications/PovertyStrategiesen.pdf>, last access 24 June 2026. The guidelines highlight the role of public participation in development as essential for the realisation of human rights. It states that the principle of participation is the cornerstone of a human rights-based approach to development.; Sen (n. 3). Sen emphasises the significance of participation in decision-making processes as a fundamental component of freedom and development.

69 I. B. Osae et al., 'Access to Information and Public Participation: Evaluating the Implementation of the Aarhus Convention in Europe', European Planning Studies 32 (2024), 2449-2472.

70 See Dinah Shelton, Makane Moïse Mbengue, Elena Cima and Brian McGarry (eds), *International Environmental Law* (4th edn, Brill/Nijhoff 2004), 674.

71 International Covenant on Civil and Political Rights of 16 December 1966 (entered into force 23 March 1976), 999 UNTS 123, Art. 25(a).

72 American Convention on Human Rights of 22 November 1969 (entered into force 18 July 1978), 1144 UNTS 123, Art. 3.

73 See Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Brill/Nijhoff 2008), 198; See also International Law Association, 'New Delhi Declaration of Principles of International Law Relating to Sustainable Development', in: *Report of the Seventieth Conference: New Delhi*, 2-6 April 2002 (International Law Association 2002), Principle 5.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

more limited notion of consultation, participation within the Right to Development framework emphasises 'meaningful participation', which goes beyond merely seeking input from stakeholders.[74] It is the 'recognition of the agency of people and the co-sharing of power with them to take decisions'.[75] In this sense, it offers a pathway to operationalise the concept of a Social License to Operate, transforming it from a voluntary, often ambiguous corporate practice into a rights-based practice. Properly embedded in law and policy, the Social License to Operate can thus serve both as a duty incumbent on corporations and states, and as an enforceable right of affected communities, thereby anchoring development projects in a more accountable and participatory framework.

This shift from voluntary consultation to enforceable participation finds further normative support in modern democratic theory and IHRL. Democratic governance principles assert that citizens are not merely passive recipients of laws and policies, but active participants in shaping them at every level.[76] This principle is explicitly endorsed in the Draft Covenant, which emphasises the need to include individuals and communities in the processes that determine development outcomes and the distribution of its benefits.[77] According to the Draft Covenant, participation must be 'active, free, and meaningful' to be effective.[78] In the context of investment law, this implies that individuals affected by investment agreements should not only be consulted but should have a substantive role in decision-making processes. Although the Draft Covenant does not specify the exact extent of individual inclusion, it is crucial that public participation be designed to genuinely influence decision-making to achieve its intended goals. Without such influence, participation risks becoming a token gesture rather than a transformative element of the development process.[79]

To substantiate how public participation can serve as a core principle of IIL and formalise the Social License to Operate, we may look to existing legal frameworks such as the 2001 Aarhus Convention,[80] and the 2021 Escazú

74 Article 4(2), United Nations Human Rights Council, Draft Covenant (n. 4).

75 Deva (n. 58).

76 Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010), 55.

77 Article 4(2), United Nations Human Rights Council, Draft Covenant (n. 4).

78 See commentary to Article 4(2) of the United Nations Human Rights Council, Draft Covenant (n. 4).

79 Roman Girma Teshome, 'The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?', HRLR 22 (2022), 1-24.

80 Aarhus Convention (n. 9).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Agreement.[81] These conventions enshrine public participation as an essential component of effective decision-making, providing an operational framework that emphasises transparency, inclusiveness, and accountability. This approach draws its foundation from Principle 10 of the Rio Declaration on Environment and Development,[82] which establishes three key pillars for meaningful public participation: (i) access to relevant information through disclosure; (ii) the opportunity to participate in decision-making processes; and (iii) access to effective judicial or administrative remedies. These pillars identify public participation as a process rather than a singular isolated event.[83] By framing public participation as a right and a procedural requirement, this model offers a comprehensive approach that can be adapted to other areas of law, including international investment law. Based on practises from these conventions, a public participation evaluation tool can be derived which can be used for Right to Development-based impact assessment by states and investors.

1. Access to Information as a Right and a Precondition for Participation

The disclosure of information regarding investments that may affect the public is fundamental to ensuring transparency and accountability in international investment law. In practice, however, investment treaty negotiations often occur behind closed doors, with minimal opportunities for public engagement.[84] Beyond the treaties themselves, the negotiation of investment contracts typically involves corporate executives, government officials, and a select group of lawyers, excluding broader public participation.[85] This lack of transparency is particularly problematic in developing countries, where both

81 Escazú Agreement (n. 9).

82 Rio Declaration, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) (1993), A/CONF.151/26.

83 See e. g. United States Environmental Protection Agency (USEPA), 'Public Participation Guide: Introduction to Public Participation', 6 February 2026, <www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>, last access 1 January 2025.

84 Lorenzo Cotula, 'Public Participation and Investment Treaties: Towards a New Settlement?' in: Eric de Brabandere, Tarcisio Gazzini and Avidan Kent (eds), *Public Participation and Investment Law* (Brill/Nijhoff 2021), 36-52.

85 Lorenzo Cotula, 'Strengthening Citizens Oversight of Foreign Investment: Investment Law and Sustainable Development', Sustainable Markets Investments Briefings, International Institute for Environment and Development (2007), 1-2.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

citizens and even elected representatives frequently play a minimal role in the treaty and contract making process. Developing states have historically been 'rule takers' rather than 'rule makers' in international investment agreements,[86] participating in negotiations that are frequently asymmetric in favour of more powerful states or multinational corporations. This process is typically driven by government officials without a transparent or participatory mechanism, raising concerns about the competency and awareness of negotiators.[87] As a result, the public, which is most directly affected by these treaties and contracts, is often unaware of the terms of these agreements until after projects become operational.[88] These structural deficiencies emphasise the critical need for access to information as a key element in achieving fair and equitable development outcomes in the sphere of international investment, aligning with the core objectives of the Right to Development approach.

The lack of transparency in investment treaty-making and contract negotiations, particularly in developing countries, underscores the critical need for access to information as a cornerstone for equitable development. Recent practice within the European Union (EU) illustrates a noticeable shift toward greater transparency in investment treaty negotiations. As Marceddu shows, however, this development did not arise from a newfound commitment to public participation but from the activation of preexisting EU legal obligations on access to information.[89] The controversies surrounding Comprehensive Economic and Trade Agreement (CETA) and Transatlantic Trade and Investment Partnership (TTIP) merely exposed the incompatibility between secretive negotiation practices and the Union's constitutional duties of openness, compelling the Commission to release negotiating directives and textual proposals.[90] In this sense, the EU's move toward transparency reflects a legal obligation rather than a voluntary participatory turn.

---

86 Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law', Constellations 23 (2016), 58-70. On the link between rule making/taking and GDP levels, see Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements', JIEL 19 (2016), 561-588.

87 Lauge N. Skovegaard Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries (Cambridge University Press 2015), 182-183.

88 Nicolás Perrone, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?', Transnational Legal Theory 7 (2016), 383-405.

89 Maria Laura Marceddu, 'Rethinking Public Participation in Investment Decision-Making' in: Maria Laura Marceddu, *EU Values in Investment Law and Policy: Promises of Democracy and Rule of Law?* (Oxford University Press 2025), 87-119.

90 Marceddu (n. 89), 109-114.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

This evolution within the EU reinforces a broader principle that lies at the core of the Right to Development-based approach, meaningful public participation is impossible without reliable, timely, and accessible information. The Right to Development-based approach therefore places transparency at the heart of public participatory development process. In this context, the Aarhus Convention emphasises the critical role of information disclosure, mandating both active[91] and passive[92] access to information. Active access requires governments to proactively provide information about environmental matters, while passive access ensures the public's right to request and receive information held by the state. This approach has been reinforced by human rights bodies. For instance, the Inter-American Court of Human Rights has affirmed the public's right to request and access government-held information, barring specific grounds for refusal.[93] Similarly, the European Court of Human Rights (ECtHR) has acknowledged that access to information is inherent in Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR).[94] Furthermore, the United Nations Human Rights Committee (UNHRC) reinforced this principle in General Comment No. 34 on Article 19 of the ICCPR, stating that the right to freedom of expression includes a general right of access to government-held information.[95] These decisions affirm the necessity for transparency and information accessibility as a means of empowering the public to participate meaningfully in investment-related decisions.

Apart from acceptance of the access to information as a basic requirement for realisation of different rights, the Aarhus Convention and Escazú Agreement also clarifies three distinct requirements for meaningful access to information i. e. Accessibility, Comprehensibility, and Timeliness.[96] Accessibility involves both active and passive forms of access, as outlined in the United Nations Economic Commission for Europe (UNECE) Aarhus Convention Implementation Guide. This entails proactive dissemination of information via accessible channels like online platforms, physical public records, and public consultations, ensuring inclusivity by addressing potential barriers

91 Aarhus Convention (n. 9), Article 5.

92 Aarhus Convention (n. 9), Article 4.

93 IACtHR, Case of *Claude-Reyes et al v. Chile*, judgment of 19 September 2006 (merits, reparations and costs), Series C No. 151 (2006).

94 ECHR, *Szabadságjogokért v. Hungary*, judgment of 14 April 2009, Application no. 37374/05; ECtHR, *Kenedi v. Hungary*, judgment of 26 May 2009, Application no. 31475/05.

95 United Nations Human Rights Committee, General Comment No. 34 of 12 September 2011, CCPR/C/GC/34.

96 See Escazú Agreement (n. 9), Article 5(1)-5(4); Aarhus Convention (n. 9), Articles 4 and 5.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

such as digital divides and language accessibility.[97] In the investment context, information about treaties and contracts must be made accessible to all stakeholders, regardless of socio-economic or geographic limitations.

Secondly, Comprehensibility necessitates that the information be presented in a manner that is intelligible to the public, particularly to those directly affected by the investment.[98] Legal and technical jargon should be minimised to facilitate a clear understanding of the implications for individuals, communities, and the environment. The capacity of the public to comprehend and engage with this information is critical to fostering effective participation.

Finally, timeliness is indispensable for meaningful public participation. The Aarhus Convention and Escazú Agreement emphasise that delays in access to information undermine participatory processes by depriving stakeholders of the opportunity to influence decision-making.[99] In the realm of investment law, information must be made available at the earliest stages of decision-making, allowing stakeholders adequate time to evaluate and respond before irreversible decisions are made. The Aarhus convention implementation guide provides that a minimum time of 30 days must be provided between public notice and start of public consultations.[100] By adhering to these criteria, access to information can serve its intended purpose of enhancing transparency and accountability in investment-related decisions.

2. Embedding Community Consent in Investment Decision-Making

Participation, in its truest sense, implies not merely the provision of information but the capacity of stakeholders to exert significant influence over the decision-making process.[101] Genuine participation extends beyond

97 United Nations Economic Commission for Europe (UNECE), *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations 2014).

98 See Sherry R. Arnstein, 'A Ladder of Citizen Participation', Journal of the American Institute of Planners 35 (1969), 216-224. Arnstein's classic model of citizen participation emphasises that without comprehensible information, public participation becomes superficial, as people cannot contribute meaningfully if they do not fully understand the information.

99 See Aarhus Convention (n. 9), Articles 4(2) and 5; Escazú agreement (n. 9), Articles 5 and 6.

100 UNECE (n. 97), 137.

101 Ross Hughes, 'Environmental Impact Assessment and Stakeholder Involvement', Environmental Planning Issues 11 (1998), available at: <https://www.iied.org/7789iied>, last access 15 July 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

passive consultation; it requires that affected communities are integral to shaping decisions that directly impact their lives, particularly in contexts where their livelihoods are at stake. In the realm of international investment law, states and their representatives bear a duty to ensure the meaningful engagement of those impacted by investment projects, making public participation a necessary precondition for legitimate governance.[102] Investment contracts, often negotiated behind closed doors, are particularly vulnerable to the exclusion of public input, leading to outcomes that may lack both transparency and social legitimacy.[103] The inclusion of public participation in the early stages of law-making, including during contract negotiations, offers not only a pathway to more equitable agreements[104] but also a means of fostering greater legitimacy in the investment process.[105] From a liberal economic standpoint, such as that of F. A. Hayek, decision-making in a free market is more likely to yield superior outcomes when undertaken by decentralised, independent actors rather than government experts.[106] This is particularly true in complex situations where a small group of bureaucrats may struggle to fully comprehend the intricate variables at play. The dispersed knowledge and individual choices of numerous decision-makers are better equipped to address such complexities, as they can incorporate localised and real-time information that may otherwise be inaccessible to a central authority. The surge in transparency and inclusivity at this stage significantly reduce the potential for disputes and promote more balanced, well-negotiated contracts. Conversely, at the dispute settlement stage, the absence of public participation is a recurring flaw, where affected communities frequently have little or no input, even in cases where the stakes are high.[107] This demon-

102 Carla García Zendejas and Layla Hughes, 'Submission to the Office of the United Nations High Commissioner for Human Rights on the Draft Guidelines on Effective Implementation of the Right to Participate in Public Affairs by the Center for International Environmental Law', Center for International Environmental Law (CIEL), 11 February 2018, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/EqualParticipation/DraftGuidelines/CIEL.pdf>, last access 1 January 2025.

103 Youseph Farah and Valentine Olusola Kuniji, 'Contractualisation of Human Rights and Public Participation: Challenges and Prospects' in: Eric de Brabandere, Tarcisio Gazzini and Avidan Kent (eds), *Public Participation and Investment Law* (Brill/Nijhoff 2021), 122-147.

104 Cotula (n. 1), 86.

105 International Institute for Sustainable Development, 'A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for achieving the 2030 Sustainable Development Agenda' (2016), <www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/6-process/6-3-public-participation>, last access 1 January 2025.

106 Bruce Caldwell, *The Collected Works of F. A. Hayek: The Road to Serfdom – Definitive Edition* (The University of Chicago Press 2007), 94-96.

107 See Ladan Mehranvar, *How the International Investment Law Regime Undermines Access to Justice for Investment Affected Stakeholders* (Columbia Center on Sustainable Investment (CCSI) 2024), 8-16.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

strates the imperative of embedding participatory mechanisms from the outset to avoid disenfranchisement and ensure that the decision-making process is truly democratic and inclusive.

A structured framework for public participation in decision-making within the context of investment law-making is largely absent in current practices. To ensure meaningful engagement, it is essential to establish such a framework, one that integrates the active involvement of relevant 'rights holders' throughout the law-making process. According to Hayek's principle, the allocation of societal resources should be informed by the input of broad, decentralised groups, ensuring a more equitable and efficient distribution of resources.[108] In this regard the Aarhus Convention and Escazú Agreement offer valuable guidance by outlining three core principles for environmental law, which can be adapted to the investment law-making process, i. e. public consultation periods, gathering public feedback mechanisms, and ensuring that public input influences the final decisions.

Public consultation periods can be defined as timeframes during which government entities and corporate actors gather input from stakeholders affected by potential decisions. These periods offer structured opportunities for stakeholders to raise concerns or support proposals before finalisation, ensuring that decisions are informed by diverse perspectives. Both the Aarhus Convention and Escazú Agreement emphasise the need for public authorities to offer 'early and effective opportunities' for participation when all options remain open, fostering more inclusive decision-making processes.[109]

Secondly, mechanisms for gathering public feedback must be tailored to the social, political, and environmental context of the activity. Methods such as public hearings, surveys, and town hall meetings provide essential avenues for structured engagement. A widely inclusive system for public participation can face significant issues, particularly regarding the self-selection bias of commenters, where only a narrow segment of the population actively participates. To address this, regulators may need to take steps to ensure that the entities providing input are representative of the broader demographic impacted by a proposed regulation.[110] For instance, the EU reaches out to diverse stakeholders (including industry representatives, unions, civil society organisations) during a policy proposal.[111]

108 Caldwell (n. 106), 94-96.

109 Aarhus Convention (n. 9), Article 6; Escazu Agreement (n. 9), Article 7.

110 Reeve T. Bull, 'Public Participation and the Transatlantic Trade and Investment Partnership', The George Washington Law Review 83 (2015), 1262-1293 (1269).

111 See Stakeholder Consultation Guidelines, (2014), <http://ec.europa.eu/smart-regulation/impact/docs/scgl_pc_questionnaire_en.pdf>, last access 1 January 2025, 29.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Finally, the influence of public input on final decisions is what defines meaningful participation. Arnstein's *Ladder of Citizen Participation* distinguishes between different levels of engagement, with 'citizen control' at the highest level, indicating significant public influence over outcomes.[112] Lower levels, such as 'consultation' without genuine impact, are seen as less meaningful. Article 6(8) of the Aarhus Convention also mandates that decision-makers take 'due account […] of the outcome of the public participation' process, reinforcing the need for public input to meaningfully shape final decisions.

3. Legal Remedies for Denied Participation

In the context of participatory development, access to an effective remedy refers to the right of individuals and communities to challenge decisions that impede their participation in public processes or restrict access to relevant information, particularly where such decisions affect their rights or livelihoods. Article 15(1) of the Draft Covenant affirms public participation not only as a procedural obligation but also as a remedial measure for violations of the Right to Development. These remedial measures would involve both judicial and administrative mechanisms, allowing individuals to seek redress when their participatory rights are violated. The Aarhus Convention provides a model for this by ensuring that individuals have a right to challenge public decisions that contravene their participatory rights, particularly in environmental matters. Article 9 of the Aarhus Convention focuses on access to justice, ensuring that members of the public have access to review procedures before courts or other independent bodies when their rights to information and participation are denied. This includes both procedural and substantive remedies, ensuring transparency, accountability, and fairness in decision-making processes.

In the context of participatory development through investment, ensuring access to effective remedies means allowing affected individuals or communities to contest decisions related to the denial of public participation or the withholding of critical information. As seen in *Claude Reyes v. Chile*[113] and *ClientEarth v. European Investment Bank*[114], *Endorois Welfare Council*

112 Arnstein (n. 98), 216.

113 IACtHR, *Reyes et al.* (n. 93).

114 EU General Court, *ClientEarth v. European Investment Bank*, judgment of 27 January 2021, case no. T-9/19.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

v. Kenya[115], and *Saramaka People v. Suriname*[116], domestic and regional courts have upheld the public's right to information and participation, setting strong precedents for transparency in environmental and investment-related decisions.

Similarly, national courts have also recognised participation as an integral component of remedial justice in development-related disputes. For instance, a comparable approach was taken by the Supreme Court of India in *Orissa Mining Corporation v. Ministry of Environment and Forests* (2013).[117] In this case, the Court empowered the *Gram Sabha* (village assembly) to make the final determination on whether mining could proceed in the Niyamgiri Hills, sacred to the Dongria Kondh Indigenous community, and appointed a judicial officer to oversee the process to ensure independence and freedom from coercion.[118] Here, the participatory process itself was crafted as the central remedial measure, capable of reconciling development imperatives with the community's cultural and environmental rights.

Collectively, these judicial practices reveal a growing recognition that participation is not only a precondition for legitimate decision-making but also a form of remedy capable of addressing exclusion, restoring agency, and rebalancing power asymmetries. Within the Right to Development-based approach, this positions participation as both a corrective response to past violations and a forward-looking guarantee of non-repetition through inclusive governance. In this way, it formalises what has often been treated as a discretionary Social License to Operate, giving it normative shape through legal standards of participation, transparency, and remedy. The following graph visually represents the proposed Right to Development-based impact assessment tool and how it functions within investment agreements and contracts to ensure human rights compliance.

115 African Commission on Human and People's Rights, *Endorois Welfare Council v. Kenya*, judgment of 25 November 2009, communication no. 276/2003.

116 IACtHR, *Saramaka People v. Suriname*, judgment of 28 November 2007, Series C No. 172.

117 Supreme Court of India, *Orissa Mining Corporation v. Ministry of Environment and Forest and Others*, Writ Petition (CIVIL) No. 180 of 2011, para. 60.

118 *Orissa Mining Corporation* (n. 117), para. 62.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Figure 1: *Participatory Development Based Impact Assessment*

 DOI 10.17104/0044-2348-2026-3-869

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

IV. Conclusion

This article has proposed public participation, as articulated in the Draft Covenant, as a transformative and operational model for recalibrating investment practices towards a rightsholder-focused paradigm. The argument advanced here is not that either international investment law or the Draft Convention presently mandates such participatory obligations as a matter of *lex lata*. Rather, the article advances a primarily *lex ferenda* argument. It demonstrates that existing human rights and environmental regimes already recognise participatory rights and procedural guarantees in specific contexts and argues that, when read through the people-centred logic of the Right to Development, these developments support a reorientation of investment governance towards meaningful participation. In this sense, the framework proposed here seeks to provide greater normative content to investment practices and non-binding concepts such as the Social License to Operate, while offering a conceptual basis for the future integration of participatory obligations into investment governance.

By centring on the core principle of participatory development, the article introduces a reformed Right to Development-based impact assessment framework offering a normative and operational structure to align investment decision-making with international human rights standards. As demonstrated, this framework can be implemented by institutionalising transparent and inclusive practices – such as requiring the publication of draft investment agreements and facilitating open consultation with affected communities and civil society organisations as recommended by the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises.[119] These mechanisms, already reflected in instruments like the Aarhus Convention and Escazú Agreement, affirm that public participation is emerging as a procedural human rights obligation even within sectors traditionally governed by private law or technocratic expertise.[120]

Moreover, the Right to Development framework elevates the role of business entities, moving beyond mere compliance to mandate active engagement in participatory mechanisms that respect and uphold the rights and aspirations of affected communities. This addresses significant gaps in current

119 United Nations General Assembly (UNGA), Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Human Rights-Compatible International Investment Agreements' of 21 July 2021 A/76/238, para. 76(k).

120 UNECE (n. 97), 46.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

HRDD practices, particularly in ensuring meaningful consultation, especially in sectors like natural resource exploitation.

Embedding this framework into international investment law not only advances corporate accountability but helps reconstitute investment governance as a vehicle for equitable, sustainable, and rights-respecting development. As Salomon aptly notes, much like the right to self-determination, the right to development is a foundational right – without which the realisation of other rights remains precarious.[121] In this spirit, the Right to Development-based impact assessment model should not be viewed as an aspirational ideal, it offers a coherent legal framework grounded in existing human rights norms and provides a practical roadmap for integrating participatory obligations into investment treaty-making and contractual practices. Properly implemented, it has the potential to rebalance the asymmetries of international investment law and restore human dignity to the core of development governance.

121 Margot E. Salomon, Legal Cosmopolitanism and the Normative Contribution of the Right to Development (September 23, 2008). London School of Economics (LSE) Working Paper on Law, Society and Economics No. 16/2008, 14, available at SSRN: https://ssrn.com/abstract=1272582.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Independent Justice in the Name of His Holiness? Vatican Tribunals and International Law Requirements

Kevin Grimmeiß*
University of Würzburg, Würzburg, Germany
kevin.grimmeiss@uni-wuerzburg.de

Abstract 897
Keywords 898
I. Introduction: The Vatican – An Atypical State 898
II. The Vatican Financial Trial 899
1. Facts of the Case 900
2. Defendants' Arguments on Judicial Independence 901
3. Reasoning of the Tribunal 903
III. ECHR Fair Trial Requirements 905
1. Establishment by Law 905
2. Independence from the Executive and the Parties 907
3. Right to Democracy? 909
IV. Applicability of Fair Trial Guarantees to the Vatican 910
1. Legal and Practical Relevance of ECHR Requirements for the Vatican 911
2. Fair Trial Principles in Customary International Law? 912
V. Vatican Compliance with Fair Trial Guarantees 914
1. Aspects of Vatican Judicial Organisation 914
2. Particularities of the Vatican Legal Order 916
3. Aspects of Public International Law 917
VI. Conclusion: The Vatican – An Accepted Partner in International Cooperation 919

Abstract

In a judgment of 2023, the Vatican City State Tribunal imposed prison sentences and fines on several laypersons and clerics involved in a London real estate transaction. The judges used a significant portion of their statement of reasons to explain why the proceedings did not violate European fair trial principles. In contrast, defence counsel had argued that the pope's position as absolute monarch of the Vatican is incompatible with the notion of judicial independence. The present article weighs the conflicting

* Research associate at the chair for German and foreign public law, public international law and European law at the University of Würzburg and judge at the Administrative Court of Würzburg.

DOI 10.17104/0044-2348-2026-3-897 ZaöRV 86 (2026), 897-919

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

arguments, considering both the implications of the European Convention on Human Rights and the purpose and special nature of the Vatican City State.

Keywords

European Convention on Human Rights – Vatican City State – fair trial – court established by law – judicial independence

I. Introduction: The Vatican – An Atypical State

Few introductions to public international law can do without at least a glance at the Catholic church. They typically cover its governmental organ,[1] the Holy See, a fully accepted non-state subject of public international law.[2] It is represented by the pope, maintains diplomatic relations with almost all states through its ambassadors, the apostolic nuncios, and has concluded a number of treaties. The international standing of the Holy See is based on a century-long acceptance of the pope's spiritual position and does not, therefore, depend on a territorial basis, which formerly existed in the Papal States but was lost in 1870.[3] These characteristics make the Holy See a rather unusual case.

The Vatican City State, on the other hand, is much closer to the typical subject of public international law. It owes its existence to the Holy See and forms the territorial basis of its activities.[4] Admittedly, the State territory in the centre of Rome encompasses little more than Saint Peter's Basilica and the Apostolic Palace. Still, the Vatican also possesses a permanent population as well as a government and thereby meets all criteria for

1 James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon 2006) 225-226; Graham Butler, 'The Legal Relations of the European Union with the Vatican City State and Holy See', European Foreign Affairs Review 27 (2022), 263-282 (267).

2 See only Giovanni Distefano, *Fundamentals of Public International Law* (Brill Nijhoff 2019), 223-225; Malcolm N. Shaw, *International Law* (9th edn, Cambridge University Press 2021), 224-225; Markus Krajewski, *Völkerrecht* (3rd edn, Nomos 2023), chapter 7, para. 133; Samantha Besson, *Droit international public* (Stämpfli 2024), paras 874-881; Matthias Herdegen, *Völkerrecht* (23rd edn, C. H. Beck 2024), chapter 9, para. 1. Also see these references for the following description of the Holy See.

3 Hyginus Eugene Cardinale, *The Holy See and the International Order* (Colin Smythe 1976), 82; Crawford (n. 1), 226; Fulvio Maria Palombino, *Introduzione al diritto internazionale* (Laterza 2024), 184.

4 Crawford (n. 1), 230-231; Butler (n. 1), 267.

 DOI 10.17104/0044-2348-2026-3-897

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

statehood.[5] Like most contemporary states, it has a written constitution, the Fundamental Law of the Vatican City State (FL).[6] But a mere reading of Art. 1 FL illustrates that the Vatican system of government is markedly different from modern standards: It unites all authority, be it legislative, executive or judicial, in the supreme pontiff, the pope. With this expressly absolutist concept, the Vatican stands out in today's international community, most members of which regard themselves as democracies bound by human rights and the rule of law.[7]

A 2023 judgment from the Vatican, which found several defendants guilty of financial crimes, highlights this discrepancy. While defence counsel argued that the Vatican system of government is incompatible with fair trial principles and independent justice as guaranteed by public international law, the judges saw no such violation. The present article will give a summary of both of these positions at the outset. It will go on to outline the organisational requirements of Art. 6 European Convention on Human Rights (ECHR) as invoked by defence counsel and analyse their relevance for the Vatican, but also take a look at fair trial principles in customary international law. Considering the special purpose and particular legal order of the Vatican, the article will argue that the city state should be – and is in fact, by the international community – regarded as adhering to fair trial requirements.

II. The Vatican Financial Trial

On 16 December 2023, the Vatican City State Tribunal, the court charged with, *inter alia*, the administration of (non-canonical) criminal justice in the Vatican City State,[8] handed down prison sentences and fines against several laypersons and clerics who had been involved in a London real estate transac-

5 Gerd Westdickenberg, 'Holy See' in: Rüdiger Wolfrum and Anne Peters (eds), *MPEPIL* (online edn, Oxford University Press 2025), para. 5.

6 Legge fondamentale dello Stato della Città del Vaticano of 13 May 2023, Bollettino no. 365. Due to the particular nature of the Vatican City State, this document is not a constitution in the sense of higher-ranking fundamental rules, even though it contains certain stipulations typical for constitutions, see Giuseppe Dalla Torre, *Lezioni di diritto vaticano* (2nd edn, Giappichelli 2020), 76-77.

7 In many cases, however, this generous self-assessment is unconvincing.

8 Stephen E. Young and Alison Shea, 'Separating State from Church: A Research Guide to the Law of the Vatican City State', L. Libr. J. 99 (2007), 589-610 (599-601); Norbert Witsch, 'Der Vatikanstaat' in: Stephan Haering, Wilhelm Rees and Heribert Schmitz (eds), *Handbuch des katholischen Kirchenrechts* (3rd edn, Friedrich Pustet 2015), 538-542 (541).

DOI 10.17104/0044-2348-2026-3-897 ZaöRV 86 (2026)

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

tion.[9] The judgment attracted criticism based on the alleged lack of judicial independence, with one of the accused complaining to the United Nations (UN) Special Rapporteur on independence of judges and lawyers.[10] The following section will outline the facts of the case, covering, in particular, the defendants' arguments on judicial independence as well as the respective reasoning of the court.

1. Facts of the Case

The proceedings before the Vatican City State Tribunal[11] revolved around a 350-million-euro investment in a real estate fund which the Secretariat of State, a central department of the Roman curia, made in 2013 and 2014. The fund was managed by a broker of Swiss and British nationality and held, among other assets, a property in Chelsea, London, which it sought to redevelop. When no progress was made in the development, the Secretariat of State planned to directly acquire and administer the property in 2018. The

9 Tribunal of the Vatican City State (TSV), *Carlino et al.*, judgment of 16 December 2023, no. 45/19 Reg. Gen. Pen. The judgment is available online at <https://drive.google.com/file/d/1M2TmzVL0-2IGoN259k-nP6VkuyaPTxA3/edit>, last access 8 July 2026. The case has since moved to the Court of Appeal of the Vatican City State, which, by an order of 17 March 2026, declared the first instance procedure partially void. This gives the accused, *inter alia*, a broader access to the files than before. As regards the matters discussed in this article, however, the appellate proceedings have not yielded any new insights yet. See Salvatore Cernuzio, 'Processo vaticano, decretata "nullità relativa" del primo grado. Si riapre dibattimento', Vatican News, 17 March 2026, <https://www.vaticannews.va/it/vaticano/news/2026-03/processo-fondi-santa-sede-ordinanza-corte-appello-17-marzo-2026.html>, last access 8 July 2026; 'Immobilienprozess im Vatikan muss neu aufgerollt werden. Teils geschwärzte Unterlagen', Domradio online, 18 March 2026, <https://www.domradio.de/artikel/immobilienprozess-im-vatikan-muss-neu-aufgerollt-werden>, last access 8 July 2026.

10 Nicole Winfield, 'Defendant in Vatican Trial Takes Case to UN, Accuses Pope of Violating His Rights with Surveillance', Associated Press, 20 June 2024; Mario Trifunovic, 'Medien: UN-Menschenrechtsbeschwerde gegen Vatikan-Justiz', katholisch.de, 18 June 2024, <https://katholisch.de/artikel/54077-medien-un-menschenrechtsbeschwerde-gegen-vatikan-justiz>, last access 8 July 2026.

11 The case details are outlined in extenso in TSV, *Carlino et al.* (n. 9), 84-610. Shorter overviews are provided by 'Documenti e testimonianze contenuti nella richiesta di citazione a giudizio', Vatican News, 3 July 2021, <https://www.vaticannews.va/it/vaticano/news/2021-07/documenti-e-testimonianze-contenuti-richiesta-di-citazione.html>, last access 8 July 2026; Philip Pullella, 'Cardinal Among 10 Indicted by Vatican for Financial Crimes', Reuters, 3 July 2021, <https://www.reuters.com/world/europe/vatican-judge-indicts-10-including-cardinal-alleged-financial-crimes-2021-07-03/>, last access 26 July 2026; Roland Juchem, 'Von einer Londoner Immobilie zum Mammutprozess im Papst-Staat', Domradio online, 5 July 2021, <https://www.domradio.de/artikel/von-eine-londoner-immobilie-zum-mammutprozess-im-papst-staat-der-vatikanische-finanzskandal>, last access 8 July 2026.

 DOI 10.17104/0044-2348-2026-3-897

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

transaction ultimately closed did not, however, yield the results intended by the Secretariat of State, for the Italian agent acting on behalf of the Vatican had retained all voting shares, requesting an additional payment for their transfer. The developments came to light when Vatican police raided the offices of the Secretariat of State and the Vatican financial regulator as well as a private apartment in late 2019 and early 2020.

The Promoter of Justice, the Vatican prosecutor, alleged criminal misconduct by several brokers and advisors as well as Vatican officials involved in the deal. In June 2021, he brought several charges including embezzlement, money laundering, fraud, extortion, corruption, and abuse of office against ten laypersons and clerics, amongst them a cardinal. The Vatican City State Tribunal issued a complex verdict on 16 December 2023, finding a few of the accused persons guilty of some of the charges and acquitting them of others, while, at the same time, requalifying a number of accusations. The court pronounced prison sentences of up to seven years as well as pecuniary fines. It further ordered some of the defendants to pay damages totalling about 200 million euros. The Chelsea property had meanwhile been sold, reportedly incurring a loss of more than 200 million euros for the Vatican.[12]

2. Defendants' Arguments on Judicial Independence

The defendants argued that the judicial proceedings before the Vatican City State Tribunal violated the ECHR, particularly its Art. 6, which guarantees a fair hearing by an independent and impartial tribunal established by law. They criticised restrictions in document access as well as four rescripts, decrees by Pope Francis, which gave extraordinary powers to investigators in deviation from general Vatican law, namely to intercept communication.[13]

12 Francesco Antonio Grana, 'Vaticano, il processo sul palazzo di Londra: "Le perdite della Santa Sede ammontano a 217 milioni di euro"', Il Fatto Quotidiano online, 28 February 2022, <https://www.ilfattoquotidiano.it/2022/02/28/vaticano-il-processo-sul-palazzo-di-londra-le-perdite-della-santa-sede-ammontano-a-217-milioni-di-euro/6510732/>, last access 8 July 2026. Conversely, Philip Pullella, 'Vatican Takes Big Loss in Sale of London Building at Heart of Trial', Reuters, 1 July 2022 reports a loss of 140 million euros, <https://www.reuters.com/world/uk/vatican-sells-london-building-heart-corruption-trial-bain-capital-2022-07-01/>, last access 8 July 2026.

13 Nicole Winfield, 'At Vatican Trial, Defense Questions the Legal System Itself', Associated Press, 4 October 2021, <https://apnews.com/article/europe-religion-trials-london-vatican-city-2213fff3d492899a15254ad911d1d0a4>, last access 8 July 2026; Nicole Winfield, 'Lawyers: Papal Decrees Violated Fraud Suspects' Human Rights', Associated Press, 18 February 2022, <https://apnews.com/article/pope-francis-business-europe-religion-vatican-city-c93a8193908d92946c3636aa4134fd87>, last access 8 July 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Going beyond the specific case, the accused questioned the independence and impartiality of Vatican judges on the grounds that supreme judicial power is vested in the pope, to whom magistrates swear loyalty and obedience.[14] In essence, defence counsel argued that the Vatican's organisation as an absolute monarchy made it impossible for its courts to attain internationally accepted standards of fair trial.

This reasoning rests on the assumption that contemporary international law contains norms obliging the Vatican to guarantee an independent judiciary. To start with, Art. 6 ECHR as invoked by the defendants does not, however, directly bind the Vatican. According to the *pacta tertiis* principle enshrined in Art. 34 Vienna Convention on the Law of Treaties (VCLT),[15] international agreements apply only to their parties, not to third states. While the Holy See holds an observer status in the Council of Europe, neither this entity nor the Vatican City State are a party to the ECHR.[16] Hence, there is no (or at least no direct) obligation of the Vatican to adhere to the human rights that the convention stipulates.

The defence counsel in the Vatican Financial Trial nevertheless considered the Vatican bound by the principles enshrined in Art. 6 ECHR.[17] They pointed to the fact that the Vatican has entered into a monetary agreement with the EU,[18] which under Art. 8 obliges the Vatican to adopt all appropriate measures, through direct transposition or equivalent action, with a view to implementing certain annexed EU norms.[19] These norms include Directive 2005/60/CE, the 3rd Anti-Money-Laundering Directive, whose recital 48 states:

> 'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Nothing in this Directive should be interpreted or implemented in a manner that is inconsistent with the European Convention on Human Rights[.]'

14 Winfield, 'Vatican Trial' (n. 13).

15 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

16 See Council of Europe Parliamentary Assembly (CoE-PA), 'The Council of Europe and Its Observer States: the Current Situation and a Way Forward', Report of 22 December 2007, Doc 11471, paras 2, 77; Cedric Ryngaert, 'The Legal Status of the Holy See', GoJIL 3 (2011), 829-859 (835-836, 847).

17 The argument is reproduced verbatim in TSV, *Carlino et al.* (n. 9), 18-19. Similarly, Paolo Cavana, 'Osservazioni sul processo vaticano contro il cardinale Becciu e altri imputati', Stato, Chiese e pluralismo confessionale (4/2023), 1-31 (5-6).

18 Monetary Agreement between the European Union and the Vatican City State of 17 December 2009, OJ 2010 C 28/13.

19 Butler (n. 1), 272-280.

 DOI 10.17104/0044-2348-2026-3-897

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

The accused regarded the criminal proceedings against them as a violation of the guarantee of an independent judiciary and, consequently, as an application of Directive 2005/60/CE incompatible with Art. 6 ECHR.

3. Reasoning of the Tribunal[20]

The Vatican City State Tribunal dismissed this allegation. The judges' reasoning on the question of judicial independence was threefold: They rejected the notion that the Vatican was bound by Art. 6 ECHR, but accepted corresponding safeguards under canon law. Proceeding on this basis, they found that the legal rules governing the establishment and operation of the court ensured a sufficient level of judicial independence.

The tribunal began its reasoning by stating that Vatican law recognised the fair trial principle. It cited canon 221 paras 2-3 Codex Iuris Canonici (CIC),[21] which gives all faithful the right to be tried and sentenced according to law and on a non-discriminatory basis, as well as canon 1321 para. 1 CIC, which contains the presumption of innocence. Further reference was made to papal statements.

Only in a second step did the tribunal decline the applicability of the ECHR and dismiss the argument that Directive 2005/60/CE indirectly binds the Vatican.[22] It stressed that the city state had only undertaken, in Art. 8 of the European Union (EU)-Vatican monetary agreement, to 'adopt all appropriate measures', a formulation which does not imply direct applicability of the Anti-Money-Laundering Directive, but a mere duty to implement its contents into national law.[23] The magistrates further substantiated their reasoning by emphasising the legal effects of EU directives in general, which according to Art. 288 para. 3 Treaty on the Functioning of the European Union (TFEU)[24] bind member states as to the result to be achieved but leave the choice of form and methods to the national authorities. If, consequently, there is no direct applicability of a directive within EU member states, this must be even more so for states which are not part

20 The reasoning of the tribunal regarding judicial independence and Art. 6 ECHR can be found at TSV, *Carlino et al.* (n. 9), 16-27.

21 Codex Iuris Canonici of 25 January 1983, Acta Apostolicae Sedis 75 (1983) II.

22 On the (supreme) role of canon law in the interpretation of transformed foreign legislation, see Alessio Sarais, 'Il principio di legalità nel sistema penale vaticano: alcune considerazioni', Sicurezza e Giustizia 2014, 44-46 (46).

23 Monetary Agreement EU/Vatican City State (n. 18).

24 Consolidated version of the Treaty on the Functioning of the European Union of 26 October 2012, OJ 2012 C 326/47.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

of the EU.[25] The tribunal additionally pointed to Art. 39 para. 2 Directive 2005/60/CE, which obliges member states to ensure appropriate administrative measures and sanctions 'in conformity with their national law'. The judges held that the respect for national legal particularities evidenced by this section was an absolute necessity in criminal law, given the diverse European traditions in that field. In this context, they also referred to the margin of appreciation granted to state parties of the ECHR by the European Court of Human Rights (ECtHR). Moreover, the tribunal turned to the recital in question, stressing that it lacked normative character and focussed on the interpretation and application of the directive, thereby underscoring the fact that the latter was not directly applicable.

Applying the canonical standard of fair trial, the tribunal found that it disposed of the necessary independence and impartiality. It considered, *inter alia*, Art. 2 paras 1-2 Legge n. CCCLI,[26] which stipulate:

> '[I]n the exercise of their functions, [the magistrates] are subject only to the law. The magistrates exercise their duties with impartiality, on the basis and within the limits of the competences defined by law.'

Previously, the law had contained a reference to the magistrate's hierarchical dependence on the supreme pontiff. Following an amendment in 2023, the relevant section now merely reads: 'The magistrates are nominated by the Supreme Pontiff'. The court found both the former and current formulations unproblematic, given that the judicial function must be exercised in complete independence. Concerning the magistrates' oath of loyalty and obedience to the pope, the judges reiterated the equal importance of the second part of the promise, 'to exercise the judicial duties with truth and diligence', and employed it as a further argument for their independence. The magistrates additionally cited foreign courts, two from Switzerland[27] and one from Italy,[28]

25 Direct applicability of a directive, which is possible under extraordinary circumstances (see Marios Costa and Steve Peers, *Steiner & Woods EU Law* (14th edn, Oxford University Press 2017), 117-120; Robert Schütze, *European Constitutional Law* (3rd edn, Oxford University Press 2021), 170-172), was implicitly rejected by the court in finding that Directive 2006/60/CE was 'extremely complex and detailed'.

26 Legge n. CCCLI sull'ordinamento giudiziario dello Stato della Città del Vaticano of 16 March 2020, Bolletino Sala Stampa della Santa Sede, n. 162.

27 Federal Criminal Court, judgment of 26 February 2021, no. RR.2020.305, para. 2; Federal Criminal Court, judgment of 24 November 2021, no. RR.2021.144, para. 2.3. Both cases were initiated by one of the accused in the Vatican Financial Trial, who sought to prevent legal assistance to the Vatican by Switzerland, his country of residence.

28 Supreme Court of Cassation, judgment of 12 October 2021, no. 1396, para. 1.4 (diritto). The case concerned the remand of one of the accused, which had been ordered by a lower Italian court on the initiative of the Vatican Promoter of Justice.

 DOI 10.17104/0044-2348-2026-3-897

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

which had previously held that the Vatican courts fulfilled all fair process requirements.

III. ECHR Fair Trial Requirements

The defendants in the Vatican Financial Trial argued, albeit unsuccessfully, that Vatican court organisation is inherently incompatible with the ECHR guarantee of judicial independence, considering the pope's position as an absolute monarch with supreme power over the judiciary. They accordingly understood Art. 6 ECHR as a far-reaching stipulation also affecting state structure, an assumption that the following section will analyse in more detail. It will highlight three particular aspects of the guarantee, namely the 'established by law' criterion, the independence requirement and a potential right to democratic statehood.

1. Establishment by Law

Art. 6 para. 1 sentence 1 ECHR demands that courts must be established by law. Stressing the importance of this requirement for the rule of law, the ECtHR has repeatedly held that any institution failing to meet this requirement lacks the legitimacy 'in a democratic society' to issue binding decisions on individual cases.[29] On the court's account, this is meant to ensure that judicial organisation is not left to the discretion of the executive but 'regulated by law emanating from parliament'.[30] An act of parliament which establishes a court structure and defines the respective competences therefore is a law within the meaning of Art. 6 para. 1 sentence 1 ECHR.[31] However, according to the ECtHR, the term also covers any other provision of the domestic legal order the disrespect of which would render the participation of one or more judges in the adjudication

29 ECtHR, *Lavents v. Latvia*, judgment of 28 November 2002, no. 58442/00, para. 114; ECtHR, *Gorgiladze v. Georgia*, judgment of 20 October 2009, no. 4313/04, para. 67; ECtHR, *Kontalexis v. Greece*, judgment of 31 May 2011, no. 59000/08, para. 38.

30 ECtHR, *Coëme and Others v. Belgium*, judgment of 22 June 2000, nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 98; ECtHR, *Gurov v. Moldova*, judgment of 11 July 2006, no. 36455/02, para. 34; ECtHR, *Chim and Przywieczerski v. Poland*, judgment of 12 April 2018, nos 36661/07 and 38433/07, para. 137. In a similar vein already, ECmHR, *Zand v. Austria*, report of 12 October 1978, no. 7360/76, para. 69.

31 ECtHR, *Lavents* (no. 29), para. 114; ECtHR, *Richert v. Poland*, judgment of 25 October 2011, no. 54809/07, para. 41

DOI 10.17104/0044-2348-2026-3-897 ZaöRV 86 (2026)

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

of a case unlawful.[32] The constitution, international treaties, ordinances, and decrees can equally form part of this legal basis.[33]

No court can function without judges, which is why an adequate appointment process is also a precondition for courts to be established by law.[34] There is nothing in Art. 6 ECHR to prohibit, in principle, the appointment of judges by the executive or legislative branches of government, provided that the appointees are able to exercise their duties without undue influence or pressure.[35] The established by law standard aims at the prevention of ad-hoc courts,[36] but Art. 6 para. 1 sentence 1 ECHR does not necessarily exclude exceptional or transitional institutions like special bodies for war crimes.[37]

The foregoing principles and case-law use established separation of powers terminology and refer to the law establishing courts as emanating from 'parliament'.[38] One might thus assume that Art. 6 ECHR requires states to comply with a Montesquieu system of government in which public authority is divided between a parliamentary legislator, the executive, and the judiciary.[39] Indeed, the ECtHR attaches a growing importance to 'the notion of separation of powers between the political organs of government

32 ECtHR, *Pandjikidze and Others v. Georgia*, judgment of 27 October 2009, no. 30323/02, para. 104; ECtHR, *Gorgiladze* (no. 29), para. 68.

33 ECmHR, *Zand* (n. 30), paras 68-73; ECtHR, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, nos 6878/75 and 7238/75, para. 56; ECtHR, *Jorgic v. Germany*, judgment of 12 July 2007, no. 74613/01, paras 64-71. See Lydia Friederike Müller, *Richterliche Unabhängigkeit und Parteilichkeit nach Art. 6 EMRK* (Duncker & Humblot 2015), 35 for questions reserved for parliamentary legislation.

34 ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, no. 26374/18, para. 227.

35 ECtHR (Grand Chamber), *Maktouf and Damjanović v. Bosnia and Herzegovina*, judgment of 18 July 2013, nos 2312/08 and 34179/08, para. 49; ECtHR, *Guðmundur Andri Ástráðsson* (n. 34), para. 207.

36 Frank Meyer, 'Art. 6' in: Ulrich Karpenstein and Franz C. Mayer (eds), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (3rd edn, C.H. Beck 2022), 171 (para. 50); Helmut Satzger, 'Art. 6 EMRK' in: Helmut Satzger and Wilhelm Schluckebier (eds), *StPO-Kommentar* (5th edn, Carl Heymanns 2023), 2636 (para. 19).

37 ECtHR, *Fruni v. Slovakia*, judgment of 21 June 2011, no. 8014/07, paras 138-140; *Xhoxhaj v. Albania*, judgment of 9 Februar 2021, no. 15227/19, para. 284; for a case of reassignment, see ECtHR, *Bahaettin Uzan v. Turkey*, judgment of 24 November 2020, no. 30836/07.

38 See Müller (n. 33), 35; Meyer (n. 36), para. 50.

39 In this vein, Wolfgang Peukert, 'Art. 6' in: Jochen Abr. Frowein and Wolfgang Peukert, *Europäische Menschenrechtskonvention* (3rd edn, N.P. Engel 2009), 140 (para. 204); William A. Schabas, *The European Convention on Human Rights* (Oxford University Press 2015), 294. See also the international jurisprudence referred to by Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford University Press 2020), 85-86.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

and the judiciary'.[40] Still, it has constantly reiterated that nothing in the ECHR requires states 'to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction'.[41] As concerns criminal justice, it has emphasised the autonomy states enjoy in the establishment of a system of their own choosing, a decision which is, in principle, beyond the court's control.[42] Literature equally accepts that member states are free to choose the means of implementing the standards set forth in Art. 6 ECHR.[43] In this situation, it is useful to assess why the ECtHR requires courts to be established by a parliamentary act: The court wants to rule out any arbitrariness in the organisation of the judiciary, it seeks to avoid the exercise of discretion by both the executive and judicial authorities.[44] Strasburg's underlying goal is therefore not to reserve judicial organisation to parliament but to protect the independence of the judiciary, no matter who puts it at risk. This understanding is in line with the thrust of Art. 6 ECHR, which is a judicial guarantee, not a parliament-related one.

2. Independence from the Executive and the Parties

Under Art. 6 para. 1 sentence 1 ECHR, everyone is entitled to an independent and impartial tribunal. The notion of independence is directed against undue influence not only by other branches of government but also by the parties to the proceedings.[45] Independence has a double dimension: It must be attained in a personal and in an institutional kind of way, meaning that it includes both a state of mind of the respective decision-maker and an institutional setup of how magistrates enter into office and exercise their duties free

40 ECtHR (Grand Chamber), *Stafford v. The United Kingdom*, judgment of 28 May 2002, no. 46295/99, para. 78; ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal*, judgment of 6 November 2018, nos 55391/13, 57728/13 and 74041/13, para. 196; ECtHR, *Svilengaćanin and Others v. Serbia*, judgment of 12 January 2021, nos 50104/10 and 9 others, para. 64.

41 ECtHR (Grand Chamber), *Kleyn and Others v. The Netherlands*, judgment of 6 May 2003, nos 39343/98, 39651/98, 43147/98 and 46664/99, para. 193; ECtHR, *Sacilor Lormines v. France*, judgment of 9 November 2006, no. 65411/01, para. 59.

42 ECtHR (Grand Chamber), *Achour v. France*, judgment of 29 March 2006, no. 67335/01, paras 44, 51; ECtHR, *Ould Dah v. France*, decision of 17 March 2009, no. 13113/03.

43 Stefan Harrendorf, Stefan König and Lea Voigt, 'Art. 6' in: Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *Europäische Menschenrechtskonvention* (5th edn, Nomos 2023), 216 (para. 30); Karsten Gaede, 'Art. 6 EMRK' in: Christoph Knauer, Hans Kudlich and Hartmut Schneider (eds), *Münchener Kommentar zur Strafprozessordnung* (2nd edn, C. H. Beck 2025), 984, para. 23.

44 ECtHR, *Coëme* (n. 30), para. 98.

45 ECtHR, *Sramek v. Austria*, judgment of 22 October 1984, no. 8790/79, para. 42.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

from undue influence.[46] In its assessment, the ECtHR consequently looks at how the members of a tribunal are appointed, how their term of office is designed and whether there are guarantees against outside pressure and further takes into account if the appearance of the body in question is one of independence or not.[47]

As outlined above, Art. 6 para. 1 sentence 1 ECHR does not rule out the appointment of judges by the executive, but it insists that those appointed be able to exercise their duties free from influence or pressure.[48] In this regard, the ECtHR has held that the involvement of the French President in the appointment and promotion of judges does not constitute a violation of the right to an independent tribunal.[49] The court considered several safeguards against undue influence by the President enshrined in French law, namely a constitutionally guaranteed term of judicial office, freedom from instructions by members of the executive and the role of the *Conseil supérieur de la magistrature* in the appointment, promotion, and transfer of judges. The ECtHR has not deduced a minimum term of office from the independence requirement, but it demands that members of a judicial body be irremovable during that term.[50] In this regard, the court does not insist on a formal stipulation; instead, it is sufficient that the principle of irremovability is respected in practice.[51]

The ECtHR has stressed its special concern with the protection of the judiciary against undue influence 'given the prominent place the judiciary occupies among State organs in a democratic society'.[52] This wording, particularly in conjunction with the separation of powers terminology discussed above,[53] seems to suggest that the independence requirement also imposes a democratic system of government. On the other hand, the court has maintained a clear focus on the judiciary when stating that the notion of independence of a tribunal entails the existence of procedural safeguards to separate

46 ECtHR, *Guðmundur Andri Ástráðsson* (n. 34), para. 234; ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, judgment of 8 November 2021, nos 49868/19 and 57511/19, para. 316.

47 ECtHR, *Langborger v. Sweden*, judgment of 22 June 1989, no. 11179/84, para. 32; ECtHR, *Kleyn* (n. 41), para. 190; ECtHR, *Ramos Nunes de Carvalho e Sá* (n. 40), paras 153, 156.

48 ECtHR, *Maktouf and Damjanović* (n. 35), para. 49; ECtHR, *Guðmundur Andri Ástráðsson* (n. 34), para. 207.

49 ECtHR, *Thiam v. France*, judgment of 18 October 2018, no. 80018/12, paras 75-85.

50 ECtHR, *Guðmundur Andri Ástráðsson* (n. 34), paras 239-240.

51 ECtHR, *Campbell and Fell v. The United Kingdom*, judgment of 28 June 1984, nos 7819/77 and 7878/77, para. 80; ECtHR, *Sacilor Lormines* (n. 41), para. 67.

52 ECtHR (Grand Chamber), *Danileț v. Romania*, judgment of 15 December 2025, no. 16915/21, para 125.

53 At III. 1.

 DOI 10.17104/0044-2348-2026-3-897

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

the judiciary from other powers.[54] In view of this ambiguity, a closer look at the larger relationship between the ECHR and democratic government might prove useful.

3. Right to Democracy?

If the convention presupposed democratic statehood, the Vatican would necessarily fail to meet the standard of Art. 6 ECHR. Its judges are neither elected by the people nor chosen by its representatives, but exercise their function based on a decision by the supreme pontiff. The latter is an absolute monarch with supreme power over legislation, executive and judiciary. Any requirement of democratic governance directly or indirectly set forth by Art. 6 ECHR would therefore render the Vatican incapable of adhering to the guarantee.

Art. 6 para. 1 sentence 2 ECHR makes an explicit mention of democracy, tying the exclusion of public and press from court proceedings to the interest of morals, public order, or national security 'in a democratic society'.[55] Additionally, the ECtHR has referred to democracy as a logical basis for its interpretation of the fair trial principle: It has, first and foremost, regarded the guarantee as one of the 'fundamental principles of any democratic society'.[56] It has stated that courts not established according to law lack the legitimacy required in a democratic society to decide legal issues.[57] It has stressed the role of the judiciary in 'a democratic State governed by the rule of law' when including the appointment process in the established by law requirement.[58] And it has viewed this imperative as a means to ensure that 'the judicial organisation in a democratic society does not depend on the discretion of the executive'.[59]

Despite all these connections, the ECHR itself contains – unlike Art. 25 International Covenant on Civil and Political Rights (ICCPR)[60] or Art. 23 American Convention on Human Rights[61] – no right to democratic partici-

54 See ECtHR, *Guðmundur Andri Ástráðsson* (n. 34), para. 215.

55 The possible consequences of this wording are discussed by Bosko Tripkovic and Alain Zysset, 'Uncovering the Nature of ECHR Rights: An Analytical and Methodological Framework', HRLR 24 (2024), 1-22 (13-21).

56 ECtHR, *Pretto and Others v. Italy*, judgment of 8 December 1983, no. 7984/77, para. 21.

57 ECtHR, *Lavents* (n. 29), para. 114; *Gorgiladze* (n. 29), para. 67.

58 ECtHR, *Guðmundur Andri Ástráðsson* (n. 34), para. 227.

59 ECtHR, *Coëme* (n. 30), para. 98; ECtHR, *Richert* (n. 31), para. 42.

60 International Covenant on Civil and Political Rights of 16 December 1966, 999 UNTS 171.

61 American Convention on Human Rights of 22 November 1969, 1144 UNTS 123.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

pation.[62] Instead, a guarantee of free elections, one central aspect of democratic government, is enshrined in Art. 3 First Protocol to the ECHR.[63] This deliberately chosen structure makes it difficult to construe general democratic deficits as a violation of the convention, provided that they do not touch upon the material content of the individual guarantees contained therein.[64] Still, there is no clear dividing line between the right to democracy, which is absent from the text of the convention, and ECHR human rights like freedom of thought and of expression, freedom of assembly and freedom of association, all of which are closely connected to the functioning of democracy.[65] In view of this latter aspect, the ECtHR reached the conclusion that democracy 'appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it'.[66] While this is certainly a plausible assumption, it fails to explain why the states involved chose to guarantee only select aspects of democratic statehood, moving the cornerstone of electoral participation to a protocol.

IV. Applicability of Fair Trial Guarantees to the Vatican

The defence counsel in the Vatican Financial Trial had argued that Art. 6 ECHR binds the Vatican. Even though the tribunal was correct in dismissing this argument, the provision still has a legal and practical relevance for the Vatican. The following section will look at how fair trial guarantees can play a role in international legal cooperation and treaty-making before discussing

62 Hilary Charlesworth, 'Is there a human right to democracy?' in: Cindy Holder and David Reidy (eds), *Human Rights* (Cambridge University Press 2013), 271-284 (276). See also Jude I. Ibegbu, *Right to Democracy in International Law* (Edwin Mellen Press 2003), 88-90, who at 96-214 also discusses general principles and custom as potential sources of a right to democracy. For a sceptical assessment, see Stefan Oeter, 'Self-Determination' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations* (4th edn, Oxford University Press 2024), Vol. I, 457-484 (para. 41).

63 Protocol to the Convention on the Protection of Human Rights and Fundamental Freedoms of 20 March 1952, ETS no. 009. For the drafting history of the provision, see Susan Marks, 'The European Convention on Human Rights and Its "Democratic Society"', BYIL 66 (1996), 209-283 (221-224).

64 See Rory O'Connell, 'The Right to Democracy' in: Nico Bechter and Gabriele De Angelis (eds), *Problems of Democracy* (Inter-Disciplinary Press 2010), 47-54 (48-49).

65 Marks (n. 62), 210-214. Steven Wheatley, 'Democracy in International Law: A European Perspective', ICLQ 51 (2002), 225-248 (237-238) and Johannes Hendrik Fahner, 'Revisiting the Human Right to Democracy: A Positivist Analysis', International Journal of Human Rights 21 (2017), 321-341 (326) consequently argue that the ECHR contains a right to democracy.

66 ECtHR (Grand Chamber), *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, no. 19392/92, para. 45.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

whether such standards might apply to states irrespective of contractual consent to be bound.

1. Legal and Practical Relevance of ECHR Requirements for the Vatican

The ECHR principles discussed above have greater relevance for the Vatican City State than might seem at first sight. There is indeed little to add to the tribunal's finding that the ECHR is neither directly nor indirectly applicable to the Vatican:[67] There has been no consent to be bound, the EU directive in question is not self-executing and the mere mention of the ECHR in its recitals is much too vague to trigger such a far-reaching commitment. But Art. 6 para. 1 ECHR might still play a role in the field of international legal cooperation, namely as regards the enforcement of Vatican judgments by ECHR member states, or in matters of judicial assistance.[68]

When parties to the convention grant the execution of a foreign verdict, Art. 6 ECHR obligates them to ensure that fair trial standards have been met by the foreign authorities.[69] Specifically, courts wishing to declare a foreign decision enforceable must duly satisfy themselves that the respective proceedings adhered to the guarantees set forth in Art. 6 ECHR, in particular where the enforceability of the decision is of considerable importance for the parties to the proceedings.[70] According to ECtHR case law, this duty also comes into play where a national court wishes to render the decision of its ecclesiastical counterpart enforceable, as can be the case for matrimonial matters under certain concordats.[71]

---

67 Cavana (n. 17), 5-6 and Geraldina Boni, Manuel Ganarin and Alberto Tomer, 'Il "processo del secolo" in Vaticano e le violazioni del diritto', Stato, Chiese e pluralismo confessionale (5/2024), 1-135 (50-66) contest this finding. Alessandro Diddi, 'Il processo penale vaticano e le garanzie del "giusto processo". Riflessioni a margine di una recente sentenza del Tribunale vaticano', Diritto e religioni 19 (2024), 629-649 (631) accepts it.

68 The latter aspect depends on the (disputed) question of whether matters of international legal assistance fall within the ambit of Art. 6 ECHR, see Meyer (n. 36), paras 35-36. For a general assessment of judicial cooperation with the Vatican, see Cavana (n. 17), 25-29; Diddi (n. 66), 631-634; Boni, Ganarin and Tomer (n. 66), 94-103.

69 For an overview with special focus on the Vatican Financial Trial, see Boni, Ganarin and Tomer (n. 66), 103-113.

70 ECtHR, *Pellegrini v. Italy*, judgment of 20 July 2001, no. 30882/96, para. 40; ECtHR (Grand Chamber), *Avotiņš v. Latvia*, judgment of 23 May 2016, no. 17502/07, paras 96-100; ECtHR, *Dolenc v. Slovenia*, judgment of 20 October 2022, no. 20256/20, paras 55-60.

71 ECtHR, *Pellegrini* (n. 69), para. 40.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

At the same time, Art. 6 ECHR might set limits for a treaty-based cooperation of member states with the Vatican. One such public international law instrument is the above-mentioned monetary agreement between the EU and the Vatican. Its Art. 8 para. 1 lit. b,[72] read in conjunction with Art. 6 Council Framework Decision 2000/383/JHA[73] obliges the Vatican, *inter alia*, to amend its criminal law to render certain counterfeiting activities punishable.[74] If it were established that the city state was inherently unable to guarantee a fair trial,[75] ECHR member states entering into such an agreement could face legal risks: Their cooperation with the Vatican might well be construed as a violation of Art. 6 ECHR.[76]

2. Fair Trial Principles in Customary International Law?

According to newspaper reports, defence counsel might additionally argue on appeal that the Vatican Financial Trial violated 'well-established international legal obligations applicable to all criminal proceedings', a formulation suggesting the existence of fair trial guarantees in customary international law.[77] Relying on this body of law would address one core problem in the defence's line of argument, the applicability of Art. 6 ECHR. Unlike treaties, which bind only those states that have expressly consented, rules of customary international law come into being through general, not necessarily universal practice and do not, therefore, require the explicit support of each member of the international community.[78]

---

72 See n. 18.

73 Council Framework Decision of 29 May 2000 on Increasing Protection by Criminal Penalties and Other Sanctions Against Counterfeiting in Connection with the Introduction of the Euro, OJ 2000 L 140/1.

74 For details, see Roberto Zannotti, 'Le riforme penali vaticane', Diritto e Religioni 17 (2022), 205-218 (208-209).

75 For potential consequences in the realm of liability, see, for example, EGC, *Odigitria AAE v. Council and Commission*, judgment of 6 July 1995, case no. T-572/93, ECLI:EU:T:1995:131.

76 Even though Art. 6 para. 2 TEU obliges the EU to become a party to the ECHR, no accession has taken place yet. The contents of the ECHR nevertheless bind the EU as general principles of EU law, see Art. 6 para. 3 TEU.

77 Nicole Winfield, 'The First Outside Legal Analyses of Vatican's "Trial of the Century" Are In, and They're Critical', Associated Press, 19 March 2024, <https://www.ncronline.org/vatican/vatican-news/first-outside-legal-analyses-vaticans-trial-century-are-and-theyre-critical>, last access 8 July 2026; Sean O'Neill, 'Vatican Fights Case in London Court. A British Financier Says He Was Denied Human Rights in a Corruption Trial Driven by the Pope', The Times, 22 June 2024, 13.

78 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019), 22-23; Krajewski (n. 2), chapter 4, para. 129.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Indications for a customary status of certain fair trial guarantees are not hard to find: Art. 10 Universal Declaration of Human Rights (UDHR) enshrines the right to a fair hearing by an independent and impartial tribunal while Art. 14 ICCPR additionally speaks of a court established by law.[79] As 174 states have committed themselves to the latter stipulation through their ratification of the covenant, it seems indeed plausible that fair trial principles could form part of customary international law,[80] particularly when it comes to the proceedings of international criminal tribunals.[81]

One typical problem with customary law is to pinpoint the specific contents and requirements of the rule in question.[82] In this regard, Art. 14 ICCPR provides no particular insights into what exactly customary law might require in terms of judicial organisation. The wording of the guarantee closely resembles Art. 6 ECHR and contains both the established by law element and the independence criterion.[83] Questions regarding the content of those two aspects, discussed above with a view to Art. 6 ECHR, equally arise in relation to Art. 14 ICCPR. Compared to Art. 6 ECHR, however, a cogent yes in favour of a democratic, Montesquieu system of government is even more unlikely under Art. 14 ICCPR and customary law. While one might at least argue that a common history of ideas, namely of Enlightenment ideals,

79 Art. 14 para. 1 sentence 1 ICCPR.

80 Christiane Kamardi, *Die Ausformung einer Prozessordnung sui generis durch das ICTY unter Berücksichtigung des Fair-Trial-Prinzips* (Springer 2009), 251-255; Patrick Robinson, 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY', Berkeley J. Int'l L. Publicist 3 (2009), 1-11 (5); Clooney and Webb (n. 39), 13-20; Louise Doswald-Beck, 'Fair Trial, Right to, International Protection' in: Rüdiger Wolfrum and Anne Peters (eds), *MPEPIL* (online edn, Oxford University Press 2025), para. 16 ('a rule of customary international law or, at the very least, there is a trend towards the hardening of such a rule'). Viewing the guarantee (also) as a general principle of international law, as Param Cumaraswamy, 'Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers', E/CN.4/1995/39, para. 32-35 does, makes no difference for the questions discussed here.

81 Robinson (n. 79), 8-9; John H. Dingfelder Stone, 'Existence of the Right to Translation under the ICCPR', Max Planck UNYB 16 (2012), 159-181 (161, 179-180); Dominik Zimmermann, *The Independence of International Courts* (Nomos 2013), 381-383, 440; similarly Jacob Katz Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects', Yale J. Int'l L. 27 (2002), 111-140 (117-118).

82 ILC, 'Report on the Work of the Seventieth Session', ILCYB 2018, Vol. II, Part Two, 1 (93); see also Cumaraswamy (n. 79), para. 36. On the vagueness of the independence principle concerning international judicial organs see Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, Cambridge University Press 2005), 259.

83 See also HRC General Comment No. 32 of 23 August 2007, CCPR/C/GC/32, para. 19. Rhona K.M. Smith, *International Human Rights Law* (8th edn, Oxford University Press 2018), 280 states, on this basis, that 'there should be a separation of powers', a result that is not compelling in view of the wording and the arguments outlined at III.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

of liberalism and democracy, links the state parties to the ECHR, there is far less intellectual common ground when it comes to the international community as a whole. Against this background, it is difficult to assume that modern states, in all their diversity, could have agreed on one specific model of government as the only setup compatible with international law. In fact, Art. 14 ICCPR has attracted the highest number of declarations and reservations among the guarantees enshrined in the covenant, which underlines that a considerable number of states are unable to effectively secure judicial independence.[84] Moreover, the UN Basic Principles on the Independence of the Judiciary of 6 September 1985, which were endorsed by the General Assembly in 1985,[85] carefully avoid any reference to a particular system of government. A global consensus in this regard should not therefore be assumed.[86]

V. Vatican Compliance with Fair Trial Guarantees

There is thus little reason to assume that the Vatican is subject to any public international law standards of fair trial. However, in view of the legal and practical relevance Art. 6 ECHR has for the Vatican, the question of whether or not the city state can guarantee a fair trial is important beyond the judgement of 2023. A conclusive answer must take into account the particular purpose and special legal system of the Vatican. Against this background, the following sections will demonstrate that the Vatican is in fact able to comply with fair trial standards.

1. Aspects of Vatican Judicial Organisation

There is certainly room to argue that the Vatican, with its particular system of government, cannot meet the standard set by Art. 6 ECHR. The unification of all legislative, executive, and judicial power in the supreme pontiff is hard to reconcile with the separation of powers concept that underlies the

84 Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press 2020), 371.

85 UNGA Res 40/32 of 29 November 1985, A/RES/40/32, para. 5; UNGA Res 40/146 of 13 December 1985, A/RES/40/146, para. 2.

86 See Michael Bohlander, 'Separation of Powers and the International Judiciary – A Vision of Institutional Judicial Independence in International Law' in: Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence* (Brill 2011), 269-280 (271-273) for a discussion focussing on international tribunals.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

notion of an independent court established by law.[87] This is true even though justice is administered by separate institutions in the Vatican, because those are closely intertwined with the pontiff. Not only do they exercise jurisdiction in his name,[88] the pope also nominates the magistrates and assigns their duties.[89] In addition, Art. 21 para. 2 FL entitles the pontiff to assign the investigation and decision of any civil or criminal matter to a special instance created by him.[90] And finally, the Vatican lacks the parliamentary legislator the ECtHR expressly calls for to establish a court structure. Even if one accepted a non-parliamentary law as a valid legal basis for court organisation, the result remained problematic: Vatican legislation ultimately emanates from the pope, who as supreme legislator is not himself bound by his laws, but free to amend them at will.[91] Any legislation in existence would therefore seem of little practical value for restraining the pope's strong position in the judicial field.

Despite the fundamental differences between the Vatican City State and the system envisaged by the ECHR, certain aspects supporting the independence of Vatican judges remain.[92] The position of the pontiff as sovereign holding all (judicial) power notwithstanding, judicial organs have been instituted by way of Legge n. CCCLI, a Vatican law issued by the pope. On this basis, judges are appointed by the pope, not by the administration, whose acts they may have to review.[93] There is no hard age limit, but similar to the rules for senior clergy, judges are obliged to tender their resignation at the end of the judicial year in which they turn 75, which will become effective upon acceptance by the pope. And finally, both Art. 21 para. 4 FL and Art. 2 para. 2 Legge n. CCCLI guarantee the independence of the judiciary in the

87 Konrad Dyda, 'Power and Its Exercise in the Vatican City State', Ecclesiastical Law Journal 26 (2024), 259-275 (265-266).

88 See Joseph-Thomas Pini, 'Le "droit du Vatican": de la loi de la pesanteur dans l'univers juridique', Pouvoirs. Revue française d'études constitutionelles et politiques 162 (2017), 89-103 (92-93).

89 Art. 8 para. 1, Art. 2 para. 1 Legge n. CCCLI. See also Cavana (n. 17), 19-20.

90 Cavana (n. 17), 15; Boni, Ganarin and Tomer (n. 66), 82. Even though Legge n. CCCLI now provides for the cessation of judicial office when the age limit is reached, see Dyda (n. 86), 267-268; Geraldina Boni, Manuel Ganarin and Alberto Tomer, 'Qualche "aggiustamento" alle disciplina dei magistrate vaticani', Stato, Chiese e pluralismo confessionale (9/2024), 1-23 (3-4), this does not mean that the pontiff would thus be barred from removing a judge, Cavana (n. 17), 19.

91 Heinrich de Wall and Stefan Muckel, *Kirchenrecht* (6th edn, C. H. Beck 2022), 146; Sarais (n. 22), 45. See canon 331 CIC, which speaks of the pope's 'supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely'.

92 For an overview, see Diddi (n. 66), 640-643; Dyda (n. 86), 267-269.

93 Giuseppe Dalla Torre, 'L'indipendenza della giustizia vaticana', Stato, Chiese e pluralismo confessionale (5/2019), 21-33 (27).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

exercise of their adjudicating function.[94] As long as these laws stand, they must be regarded as the legislative *status quo*. The possibility of amendment or dispensation, which is inherent in parliamentary systems, too, can only be considered once such an event has actually taken place.

2. Particularities of the Vatican Legal Order

Certain particularities of the Vatican, which stem from its historic origins, must also be taken into consideration. For centuries, the popes have held temporary power over the Papal States, which ceased to exist following annexation in the course of Italian unification in the 19th century.[95] The fact that the pope and his court remained in Rome, albeit restricted to the Vatican, begged the famous 'Roman question', which remained unresolved until the 1929 Lateran Pacts between Italy and the Holy See. In Art. 3 of the pertaining treaty,[96] Italy recognised the Vatican City State as a separate entity in international law. The stipulation made an explicit reference to the fact that the creation of the Vatican City State took place 'for the special purposes and modalities outlined in the treaties'. The general idea was to give the pope as head of the Catholic Church a sovereign territorial basis to ensure the independence of the Holy See and to guarantee its international standing.[97] In its dealings with states and organisations, the Vatican has often alluded to this by referring to its own nature, universal mission and particular character both in declarations and reservations.[98] In this sense, the Vatican City State has a purpose quite different from that of other states.[99] This purpose should be taken into account when assessing whether the Vatican adheres to modern human rights law standards such as Art. 6 ECHR.

Here, a second aspect might come into play: It is often said that the Vatican is an absolute monarchy, and it is indeed true that all public power is held by

94 For a discussion of the law, see Giuseppe Dalla Torre, 'Considerazioni sul nuovo ordinamento giudiziario dello Stato della Città del Vaticano', Stato, Chiese e pluralismo confessionale (12/2020), 89-106. As Dyda (n. 86), 267 points out, popes have never been able to dictate judgments but only to judge themselves.

95 See Alessio Sarais, 'Brevi cenni sul rapporto tra diritto vaticano e diritto canonico orientale', Prawo Kanoniczne 58 (2015), 137-152 (137); Giuseppe Dalla Torre, 'La nuova legge fondamentale dello Stato della Città del Vaticano', Angelicum 79 (2002), 711-724 (711-712).

96 Trattato fra la Santa Sede e l'Italia of 11 February 1929, Acta Apostolicae Sedis 21 (1929), 209. The pacts also included a concordat and a financial convention.

97 Ryngaert (n. 16), 833; Sarais (n. 94), 138-139; Westdickenberg (n. 5), para. 19.

98 For examples, see Multilateral Treaties Deposited with the Secretary-General at Vol. I ch. V-2, 8; Vol. I ch. IV-9, 5; Vol. II ch. XXVII-2, 4; Vol. II ch. XXVI-4, 4; Vol. II ch. XVIII-7, 4-5.

99 Witsch (n. 8), 538.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

the pope.[100] At the same time, it should not be forgotten that the Vatican Law on Legal Sources places canon law at the top of its hierarchy of norms and makes it the primary criterion of interpretation.[101] Canon law, the ecclesiastical rules that govern the organisation of the church and the rights and duties of the faithful, consists of two parts:[102] One, *ius mere ecclesiasticum*, mere ecclesiastical law or man-made law, can be altered by the competent authority. The other, superior part, *ius divinum* or divine law, is beyond man's disposal and cannot be modified or changed. *Ius divinum* includes fundamental principles such as the primacy of the pope, the sacraments or the indissolubility of marriage.[103] It is not entirely accurate, therefore, to assume that the supreme pontiff is not himself bound by any law when exercising his powers with regard to the Vatican City State.[104] He must instead, for example, respect the equal dignity of all faithful[105] as part of *ius divinum*. In that sense, he resembles a constitutional rather than an absolute monarch.[106]

3. Aspects of Public International Law

Beyond Vatican law, public international law offers aspects worth considering when assessing whether procedures such as the Vatican Financial Trial can, in principle, meet fair trial standards. Even the ECtHR accepts that its decisions on Art. 6 ECHR can have far-reaching consequences for the national legal order:[107] The declaration that a court is unlawful or that judges must be removed carries a serious risk of undermining public confidence in the judiciary, reducing legal certainty and thereby causing harm to the rule of law. As a result, the consequences of such a judgment must be weighed

100 Cavana (n. 17), 14-16; Witsch (n. 8), 539; Franz Norbert Otterbeck, 'Der Vatikan. Ein "Staat des Grundgesetzes"?' in: Heinz Finger, Reimund Haas and Hermann-Josef Scheidgen (eds), *Ortskirche und Weltkirche in der Geschichte* (Böhlau 2011), 1005-1016 (1008).

101 Art. 1 para. 1 Legge n. LXXI sulle fonti del diritto of 1 October 2008, Bolletino n. 16. On the role of canon law, see Pasquale Lillo, 'Alcune riflessioni sull'ordinamento vaticano. Ricordando il Maestro', Stato, Chiese e pluralismo confessionale (6/2021), 23-42 (38-41) and, extensively, Geraldina Boni, 'L'"ordinamento canonico" come "primo criterio di riferimento interpretativo" del diritto vaticano: una rilevanza crescente', Jus-Online (6/2022), 99-170.

102 Ulrich Rhode, *Kirchenrecht* (W. Kohlhammer 2015), 16; Ludger Müller and Christoph Ohly, *Katholisches Kirchenrecht* (Ferdinand Schöningh 2018), 39-42.

103 Rhode (n. 101), 91-93; de Wall and Muckel (n. 90), 111.

104 Dyda (n. 86), 273. See also the detailed analysis by Claudio Gentile, 'I limiti al potere legislativo nello Stato della Città del Vaticano', Archivio giuridico 156 (2024), 393-422 (393).

105 Canon 208 CIC, which is part of *ius divinum*, see Müller and Ohly (n. 101), 40.

106 Similarly Otterbeck (n. 99), 1006.

107 ECtHR, *Guðmundur Andri Ástráðsson* (n. 34), para. 240.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

carefully in order to ascertain whether there is in fact a pressing need of a substantial and compelling character requiring such a decision.

As regards the Vatican, one could consider that the system at hand, namely the central role of the pope, is intertwined with religious convictions.[108] In this vein, canon 331 CIC links the supreme authority of the pope to Saint Peter and his vocation as the first among the apostles, an office instituted by Christ himself. The preamble of the fundamental law equally refers to the *munus petrino* as basis for the pope's sovereignty over the Vatican.[109] Deficits in the separation of powers which ultimately stem from this belief are therefore not merely legislative shortfalls that could easily be remedied but touch upon the very identity of the Vatican.[110] Indeed, from a canon law perspective, it might be impossible to fully address them.[111] The choice is therefore either to accept certain deficits with regard to the material content of Art. 6 ECHR or to declare the organisation of the Vatican City State fundamentally incompatible with this guarantee.

The latter decision would render judicial activities in the Vatican illegitimate or obsolete and contribute to a higher degree of impunity.[112] What is more, such a finding would also touch upon central notions of public international law. It seems somewhat unsuitable to invoke the principle of self-determination of peoples here, given that Vatican citizenship is – unlike all other nationalities – tied to a function in the Vatican and typically temporary.[113] But the prohibition of intervention can well be applied to the issue in question. Choosing a system of government is an integral part of the internal affairs of a country, which means that all pertaining decisions belong to the *domaine réservé* of the respective entity and enjoy protection from outside interference.[114] This is not

108 Lillo (n. 100), 34-38.

109 See, on the ambivalent nature of this reference, Alberto Melloni, 'Potere del papa e giustizia vaticana', Rivista il Mulino, 4 December 2023, <https://www.rivistailmulino.it/a/potere-del-papa-e-giustizia-vaticana>, last access 8 July 2026.

110 Pini (n. 87), 97-99.

111 On this question, see also Cavana (n. 17), 6-9, who argues that canon law requirements need not necessarily apply in full to the Vatican City State as the temporal holdings of the Holy See.

112 As an alternative, the Vatican could also make use of the possibility to cede the exercise of jurisdiction to Italy, as provided for in Art. 22 Trattato fra la Santa Sede e l'Italia. See, for this option, Cavana (n. 17), 12.

113 Otterbeck (n. 99), 1008; Witsch (n. 8), 539. See, on this point, Jorri C. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996), 417-418.

114 Regarding the extent of the *domaine réservé*, the ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. USA), merits, judgment of 27 June 1986, ICJ Reports 1986, 14 (para. 204) has famously stated that each state is permitted, by the principle of state sovereignty, to freely choose a political, economic, social and cultural system.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

to say that contractually agreed obligations such as the one in Art. 6 ECHR violate the prohibition of intervention. But denying a country the basic public function of adjudication would be hard to reconcile with this cornerstone of the international legal order if it was not based on absolutely striking grounds. In case of the Vatican and in view of the above, the existence of such reasons is more than doubtful.

VI. Conclusion: The Vatican – An Accepted Partner in International Cooperation

Indeed, in their practical dealings, other states do not treat the Vatican as pariah but as fully legitimate partner in international cooperation, which can be trusted with criminal proceedings. In this sense, the monetary agreement[115] should be counted as an expression of the EU's confidence in fair trial proceedings by Vatican tribunals. Similar considerations apply with regard to the 190 states bound by the International Convention for the Suppression of the Financing of Terrorism[116] as well as the parties of the UN Conventions against Transnational Organized Crime[117] and against Corruption,[118] all of which equally oblige the Vatican to ensure judicial action. Moreover, Swiss and Italian courts have accepted their Vatican counterparts as legitimate and independent judicial institutions. Finally, a draft section in the Council of Europe Parliamentary Assembly's report on observer states,[119] which criticised a lack of democratic institutions in the Vatican, was modified to refer only to the specific nature and mission of the Vatican City State.[120] A 51 to 1 majority in the Assembly found that the 'status quo should be accepted'.[121] All of this can be seen as state practice to the end that the Vatican system of government does not impair the independent administration of justice. In view of these aspects, the Vatican City State should be treated as a *sui generis* case whose court system guarantees sufficient independence even though typical organisational requirements are not met.

115 See n. 18.

116 International Convention for the Supression of the Financing Terrorism of 9 December 1999, 2178 UNTS 197.

117 United Nations Convention against Transnational Organized Crime of 15 November 2000, 2225 UNTS 209.

118 United Nations Convention against Corruption of 31 October 2003, 2349 UNTS 41.

119 CoE-PA Doc 11471 (n. 16).

120 Amendment No. 22 to Doc 11471 of 22 January 2008.

121 Council of Europe Parliamentary Assembly (CoE-PA), 'The Council of Europe and Its Observer States – the Current Situation and a Way Forward', CoE-PA Res 1600 of 23 January 2008.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

Die Voraussetzung gescheiterter Verhandlungen in der Streitbeilegungsklausel der UN-Frauenrechtskonvention

Juliane Bertram*
Europa-Universität Viadrina, Frankfurt (Oder), Deutschland/Germany
jbertramlaw@gmail.com

Abstract 921
Keywords 922
I. Einführung 922
II. Die Bedeutung von Streitbeilegungsklauseln für den Menschenrechtsschutz 925
III. Die Voraussetzung der gescheiterten Verhandlungen 927
1. Verhandlungen als zwingende verfahrensrechtliche Voraussetzung 927
2. Das Scheitern von Verhandlungen 930
3. Menschenrechtliche Konzeptualisierung von Verhandlungen 932
a) Der Konsens zur IGH-Zuständigkeit 932
b) Der IGH-Zugang als Voraussetzung zur Umsetzung der CEDAW 936
c) Die Diskrepanz zwischen Verfahrens- und materiellem Recht 940
d) Die Berücksichtigung der Schwere der CEDAW-Verletzungen 943
IV. Schlussfolgerungen 944
Summary: The Failed-Negotiations Requirement in CEDAW's Compromissory Clause 946
Keywords 946

Abstract

Klagen vor dem Internationalen Gerichtshof (IGH) wegen mutmaßlicher Menschenrechtsverletzungen werden zunehmend auf die Streitbeilegungsklauseln in Menschenrechtsverträgen gestützt. Die Voraussetzung in diesen Klauseln, dass der klageerhebende Staat vor der Anrufung des IGH mit dem beklagten Staat über die Vorwürfe verhandelt haben muss, kann dabei zu Verfahrensverzögerungen oder zur Abweisung der Klage führen. Dies hat gravierende negative Folgen für den Menschenrechtsschutz. Der vorliegende Beitrag untersucht die Voraussetzung der gescheiterten Verhandlungen in der Streitbeilegungsklausel der UN-Frauenrechtskonvention. Anhand der CEDAW (Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau)-Verletzungen in Afghanistan zeigt der Beitrag, dass die Streitbeile-

* Dr. iur. (Europa-Universität Viadrina), LL.M. (George Washington University).

DOI 10.17104/0044-2348-2026-3-921 ZaöRV 86 (2026), 921-946

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

gungsklausel auch einen materiellrechtlichen Gehalt hat und deshalb einen raschen Zugang zum IGH ermöglichen sollte.

Keywords

Menschenrechte – CEDAW – IGH-Zuständigkeit – Streitbeilegungsklausel – Afghanistan – Frauenrechte

I. Einführung

In den vergangenen knapp elf Jahren (Februar 2015 bis Januar 2026) wurden alle Klagen, die vor dem Internationalen Gerichtshof wegen mutmaßlicher Verletzungen von Menschenrechtsverträgen erhoben wurden, auf die Streitbeilegungsklausel des jeweiligen Vertrags gegründet.[1] Die Streitbeilegungsklausel des Übereinkommens zur Beseitigung jeder Form von Diskriminierung der Frau (Art. 29 Abs. 1 CEDAW[2]) setzt für die Zuständigkeit des IGH voraus, dass eine Streitigkeit der Vertragsstaaten über die Auslegung oder Anwendung der CEDAW vorliegt, die nicht durch Verhandlungen und, bei einem Scheitern dieser Verhandlungen, innerhalb von sechs Monaten durch ein Schiedsverfahren beigelegt werden konnte. Art. 29 Abs. 1 CEDAW wurde erst einmal genutzt, um mutmaßliche CEDAW-Verletzungen durch Ruanda während des Zweiten Kongokrieges (1999 bis 2003) durch den IGH beurteilen zu lassen.[3] Der IGH verneinte seine Zuständigkeit, weil der Kongo als antragstellender Staat keine ausreichenden Versuche unternommen hatte, mit Ruanda über die CEDAW-Verletzungen zu verhandeln.[4]

Während der 79. Generalversammlung der Vereinten Nationen (UN) im Herbst 2024 gaben Australien, Deutschland, Kanada und die Niederlande (Initiativstaaten) bekannt, dass sie Afghanistan für die Diskriminierung von Frauen unter Art. 29 Abs. 1 CEDAW in die Verantwortung nehmen wollen.[5]

1 IGH, List of All Cases, <https://www.icj-cij.org/list-of-all-cases>, zuletzt besucht 22. Januar 2026.

2 1249 United Nations Treaty Series (UNTS), 13.

3 IGH, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), Klageschrift v. 28. Mai 2002, 4-16.

4 IGH, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Urteil v. 3. Februar 2006, ICJ Reports 2006, 6 (40-41 Rn. 91-93).

5 United Nations General Assembly (UNGA), General Debate of the 79th Session, Mélanie Joly, Minister of Foreign Affairs, Canada, <https://gadebate.un.org/en/79/canada>, zuletzt besucht 22. Januar 2026; Penny Wong, Minister for Foreign Affairs of Australia, National

 DOI 10.17104/0044-2348-2026-3-921

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Afghanistan hat die CEDAW im März 2003 als erster muslimischer Staat ohne Vorbehalte ratifiziert.[6] Seit der gewaltsamen Machtübernahme im August 2021 wird Afghanistan de facto durch die Taliban geführt. Völkerrechtlich ist Afghanistan jedoch auch nach dem Machtwechsel an die CEDAW gebunden.[7]

Die Taliban haben die Menschenrechte von Frauen und Mädchen seit ihrer Machtübernahme systematisch und in einem gravierenden Ausmaß eingeschränkt:[8] Bereits einen Monat nach der Machtübernahme wurden Mädchen von öffentlichen und privaten Schulen ab der sechsten Klasse ausgeschlossen. Seit November 2022 ist es Frauen und Mädchen verboten, öffentliche Parks, Bäder und Fitnessstudios zu besuchen. Im Dezember 2024 wurde Frauen die zuvor ausnahmsweise erlaubte Ausbildung an privaten Krankenhäusern verboten. Dies verschlechtert die medizinische Versorgung von Frauen und Mädchen, da sie nach afghanischen Normen nur von Frauen behandelt werden dürfen.[9] Der UN-Generalsekretär, der UN-Sonderberichterstatter zur Lage der Menschenrechte in Afghanistan sowie die UN-Arbeitsgruppe

---

Statement, <https://gadebate.un.org/sites/default/files/gastatements/79/au_en.pdf>, zuletzt besucht 22. Januar 2026; Bundesregierung, Bulletin Nr. 89-5 vom 29. September 2024, Rede der Bundesministerin des Auswärtigen, Annalena Baerbock, zum Start der CEDAW-Initiative zu Frauenrechten in Afghanistan am 26. September 2024 in New York, 2-3; Auswärtiges Amt, Initiative zur Rechenschaftspflicht für Afghanistans Verletzung der UN-Konvention zur Beseitigung jeder Form von Diskriminierung der Frau, 13. Januar 2025, <https://www.auswaertiges-amt.de/de/aussenpolitik/feministische-aussenpolitik/cedaw-2693644>, zuletzt besucht 22. Januar 2026; Hannah Sweeney, 'Gender Equality and State Responsibility: Enforcing CEDAW through the ICJ', Harvard Human Rights Journal 38 (2025), 287-323 (319-321) erläutert die mögliche Motivation der Initiativstaaten.

6 UN, Convention on the Elimination of All Forms of Discrimination against Women, Status as at 23-01-2026, Afghanistan, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en>, zuletzt besucht 22. Januar 2026.

7 James Crawford, *The Creation of States in International Law* (2. Aufl., Oxford University Press 2006), 667-668; Sweeney (Fn. 5), 288-289, 317-319.

8 UNGA, Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan, Richard Bennett, 9. Februar 2023, UN Doc. A/HRC/52/84, Rn. 7-8, 14-23; UNGA, Report, Richard Bennett, 1. September 2023, UN Doc. A/78/338, Rn. 5, 10-21; UNGA, Report, Richard Bennett, 30. August 2024, UN Doc. A/79/330, Rn. 11-27, 33-39; UNGA, Report, Richard Bennett, 20. Februar 2025, UN Doc. A/HRC/58/80, Rn. 1, 13-23; Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan and the Working Group on Discrimination Against Women and Girls ('Joint Report'), 15. Juni 2023, UN Doc. A/HRC/53/21, Rn. 17, 24, 28, 33, 37, 44-49, 51-56, 59, 61-62, 66-67, 70-85; Study on the so-called "Law on the Promotion of Virtue and the Prevention of Vice". Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan, Richard Bennett, ('Vice and Virtue Report'), 25. Februar 2025, UN Doc. A/HRC/58/74, Rn. 1, 3, 12; Committee on the Elimination of Discrimination against Women, Concluding Observations on the Fourth Periodic Report of Afghanistan, 10. Juli 2025, UN Doc. CEDAW/C/AFG/CO/4, Rn. 6, 8, 11, 15, 22, 26, 30, 33, 35; Sweeney (Fn. 5), 317-318.

9 UNGA, Report, 20. Februar 2025 (Fn. 8), Rn. 16-19.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

zur Diskriminierung von Frauen bezeichnen die Situation in Afghanistan als „gender(-based) apartheid".[10]

Nachdem der IGH die Voraussetzungen der Verhandlungen nach Art. 29 Abs. 1 CEDAW im Kongo-Fall nicht präzisierte und insbesondere offen ließ, wann Verhandlungen als gescheitert anzusehen sind,[11] fehlt es diesbezüglich an belastbaren Aussagen. Diese Lücke schließt der vorliegende Beitrag. Konkret wird mittels grammatikalischer, systematischer und teleologischer Auslegung (Art. 31 Wiener Übereinkommen über das Recht der Verträge, VCLT[12]) geklärt, unter welchen Umständen Verhandlungen unter Art. 29 Abs. 1 CEDAW als gescheitert anzusehen sind und der Zugang zum IGH eröffnet ist.

Dazu wird in einem ersten Schritt die Bedeutung von Streitbeilegungsklauseln für den Menschenrechtsschutz herausgearbeitet. Es wird gezeigt, dass Streitbeilegungsklauseln regelmäßig die einzige Möglichkeit sind, um einen Staat wegen mutmaßlicher Vertragsverletzungen vor dem IGH anklagen zu können (II.). Vor dem Hintergrund der bisherigen Rechtsprechung des IGH, der Verhandlungen in vergleichbaren[13] Streitbeilegungsklauseln erst nach einem mehrjährigen zwischenstaatlichen Austausch als gescheitert ansah[14] sowie den gravierenden Folgen, diederart langwierige Verhandlungen für Frauen und Mädchen in Afghanistan hätten,[15] wird im zweiten Schritt die

10 UN, Secretary-General's remarks to the Security Council on the Promotion and Strenghtening of the Rule of Law in the Maintenance of International Peace and Security: The Rule of Law Among Nations, 12. Januar 2023, <https://www.un.org/sg/en/content/sg/speeches/2023-01-12/secretary-generals-remarks-the-security-council-the-promotion-and-strengthening-of-the-rule-of-law-the-maintenance-of-international-peace-and-security-the-rule-of-law>, zuletzt besucht 22. Januar 2026; UNGA, Report, 1. September 2023 (Fn. 8), Rn. 19; UNGA, Report, 30. August 2024 (Fn. 8), Rn. 19; UNGA, Report, 20. Februar 2025 (Fn. 8), Rn. 13; UNGA, 'Vice and Virtue Report', 25. Februar 2025 (Fn. 8), Rn. 91; UNGA, Joint Report, 15. Juni 2023 (Fn. 8), Rn. 95-96.

11 IGH, *Armed Activities* (Fn. 4), Rn. 91-93.

12 1155 UNTS 331.

13 IGH, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, Urteil v. 1. April 2011, ICJ Reports 2011, 70 (126-128 Rn. 136-140, 'comparable').

14 IGH, *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Canada and Netherlands v. Syrian Arab Republic), Provisional Measures, Order v. 16. November 2023, ICJ Reports 2023, 587 (599-601 Rn. 36-42); IGH, *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, Urteil v. 20. Juli 2012, ICJ Reports 2012, 422 (446 Rn. 58-59); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Armenia v. Azerbaijan), Judgment, Urteil v. 12. November 2024, General List Nr. 180, Rn. 53-57; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of all Forms of Racial Discrimination* (Ukraine v. Russian Federation), Preliminary Objections, Judgment, Urteil v. 8. November 2019, ICJ Reports 2019, 558 (602-603 Rn. 118-121).

15 Statt vieler UNGA, 'Vice and Virtue Report', 25. Februar 2025 (Fn. 8), Rn. 3-4.

 DOI 10.17104/0044-2348-2026-3-921

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

materiell-rechtliche Dimension des Art. 29 Abs. 1 CEDAW erörtert. Dabei wird gezeigt, dass Art. 29 Abs. 1 CEDAW für den faktischen Menschenrechtsschutz von Frauen unverzichtbar ist, da er den einzigen Mechanismus bereitstellt, der zu einer rechtsverbindlichen Feststellung von CEDAW-Verletzungen gelangen kann. Um zu verhindern, dass dieser Schutz leerläuft, darf der Zugang zum IGH nicht durch hohe Anforderungen an das Verhandlungskriterium verzögert werden (III.). Die Untersuchung schließt mit Schlussfolgerungen (IV.).

II. Die Bedeutung von Streitbeilegungsklauseln für den Menschenrechtsschutz

Nach Art. 36 Abs. 1 Alt. 2 Statut des Internationalen Gerichtshofes (IGH-Statut) ist der IGH zuständig für alle Streitigkeiten, die ihm durch einen geltenden völkerrechtlichen Vertrag übertragen werden.[16] Streitbeilegungsklauseln in einem Menschenrechtsvertrag sind folglich immer dann entscheidend, wenn keine der übrigen IGH-Zuständigkeitsgrundlagen greift, d. h. die Anerkennung seiner obligatorischen Gerichtsbarkeit per Fakultativklausel (Art. 36 Abs. 2 IGH-Statut) oder eine ad hoc Vereinbarung (Art. 36 Abs. 1 Alt. 1 IGH-Staut, *compromis*).[17] Dies gilt umso mehr, als dass sich die Erwartungen, die anfänglich in Art. 36 Abs. 2 IGH-Statut gesetzt wurden, in der Praxis nicht realisierten: Nur 74 von 193 UN-Mitgliedstaaten unterwerfen sich der obligatorischen Gerichtsbarkeit des IGH,[18] was Streitbeilegungsklauseln weitaus praxisrelevanter macht als die Fakultativklausel.[19] Unter den ständigen UN-Sicherheitsratsmitgliedern unterliegt nur noch Großbritannien der IGH-Gerichtsbarkeit nach Art. 36 Abs. 2 IGH-Statut.

16 Christian Tomuschat, 'Article 36' in: Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm und Christian Tomuschat (Hrsg.), *The Statute of the International Court of Justice. A Commentary* (3. Aufl., Oxford University Press 2019), 712-798 (Rn. 35, 39).

17 Vgl. Tomuschat (Fn. 16), Rn. 39-40, 70-72; Shabtai Rosenne, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications' in: Anne Peters und Rüdiger Wolfrum (Hrsg.), MPEPIL (Online-Ausgabe, Oxford University Press 2006), Rn. 3-4.

18 UN, Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court, <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en>, zuletzt besucht 22. Januar 2026.

19 Tomuschat (Fn. 16), Rn. 34, 71-72; Chisa Ishizuka, 'Impact of the Ukraine Conflict on Inter-State Dispute Settlement Procedures: The *Allegations of Genocide* Case (*Ukraine v. Russia*)' in: Shuichi Furuya, Hitomi Takemura and Kuniko Ozaki (Hrsg.), *Global Impact of the Ukraine Conflict. Perspectives from International Law* (Springer 2023), 115-134 (122-123).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

Frankreich hatte seine Erklärung nach den einstweiligen Anordnungen in *Nuclear Tests*[20] zurückgezogen[21] und die USA, nachdem der IGH die Klage Nicaraguas im *Military and Paramilitary Activities*-Fall[22] für zulässig erklärte.[23] Die Russische Föderation (ehemals Sowjetunion) sowie China haben sich nie der IGH-Gerichtsbarkeit nach Art. 36 Abs. 2 IGH-Statut unterworfen.

Die praktische Relevanz von Streitbeilegungsklauseln für den Menschenrechtsschutz zeigt sich in der IGH-Rechtsprechung: Im Zeitraum von knapp elf Jahren (Februar 2015 bis Januar 2026) wurden alle Klagen, die mutmaßliche Verletzungen von Menschenrechtsverträgen zum Gegenstand haben, auf die Streitbeilegungsklausel im jeweiligen Vertrag gestützt.[24] Beispielhaft zu nennen sind die auf Art. 22 Internationales Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung (ICERD) gegründeten Klagen Georgiens gegen die Russische Föderation[25] und Qatars gegen die Vereinigten Arabischen Emirate[26]. Kanada und die Niederlande stützten ihre Klage gegen Syrien[27] auf Art. 30 Abs. 1 Übereinkommen gegen Folter und andere grausame, unmenschliche oder erniedriegende Behandlung oder Strafe (CAT[28]). Belgien hatte seine Klage gegen den Senegal[29] ebenfalls auf der Grundlage des Art. 30 Abs. 1 CAT erhoben.

---

20 IGH, *Nuclear Tests* (Australia v. France), Interim Protection, Anordnung v. 22. Juni 1973, ICJ Reports 1973, 99.

21 UNTS, Volume 907, Nr. 8196. France. Declaration recognizing as compulsory the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the Court, Paris, 16. Mai 1966, Termination, 10. Januar 1974, 129.

22 IGH, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, Urteil v. 26. November 1984, ICJ Reports 1984, 392.

23 UNTS, Volume 1408, Nr. 3. United States of America. Declaration recognizing as compulsory the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the Court, Washington, 14. August 1946, Termination, 7. Oktober 1986, 270.

24 IGH, List of All Cases, <https://www.icj-cij.org/list-of-all-cases>, zuletzt besucht 22. Januar 2026.

25 IGH, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Georgia v. Russian Federation), Application Instituting Proceedings, 2008, General List Nr. 140, Rn. 17-19.

26 IGH, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Application Instituting Proceedings, 2018, General List Nr. 172, Rn. 10.

27 IGH, *Application of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Canada and the Netherlands v. Syrian Arab Republic), Joint Application Instituting Proceedings, 2023, General List Nr. 188, Rn. 8-12.

28 1465 UNTS 85.

29 IGH, *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Application Instituting Proceedings, 2009, General List Nr. 144, Rn. 14-15.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Da sich Afghanistan der IGH-Zuständigkeit nicht nach Art. 36 Abs. 2 IGH-Statut unterworfen hat und eine ad hoc Unterwerfung der Taliban nicht realistisch ist, stellt Art. 36 Abs. 1 Alt. 2 IGH-Statut i. V. m. Art. 29 Abs. 1 CEDAW die einzig mögliche Zuständigkeitsgrundlage dar, unter der die Initiativstaaten Afghanistan vor dem IGH verklagen können. Art. 29 Abs. 1 CEDAW setzt dafür das Scheitern von Verhandlungen zwischen den Streitparteien über die CEDAW-Verletzungen voraus.

III. Die Voraussetzung der gescheiterten Verhandlungen

1. Verhandlungen als zwingende verfahrensrechtliche Voraussetzung

Die Formulierung „[a]ny dispute […] which is not settled by negotiation" in der authentischen englischen Sprachfassung der CEDAW (Art. 30 CEDAW) ist eine Indikativ-Präsenskonstruktion. Nach der allgemeinen Wortbedeutung (Art. 31 Abs. 1 VCLT) sowie der ständigen IGH-Rechtsprechung[30] zu den vergleichbaren[31] Art. 22 ICERD[32] und Art. 30 Abs. 1 CAT[33] indiziert sie, dass gescheiterte Verhandlungen eine zwingende Voraussetzung für die Anrufung des IGH unter Art. 29 Abs. 1 CEDAW darstellen („precondition"[34]). In der Bewertung der prozeduralen Einrede der Russischen

30 IGH, *ICERD* (Armenia v. Azerbaijan) (Fn. 14), Rn. 50; IGH, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, Urteil v. 4. Februar 2021, ICJ Reports 2021, 71 (87 Rn. 38); IGH, *ICERD* (Ukraine v. Russian Federation) (Fn. 14), Rn. 106, 108; IGH, *CAT* (Belgium v. Senegal) (Fn. 14), Rn. 58-59; IGH, *CAT* (Canada and Netherlands v. Syrian Arab Republic) (Fn. 14), Rn. 34; IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Rn. 141.

31 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Rn. 136-140 spricht von 'comparable'; Sweeney (Fn. 5), 301 spricht von 'near identical'.

32 Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination. A Commentary* (Oxford University Press 2016), Article 22, 472-483; Xue Hanqin, *Jurisdiction of the International Court of Justice* (Brill Nijhoff 2017), 128; Ishizuka (Fn. 19), 122.

33 Giuliana Monina, 'Article 30' in: Manfred Nowak, Moritz Birk und Giuliana Monina (Hrsg.), *The United Nations Convention Against Torture and Its Optional Protocol. A Commentary* (2. Aufl., Oxford University Press 2019), 679-690 (Rn. 23-24); Hanqin (Fn. 32), 128-129; Ishizuka (Fn. 19), 122.

34 Susann Kroworsch, 'Article 29' in: Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf und Marsha A. Freeman (Hrsg.), *The UN Convention on the Elimination of All Forms of Discrimination against Women and Its Optional Protocol. A Commentary* (2. Aufl., Oxford University Press 2022), 814-818 (816).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Föderation gegen die Klage Georgiens stellte der IGH ausdrücklich auf die Indikativ-Präsenskonstruktion des Art. 22 ICERD ab, die identisch zu Art. 29 Abs. 1 CEDAW formuliert ist. Er bejahte damit die Ansicht der Russischen Föderation, dass der Wortlaut des Art. 22 ICERD vorherige Verhandlungen voraussetzt.[35]

Innerhalb der menschenrechtlichen Streitbeilegungsklauseln weist Art. 30 Abs. 1 CAT eine leicht abweichende Formulierung auf. Während Art. 29 Abs. 1 CEDAW und Art. 22 ICERD auf Streitigkeiten abstellen, die nicht durch Verhandlungen beigelegt wurden, spricht Art. 30 Abs. 1 CAT davon, dass eine Streitigkeit nicht durch Verhandlungen beigelegt werden „kann" („[a]ny dispute […] which cannot be settled through negotiation"). Auf diesen Unterschied ging der IGH in den zwei auf Art. 30 Abs. 1 CAT gestützten Klagen jedoch nicht ein.[36] Stattdessen referenzierte er in beiden Fällen auf Art. 22 ICERD,[37] der das Verhandlungskriterium genau wie[38] in Art. 29 Abs. 1 CEDAW formuliert. Nach der IGH-Rechtsprechung sind vorherige Verhandlungen demnach sowohl in der Indikativ-Präsensformulierung als auch nach der „kann"-Formulierung ein zwingend zu erfüllendes Kriterium seiner Zuständigkeit.[39]

Die im Menschenrechtsschutz besonders bedeutsame[40] teleologische Auslegung könnte allerdings dafür sprechen, dass vorherige Verhandlungen doch keine zwingende Voraussetzung darstellen. Die teleologische Auslegung legt eher nahe, bei gravierenden Vertragsverletzungen auf Verhandlungen verzichten zu können, um so eine rasche Anrufung des IGH zu ermöglichen. Genau

35 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Rn. 123-134; bestätigt in IGH, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order v. 23. Juli 2018, ICJ Reports 2018, 406 (417 Rn. 29); IGH, *ICERD* (Armenia v. Azerbaijan) (Fn. 14), Rn. 50; IGH, *ICERD* (Ukraine v. Russian Federation) (Fn. 14), Rn. 106.

36 IGH, *CAT* (Belgium v. Senegal) (Fn. 14), Rn. 57; IGH, *CAT* (Canada and Netherlands v. Syrian Arab Republic) (Fn. 14), Rn. 40.

37 IGH, *CAT* (Belgium v. Senegal) (Fn. 14), Rn. 57; IGH, *CAT* (Canada and Netherlands v. Syrian Arab Republic) (Fn. 14), Rn. 40.

38 Hierauf weist IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Separate Opinion of Judge Greenwood unter Bezugnahme auf Congo v. Ruanda ausdrücklich hin, Rn. 11.

39 So ausdrücklich auch IGH-Richterin Hanqin (Fn. 32), 129-130.

40 Oliver Dörr, 'Article 31' in: Oliver Dörr und Kirsten Schmalenbach (Hrsg.), *Vienna Convention on the Law of Treaties. A Commentary* (2. Aufl., Springer 2018), 557-616 (Rn. 28); Başak Çalı, 'Specialized Rules of Treaty Interpretation. Human Rights' in: Duncan B. Hollis (Hrsg.), *The Oxford Guide to Treaties* (2. Aufl., Oxford University Press 2020), 504-523 (512-514); ausdrücklich auch IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Dissenting Opinion of Judge Cançado Trindade, Rn. 78, Separate Opinion of Judge Greenwood, Rn. 11; IGH, *ICERD* (Qatar v. United Arab Emirates) (Fn. 35), Separate Opinion of Judge Cançado Trindade, Rn. 50, 52, 101; IGH, *ICERD* (Ukraine v. Russian Federation) (Fn. 14), Separate Opinion of Judge Cançado Trindade, Rn. 73.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

dies wurde unter anderem von dem ehemals amtierenden IGH-Präsidenten *Owada* sowie den Richtern *Simma*, *Abraham*, *Donughue* und *Ad Hoc Gaja* in ihrer joint dissenting opinion[41] im Georgien-Fall sowie von Richter *Cançado Trindade*[42] in einer Reihe von Fällen unter Art. 22 ICERD vertreten.[43] Sie argumentierten mit dem Schutzzweck der ICERD, dass die mit ihr normierten Rechte nicht formalistischen und dadurch letztlich staatlichen Interessen dienenden Verhandlungskriterien unterworfen werden sollten:[44] dass Menschenrechtsverletzungen also nicht, drastisch gesprochen, zum Gegenstand zwischenstaatlicher Verhandlungsmasse werden dürfen.

Allerdings kann die teleologische Auslegung nicht so weit führen, in Gänze auf vorherige Verhandlungen zu verzichten. Nach Art. 31 VCLT stellen die grammatikalische, systematische und teleologische Auslegung gleichwertige Interpretationsmethoden dar.[45] Ein aus Sinn und Zweck eines Vertrags hergeleitetes Auslegungsergebnis kann deshalb keinen Vorrang vor dem Wortlaut haben: „The consideration of object and purpose finds its limits in the ordinary meaning of the text of the treaty."[46] Bestimmt eine Streitbeilegungsklausel wie Art. 29 Abs. 1 CEDAW dem Wortlaut nach vorherige Verhandlungen, muss diese Voraussetzung erfüllt sein.[47] Davon weicht der IGH selbst dann nicht ab, wenn es um Verletzungen von *ius cogens* bzw.

41 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge Ad Hoc Gaja, Rn. 12, 35, 38, 43, 50-59, 72-73.

42 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Dissenting Opinion of Judge Cançado Trindade, Rn. 72-78, 89, 96, 138-140, 160-162; IGH, *ICERD* (Qatar v. United Arab Emirates) (Fn. 35), Separate Opinion of Judge Cançado Trindade, Rn. 61, 63, 101; IGH, *ICERD* (Ukraine v. Russian Federation) (Fn. 14), Separate Opinion of Judge Cançado Trindade, Rn. 17, 25, 27, 73.

43 Zu Art. 29 Abs. 1 CEDAW wurde diese Ansicht im Kongo-Fall von keinem IGH-Richter vertreten, sondern von Verhandlungen als "prior condition that has to be met" ausgegangen, vgl. *Armed Activities* (Fn. 4), Separate Opinion of Judge Al-Khasawneh, Rn. 13.

44 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge Ad Hoc Gaja, Rn. 12 und 43 sprechen von 'formalism inconsistent with the spirit of the text', Dissenting Opinion of Judge Cançado Trindade, Rn. 72-78, 89, 96, 138-140, 160-162; IGH, *ICERD* (Qatar v. United Arab Emirates) (Fn. 35), Separate Opinion of Judge Cançado Trindade, Rn. 61, 63, 101; IGH, *ICERD* (Ukraine v. Russian Federation) (Fn. 14), Separate Opinion of Judge Cançado Trindade, Rn. 17, 25, 27, 73.

45 Statt vieler Dörr (Fn. 40), Rn. 5.

46 Dörr (Fn. 40), Rn. 57; ausdrücklich auch IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Separate Opinion of Judge Koroma, Rn. 5.

47 IGH, *Armed Activities* (Fn. 4), Rn. 88: "The Court recalls in this regard that its jurisdiction is based on consent of the parties and is confined to the extent accepted by them. […] When that consent is expressed in a compromissary clause in an international agreement, any conditions to which such consent is subject must be ragrded as consituting limits thereon."

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

erga omnes-wirkenden Verpflichtungen geht.[48] Im Folgenden ist deshalb zu klären, wann die Voraussetzung des *Scheiterns* von Verhandlungen erfüllt ist.

2. Das Scheitern von Verhandlungen

Nach der ständigen Rechtsprechung des IGH ist von einem Scheitern der Verhandlungen auszugehen, wenn diese fehlschlagen, vergeblich oder festgefahren sind („failure of negotiations, or when negotiations have become futile or deadlocked"[49]). Ohne diese drei Varianten zu differenzieren, bejahte der IGH ein Scheitern bisher immer dann, wenn die Klägerin nachweist, dass weitere Verhandlungen nicht zu einer Beilegung der Streitigkeit führen.[50]

Beispielsweise hatten Belgien und der Senegal ihre Grundpositionen darüber, ob der Senegal seinen Verpflichtungen aus der CAT nachkommt (Strafverfolgung statt Auslieferung), über einen fünf Jahre dauernden diplomatischen Schriftwechsel beibehalten.[51] Kanada und die Niederlande hatten über zwei Jahre mit 66 diplomatischen Noten sowie zwei Treffen mit Vertretern Syriens versucht, Syrien zur Einstellung von CAT-Verletzungen zu bewegen.[52] Die Konfliktparteien näherten ihre Positionen einander in diesem Zeitraum nicht an.[53] In beiden Fällen ging der IGH von gescheiterten Verhandlungen aus.[54]

Unter Art. 22 ICERD hatten Armenien und Azerbaidschan seit dem Ende der militärischen Auseinandersetzungen um Bergkarabach (November 2020)

48 IGH, *Armed Activities* (Fn. 4), Rn. 64 und 125: "the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties." Vgl. auch Mariko Kawano, 'The Common Interest of Communities and the International Court of Justice' in: Chia-Jui Cheng (Hrsg.), *New Trends in International Law. Festschrift in Honour of Judge Hisashi Owada* (Brill Nijhoff 2024), 217-241 (224-229); Gentian Zyberi, 'The Interpretation and Development of International Human Rights Law by the International Court of Justice' in: Martin Scheinin (Hrsg.), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press 2019), 28-61 (41, 48-50); III. 3. b).

49 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Rn. 159; IGH, *CAT* (Belgium v. Senegal) (Fn. 14), Rn. 57; IGH, *CAT* (Canada and Netherlands v. Syrian Arab Republic) (Fn. 14), Rn. 40; IGH, *ICERD* (Armenia v. Azerbaijan) (Fn. 14), Rn. 53; Hanqin (Fn. 32), 131-132.

50 IGH, *CAT* (Belgium v. Senegal) (Fn. 14), Rn. 57.

51 IGH, *CAT* (Belgium v. Senegal) (Fn. 14), RN 57.

52 IGH, *CAT* (Canada and Netherlands v. Syrian Arab Republic) (Fn. 14), Rn. 36.

53 IGH, *CAT* (Canada and Netherlands v. Syrian Arab Republic) (Fn. 14), Rn. 41.

54 IGH, *CAT* (Canada and Netherlands v. Syrian Arab Republic) (Fn. 14), Rn. 42; *CAT* (Belgium v. Senegal) (Fn. 14), Rn. 59.

 DOI 10.17104/0044-2348-2026-3-921

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

bis zur Klageerhebung (September 2021) unter anderem mehrere bilaterale Treffen abgehalten, um ihren Konflikt über die behauptete Rassendiskriminierung ethnischer Armenier beizulegen. Da Azerbaidschan die erhobenen Vorwürfe konstant zurückwies, waren die Verhandlungen als gescheitert anzusehen.[55] Im Verfahren Georgiens gegen die Russische Föderation entschied der IGH, dass die Parteien zum maßgeblichen Zeitpunkt zwischen dem Ausbruch des Konflikts in den Regionen Südossetien und Akhbaz (9. August 2008) und der Klageerhebung (12. August 2008) nicht verhandelt hatten.[56] Nach Ansicht des IGH stellten insbesondere die Pressemitteilungen der Konfliktparteien sowie im Rahmen der UN abgehaltene Beratungen keine Verhandlung dar, weil sie sich nicht auf den Vorwurf der Rassendiskriminierung bezogen.[57]

In der bisher einzigen Klage, die auf Art. 29 Abs. 1 CEDAW gestützt wurde, verneinte der IGH seine Zuständigkeit, weil der Kongo nicht versucht hatte, mit Ruanda über die CEDAW-Verletzungen zu verhandeln.[58] Der IGH erwähnte insofern nur „Proteste" des Kongo gegen das Vorgehen Ruandas im UN-Sicherheitsrat und in der Afrikanischen Kommission der Menschenrechte und der Rechte der Völker (ACHPR). Diese Proteste waren jedoch für den Nachweis einer Streitigkeit zu berücksichtigen und nicht für das Verhandlungskriterium.[59]

Die genannte Rechtsprechung lässt insgesamt keine sichere Schlussfolgerung zu, unter welchen Umständen Verhandlungen unter Art. 29 Abs. 1 CEDAW als gescheitert anzusehen sind. Insbesondere bleibt unklar, ob von einem Scheitern erst nach mehrjährigen Verhandlungen mit unverändert aufrechterhaltenen Positionen ausgegangen werden kann. Eine Pflicht zu mehrjährigen Verhandlungen könnte sich aus dem Grundsatz ergeben, dass Verhandlungen „as far as possible" fortzusetzen sind.[60] Dadurch drohte allerdings ein „Verschleppen" des Prozesses, was erhebliche negative Konsquenzen für den Menschenrechtsschutz haben kann: „The negative consequence of compromissary clauses is that the protection of human rights can become subject to foot-dragging and prolonged State negotiations through diplomat-

55 IGH, *ICERD* (Armenia v. Azerbaijan) (Fn. 14), Rn. 53-57.

56 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Rn. 184.

57 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Rn. 167-182.

58 IGH, *Armed Activities* (Fn. 4), Rn. 91-93.

59 IGH, *Armed Activities* (Fn. 4), Rn. 91.

60 IGH, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Armenia v. Azerbaijan), Provisional Measures, Order v. 7. Dezember 2021, ICJ Reports 2021, 361 (372 Rn. 33); IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Rn. 158, 162; IGH, *ICERD* (Ukraine v. Russian Federation) (Fn. 14), Rn. 120; IGH, *CAT* (Canada and Netherlands v. Syrian Arab Republic) (Fn. 14), Rn. 35; IGH, *CAT* (Belgium v. Senegal) (Fn. 14), Rn. 57; Hanqin (Fn. 32), 130.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ic channels, while potentially serious human rights violations could go unaddressed for several month or even years."[61]

In Afghanistan hätten mehrjährige Verhandlungen gravierende Folgen für die betroffenen Frauen und Mädchen, deren Menschenrechtslage sich in immer kürzeren Abständen in einem alarmierenden Ausmaß verschlechtert.[62] Dies gilt umso mehr, als die Taliban die erhobenen Vorwürfe konstant zurückweisen.[63] Dies deutet nicht darauf hin, dass sie die CEDAW-Verletzungen aufgrund von Verhandlungen mit den Initiativstaaten einstellen werden. Vor diesem Hintergrund ist im Folgenden der auch-materielle Charakter des Art. 29 Abs. 1 CEDAW zu erläutern. Er spricht im Ergebnis für niedrigschwellige Anforderungen an das Verhandlungskriterium und infolgedessen einen raschen IGH-Zugang.

3. Menschenrechtliche Konzeptualisierung von Verhandlungen

a) Der Konsens zur IGH-Zuständigkeit

Sreitbeilegungsklauseln wie Art. 29 Abs. 1 CEDAW sind Ausdruck des völkerrechtlich unumstößlichen und in Art. 2 Ziff. 1 Charta der Vereinten Nationen (UN-Charta) kodifizierten Grundsatzes der souveränen Gleichheit der Staaten: Staaten unterwerfen sich nur insoweit der Gerichtsbarkeit des IGH, als sie diese mit ihrer Zustimmung zu Art. 29 Abs. 1 CEDAW akzeptieren.[64] Es erstaunt kaum, dass sich eine beträchtliche Anzahl der

61 Zyberi (Fn. 48), 35.

62 Statt vieler UNGA, 'Vice and Virtue Report', 25. Februar 2025 (Fn. 8), Rn. 3-4.

63 UNGA, Report, 9. Februar 2023 (Fn. 8), Rn. 15, 17; UNGA, Report, 20 Februar 2025 (Fn. 8), Rn. 2; Islamisches Emirat Afghanistan, Blames of Human Right Violations and Gender Discrimination Unfounded, 26. September 2024, <https://www.alemarahenglish.af/blames-of-human-right-violations-and-gender-discrimination-unfounded/>, zuletzt besucht 22. Januar 2026; International Community Continues to Harass Afghan Women, 1. Dezember 2024, <https://www.alemarahenglish.af/international-community-continues-to-harass-afghan-women/>, zuletzt besucht 22. Januar 2026; Islamic Hijab is Honour for Women, 17. September 2024, <https://www.alemarahenglish.af/islamic-hijab-is-honour-for-women/>, zuletzt besucht 22. Januar 2026; Western Media's slander of Women's Rights in Afghanistan, 7. September 2024, <https://www.alemarahenglish.af/western-medias-slander-of-womens-rights-in-afghanistan/>, zuletzt besucht 22. Januar 2026.

64 IGH, *Armed Activities* (Fn. 4), Rn. 65, 88; IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Rn. 131; Tomuschat (Fn. 16), Rn. 19; Rosenne (Fn. 17), Rn. 3; Andreas Zimmermann, 'Between the Quest for Universality and Its Limited Jurisdiction: The Role of the International Court of Justice in Enhancing the International Rule of Law' in: Giorgio Gaja and Jenny Grote Stoutenburg (Hrsg.), *Enhancing the Rule of Law Through the International Court of Justice* (Brill Nijhoff 2014), 33-45 (35).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

CEDAW-Vertragsstaaten durch Vorbehalte gegen Art. 29 Abs. 1 CEDAW der gerichtlichen Nachprüfung etwaiger CEDAW-Verletzungen entzieht.[65] Tatsächlich ist Art. 29 Abs. 1 CEDAW diejenige Norm, gegen welche die meisten Vertragsstaaten Vorbehalte erklärt haben (39 von 189, Stand Januar 2026).[66] Vorbehalte gegen Art. 29 Abs. 1 CEDAW sind nach Absatz 2 der Norm ausdrücklich und ohne Einschränkungen erlaubt.[67] Demgegenüber müssen Vorbehalte gegen alle anderen CEDAW-Normen gemäß der allgemeinen Vorbehaltsregelung (Art. 28 Abs. 2 CEDAW) mit dem Sinn und Zweck der CEDAW vereinbar sein, um die Norm wirksam abbedingen zu können.

Art. 29 Abs. 2 und Art. 28 Abs. 2 CEDAW sind insofern das CEDAW-interne Epizentrum eines allgemeinen und schon seit den frühen 1950er Jahren diskutierten,[68] dilemmatischen[69] Spannungsverhältnisses: Einerseits sollen infolge der grundsätzlichen Zulässigkeit von Vorbehalten möglichst viele Staaten als Vertragsparteien gewonnen werden (Universalitätsinteresse).[70] Andererseits müssen Vorbehaltsregelungen dem Integritätsinteresse eines Vertrags gerecht werden, um zu vermeiden, dass er durch die großzügige Zulässigkeit von Vorbehalten verwässert wird.[71] Inwieweit diese gegensätzlichen Interessen durch Art. 29 Abs. 2 und Art. 28 Abs. 2 CEDAW in einem ausgeglichen Verhältnis zueinander stehen, ist angesichts der umfangreich

65 UN Treaty Collection, CEDAW, <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&clang=_en>, zuletzt besucht 22. Januar 2026; Kroworsch (Fn. 34), 816.

66 UN Treaty Collection (Fn. 65); Jane Connors, 'Article 28' in: Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf und Marsha A. Freeman (Hrsg.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary* (2 Aufl., Oxford University Press 2022), 784-813 (786).

67 Connors (Fn. 66), 786.

68 Vgl. ILC, Document A/1858: Report of the International Law Commission Covering the Work of Its Third Session, 16. May-27 Juli 1951, in: ILCYB 1951, Vol. II, UN Doc. A/CN.4/SER.A/Add. 1, 123 (126-130 Rn. 18-31); Document A/CN.4/144: First Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, in: ILCYB 1962, Vol. II, UN. Doc. A/CN.4/SER.A/1962/Add. 1, 27-80 (62-65); Document A/CN.4/477 and Add. 1. Second Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur in: ILCYB 1996, Vol. II. Part One, UN Doc. A/CN.4/SER.A/1996/Add. 1 (Part 1), 37-85 (58 Rn. 102-111).

69 ILC, Document A/CN.4/477 and Add. 1 (Fn. 68), Rn. 101.

70 ILC, Document A/CN.4/477 and Add. 1 (Fn. 68), Rn. 90-93, 97; Christian Walter, 'Article 19' in: Oliver Dörr und Kirsten Schmalenbach (Hrsg.), *Vienna Convention on the Law of Treaties. A Commentary* (2. Aufl., Springer 2018), 261-315 (Rn. 2); Alain Pellet und Daniel Müller, 'Reservations to Human Rights Treaties: Not An Absolute Evil …' in: Ulrich Fastenrath et al., *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011), 521-551 (522-523).

71 ILC, Document A/CN.4/477 and Add. 1 (Fn. 68), Rn. 90-93, 97; Walter (Fn. 70), Rn. 2; Pellet und Müller (Fn. 70), 567.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

erklärten Vorbehalte gegen die CEDAW[72] eine drängende, an dieser Stelle jedoch nicht zu klärende Frage.

Allerdings hat sich die traditionell staatenzentrierte und am synallagmatischen Austauschcharakter staatlicher Verpflichtungen orientierte Völkerrechtsordnung nach dem Zweiten Weltkrieg gewandelt. Heute ist das Völkerrecht mit drittschützenden Werten angereichert, die den Schutz des Einzelnen zum Ziel haben. Diese Werte sind in einer Vielzahl universeller und regionaler Menschenrechtsverträge einschließlich spezialisierter Menschengerichtshöfe rechtsnormativ verankert. So stellt die Achtung der Menschenrechte nach Art. 1 Ziff. 3, 55 lit. c) UN-Charta ein grundlegendes Strukturmerkmal dar und erlaubt es, Staaten nach im UN-System dokumentierten Kriterien wie der Einhaltung des Gewaltverbots und ihrer Menschenrechtskonformität zu bewerten und als *ultima ratio* doch zu unterscheiden.[73] Ausdruck dessen ist die – auch kontrovers[74] – diskutierte Schutzverantwortung von Staaten (Responsibility to Protect, R2P). Nach ihr hat die internationale Gemeinschaft die Opfer planmäßiger und massiver Menschenrechtsverletzungen in Staaten, die sich unter Verweis auf ihren Souveränitätsanspruch der externen Einmischung verwehren, zu schützen („sovereignty as responsibility").[75]

Ein solch konstitutionalistisches Verständnis ist allerdings nur *eine*, nicht unumstrittene Perspektive auf das Völkerrecht. Staaten des globalen Südens beispielsweise kritisieren die Idee einer internationalen Gemeinschaft, die mutmaßlich globale Werte teilt („civilizing crusade"/„missionary

72 UN, Convention on the Elimination of All Forms of Discrimination against Women, <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&clang=_en>, zuletzt besucht 22. Januar 2026.

73 UNGA, A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, 2. Dezember 2004, UN Doc. A/59/565, Rn. 29-30; World Summit Outcome, 24. Oktober 2005, UN Doc. A/RES/60/1, Rn. 138; International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect, Report, 2001, 14; Jörn Axel Kämmerer, 'Begriff, Geschichte und Rechtsquellen des Völkerrechts' in: Alexander Proelß (Hrsg.), *Völkerrecht* (9. Aufl., De Gruyter 2024), Rn. 82; Eva Frenz und Dirk Hanschel, 'Article 55 (c)' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte und Andreas Paulus (Hrsg.), *The Charter of the United Nations. A Commentary, Vol. II* (4. Aufl., Oxford University Press 2024), Rn. 3-4, 8, 15-16, 20-23; Anne Peters, 'Humanity as the A and Ω of Sovereignty', EJIL 20 (2009), 513-544 (519-522, 524-526); Charlotte Kreuter-Kirchhof, 'Völkerrechtliche Schutzverantwortung bei elementaren Menschenrechtsverletzungen: Die Responsibility to Protect als Verantwortungsstruktur', AVR 48 (2010), 338-382 (374-376).

74 Vgl. nur Philip Cunliffe, 'A Dangerous Duty: Power, Paternalism and the Global "duty of care"' in: Philip Cunliffe (Hrsg.), *Critical Perspectives on the Responsibility to Protect. Interrogating Theory and Practice* (Routledge 2011), 51-70.

75 ICISS, Report (Fn. 73), 15, 17; Gareth Evans, 'The Responsibility to Protect: Rethinking Humanitarian Intervention', Proceedings of the Annual Meeting (ASIL) 98 (2004), 78-89 (82-83).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

work"[76]). Dem konstitutionalistischen Verständnis wird entgegengehalten, eine „old strategy of natural law"[77] zu sein mit dem Ziel, die staatliche Souveränität einer idealistischen Einheit und Kohärenz gemeinsamer Werte unterzuordnen („reinvent at an international level the sovereign authority it was determined to transcend"[78]).[79] Wo die gemeinsame Wertgrundlage als *telos* staatlicher Souveränität vor allem in den 1990er Jahren noch mit einigem Optimismus postuliert wurde,[80] kann von einem „mainstream approach of international legal constitionalism"[81] gegenwärtig ohnehin aber keine Rede mehr sein. Dies gilt spätestens angesichts eines (wiederauflebenden) Nationalismus und damit einhergehendem geopolitischen Protektionismus. Dieser zeigt sich insbesondere in Staaten wie China, den Vereinigten Staaten von Amerika unter Donald Trump sowie der Russischen Föderation unter Vladimir Putin.[82]

---

76 Makau Mutua, *Human Rights. A Political and Cultural Critique* (University of Pennsylvania Press 2002), 19; vgl. auch Salvador Santtino F. Reglime Jr., 'The Global Human Rights Regime. Risks and Contestations' in: Salvador Santino F. Reglime Jr. and Irene Hadiprayitno (Hrsg.), *Human Rights at Risk. Global Governance, American Power, and the Future of Dignity* (Rutgers University Press 2022), 3-21 (7-9); Takao Suami, 'Global Constitutionalism and European Legal Experiences. Can European Constitutionslism Be Applied to the Rest of the World?' in: Takao Suami, Anne Peters, Dimitri Vanoverbeke und Mattias Kumm (Hrsg.), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press 2018), 123-167 (156-158); Dimitri Vanoverbeke, 'Are We Talking the Same Language? The Sociohistorical Context of Global Constitutionalism in East Asia as Seen from Japan's Experiences' in: Takao Suami, Anne Peters, Dimitri Vanoverbeke und Mattias Kumm (Hrsg.), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press 2018), 203-224 (203-204).

77 Alexander Somek, 'From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law', University of Iowa Legal Studies Research Paper Nr. 09-25 (2009), 25.

78 David Kennedy, 'The Forgotten Politics of International Governance', EHRLR 2 (2001), 117-125; vgl. auch Suami (Fn. 76), 151, der 'overcoming of state sovereignty' als die 'inherent idea of global constitutionalism' bezeichnet.

79 Somek (Fn. 77), 22-23, 25-26; Alexander Somek, 'Kelsen Lives', EJIL 18 (2007), 409-451 (409, 429-430, 439, 443-448, 451).

80 Vgl. Gregory Shaffer and Wayne Sandholtz, 'The Rule of Law Under Pressure. The Enmeshment of National and International Trends' in: Gregory Shaffer and Wayne Sandholtz (Hrsg.), *The Rule of Law under Pressure* (Cambridge University Press 2025), 3-86 (50-51); Somek (Fn. 77), 409.

81 Jean d'Aspremont, 'International Legal Constitutionalism, Legal Forms and the Need for Villains' in: Anthony F. Lang Jr. and Antje Wiener (Hrsg.), *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2023), 225-239 (227).

82 Vgl. Shaffer and Sandholtz (Fn. 80), 51-52, 64-67, 69-70, 72-79; Kämmerer (Fn. 73), Rn. 83; Mattias Kumm, 'History and Theory of Global Constitutionalism' in: Takao Suami, Anne Peters, Dimitri Vanoverbeke und Mattias Kumm (Hrsg.), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press 2018), 168-200 (198-199); Kenneth Roth, 'China's Global Threat to Human Rights', Human Rights Watch, World Report 2020, 1-19 (1-2); Anne Peters, Against A Deconstitutionalisation of International Law in Times of Populism, Pandemic, and War (25 Oktober 2022). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper Nr. 2022-22, available at SSRN: https://ssrn.com/abstract=4259946, 1-2, 4-7.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Diese Dekonstitutionalisierungstendenzen ändern gleichwohl nichts an den beiden Punkten, auf die es hier ankommt: Zum einen verpflichten sich Vertragsstaaten durch ihre Ratifikation eines Menschenrechtsvertrags zur Umsetzung desselben, wenn auch gegebenenfalls mit Vorbehalten zu einzelnen Bestimmungen.[83] Zum anderen zeichnen sich Menschenrechtsverträge gerade dadurch aus, dass die Reziprozität der vertragsstaatlichen Pflichten *pro homine* hinter seinen individualschützenden Zweck zurücktritt. Die Formulierung *pro homine* bezeichnet ursprünglich die am Sinn und Zweck der Amerikanischen Menschenrechtskonvention (AMRK) orientierte Auslegungsweise des Interamerikanischen Gerichtshofes für Menschenrechte (IAGMR).[84] Mit der *pro homine*-Auslegung will der IAGMR den Begünstigten einer AMRK-Norm den größtmöglichen Schutz zukommen lassen.[85]

b) Der IGH-Zugang als Voraussetzung zur Umsetzung der CEDAW

Der Sinn und Zweck der CEDAW besteht laut ihrem Titel und ihrer Präambel in der Beseitigung aller Formen der Diskriminierung von Frauen. Spiegelbildlich dazu will die CEDAW die „full equality" zwischen Männern und Frauen herbeiführen (10. Präambel-Absatz). Die Formulierung „full equality" impliziert ein materielles Gleichheitskonzept, das sich im operativen Vertragsteil unter anderem in Art. 1 CEDAW (allgemeines Diskriminierungsverbot)[86], Art. 4 Abs. 1 CEDAW (zeitweilige Sondermaßnahmen)[87] sowie in

83 Dazu sogleich III. 3. b).

84 Mariana Monteiro de Matos, Indigenous Land Rights in the Inter-American System. Substantive and Procedural Law (Brill Nijhoff 2021), 68; Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights (2. Aufl., Cambridge University Press 2013), 12.

85 IAGMR, *Matter of Viviana Gallardo*, Advisory Opinion OC-101/81, 13. November 1981, Series A Nr. 101, Rn. 16; IAGMR, *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 24. September 1982, Series A Nr. 2, Rn. 29; IAGMR, *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*, Advisory Opinion OC-15/97, 14. November 1997, Series A Nr. 15, Rn. 29; IAGMR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1. Oktober 1999, Series A Nr. 16, Rn. 113-114; IAGMR, *Benjamin et al. v. Trinidad and Tobago*, Preliminary Objections, 1. September 2001, Series C Nr. 81, Rn. 70.

86 Andrew Byrnes and Puja Kapai, 'Article 1' in: Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf and Marsha A. Freeman (Hrsg.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary* (2. Aufl., Oxford University Press 2022), 79-108 (80-81).

87 Ulrike Lembke, 'Article 4' in: Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf und Marsha A. Freeman (Hrsg.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary* (2. Aufl., Oxford University Press 2022), 173-220 (174-175, 177).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Art. 24 (Umsetzungsmaßnahmen)[88] fortsetzt. Damit schützt die CEDAW als einziger Vertrag auf der universellen Völkerrechtsebene Frauen umfassend vor Benachteiligungen und erstreckt sich auch auf horizontale Rechtsbeziehungen (Art. 2 lit. e) und f) CEDAW, vertragsstaatliche Schutzpflicht).[89]

Der Sinn und Zweck der CEDAW schließt es ein, dass ihre Umsetzung in den Vertragsstaaten nachgeprüft wird.[90] Die CEDAW sieht dafür ein spezialvertragliches Monitoring in Form der Prüfung von periodischen Staatenberichten (Art. 18 CEDAW) einschließlich der Abschließenden Bemerkungen und eines follow-up-Verfahrens durch den CEDAW-Ausschuss (Art. 17 CEDAW) vor. Unter dem CEDAW-Fakultativprotokoll[91] (CEDAW-FP) kann der CEDAW-Ausschuss zudem Individualbeschwerde- und Untersuchungsverfahren gegen einen Vertragsstaat durchführen.[92] In Individualbeschwerdeverfahren beurteilt er Beschwerden einzelner Frauen sowie Gruppen von Frauen wegen mutmaßlicher CEDAW-Verletzungen (Art. 2 CEDAW-FP). In Untersuchungsverfahren beurteilt der Ausschuss mutmaßliche schwerwiegende und systematische Verletzungen der CEDAW (Art. 8 CEDAW-FP).[93] Voraussetzung für beide Verfahren ist die Ratifikation des Fakultativprotokolls durch den Vertragsstaat (Art. 1 CEDAW-FP).[94] Mit Stand vom Januar 2026 haben 115 der 189 Vertragsstaaten das CEDAW-FP ratifiziert.[95]

---

88 Andrew Byrnes and Meghan Campbell, 'Article 24' in: Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf und Marsha A. Freeman (Hrsg.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary* (2. Aufl., Oxford University Press 2022), 755-764 (755).

89 Andrew Byrnes and Meghan Campbell, 'Article 2' in: Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf and Marsha A. Freeman (Hrsg.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary* (2. Aufl., Oxford University Press 2022), 109-146 (126-133).

90 Kroworsch (Fn. 34), 816; Ineke Boerefijn und Julie Fraser, 'Article 18' in: Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf and Marsha A. Freeman (Hrsg.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary* (2. Aufl., Oxford University Press 2022), 701-720 (701).

91 2131 UNTS 83.

92 Boerefijn und Fraser (Fn. 90), 701-702, 714-715; Meghan Campbell and Jane Connors, 'Optional Protocol' in: Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf und Marsha A. Freeman (Hrsg.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary* (2. Aufl., Oxford University Press 2022), 823-896 (824); Sweeney (Fn. 5), 291-292.

93 Campbell und Connors (Fn. 92), 824.

94 Campbell und Connors (Fn. 92), 831.

95 UN, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8-b&chapter=4&clang=_en>, zuletzt besucht 22. Januar 2026.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Weder unter dem CEDAW-FP noch unter Art. 18 CEDAW kann der CEDAW-Ausschuss allerdings Vertragsverletzungen rechtsverbindlich feststellen oder Wiedergutmachung für die Opfer anordnen.[96] Das Ziel dieser Verfahren ist es in erster Linie, die Vertragsstaaten zur Einhaltung ihrer Vertragsverpflichtungen anzuregen, indem Beanstandungen aufgezeigt und ein *politischer* Erklärungsbedarf vor der nationalen und internationalen Öffentlichkeit erzeugt wird.[97] Art. 29 Abs. 1 CEDAW stellt im Vergleich dazu den einzigen Mechanismus bereit, der zu einem rechtsverbindlichen IGH-Urteil über konkrete Rechtsverletzungen gelangen kann.[98] Er überlässt den durch die CEDAW gewährten Schutz dadurch nicht der politischen Befolgungsbereitschaft der Vertragsstaaten, sondern macht ihn gerichtlich durchsetzbar. Erst durch Art. 29 Abs. 1 CEDAW ist der Menschenrechtsschutz von Frauen nicht nur „theoretical and illusory", um die Worte des Europäischen Gerichtshofes für Menschenrechte (EGMR) zu gebrauchen, sondern „practical and effective"[99]. Dies legt nahe, den Art. 29 Abs. 1 CEDAW nicht nur als prozedurale Norm zu verstehen, sondern ihm auch einen materiell-rechtlichen Gehalt beizumessen.[100]

---

96 Patricia Schulz, Ruth Halperin-Kaddari und Beate Rudolf, 'Introduction' in: Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf and Marsha A. Freeman (Hrsg.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary* (2. Aufl., Oxford University Press 2022), 1-60 (22); Boerefijn und Fraser (Fn. 90), 710, 713; Sweeney (Fn. 5), 291.

97 Christoph Gusy, 'Grundrechtsmonitoring. Grundrechtsdurchsetzung außerhalb gerichtlicher Instanzen', Der Staat 47 (2008), 511-549 (537); Martin Scheinin, 'The ICJ and the Individual', International Community Law Review 9 (2007), 123-137 (134).

98 Kroworsch (Fn. 34), 816; darauf stellt auch IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge Ad Hoc Gaja, Rn. 43 mit Blick auf Art. 22 ICERD ab: 'The Committee established by the Convention has no power to impose a *legally binding* solution.'

99 EGMR, z. B. *Airey v. Ireland*, Urteil v. 9. Oktober 1979, Series A Nr. 32, Rn. 24; EGMR, *Soering v. United Kingdom*, Urteil v. 7 Juli 1989, Series A Nr. 161, Rn. 87; EGMR, *Loizidou v. Turkey (Preliminary Objections)*, Urteil v. 23. März 1995, Nr. 15318/89, Rn. 72; EGMR, *Matthews v. The United Kingdom [Große Kammer]*, Urteil v. 18. Februar 1999, Nr. 24833/94, ECHR 1999-I, Rn. 34; EGMR, *Christine Goodwin v. United Kingdom [Große Kammer]*, Urteil v. 11. Juli 2002, Nr. 28957/95, ECHR 2002-VI, Rn. 74; so auch IGH, *Armed Activities* (Fn. 4), Joint Seperate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, Rn. 21; Kroworsch (Fn. 34), 816.

100 Kroworsch (Fn. 34), 816 und sogleich in III. 2. c); vgl. auch IGH, *Armed Activities* (Fn. 4), Dissenting Opinion of Judge Koroma, Rn. 11-13, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, Rn. 21-23; für Art. 22 ICERD ausdrücklich IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Separate Opinion of Judge Greenwood, Rn. 6-7, Dissenting Opinion of Judge Cançado Trindade, Rn. 210; IGH, *ICERD* (Ukraine v. Russian Federation) (Fn. 14), Separate Opinion of Judge Cançado Trindade, Rn. 17, 26; IGH, *ICERD* (Qatar v. United Arab Emirates) (Fn. 35), Separate Opinion of Judge Cançado Trindade, Rn. 101.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Gegen einen zusätzlichen materiellen Gehalt spricht allerdings, dass die Vertragsstaaten die Zuständigkeit des IGH nach Art. 29 Abs. 2 CEDAW abbedingen können. Insbesondere ist die Erklärung von Vorbehalten gegen die Streitbeilegungsklausel *ohne Einschränkung* möglich. Für die materiellrechtlichen CEDAW-Normen gilt demgegenüber, dass Vorbehalte mit dem Sinn und Zweck der CEDAW vereinbar sein müssen, um zulässig zu sein (Art. 28 Abs. 2 CEDAW).[101] Nach Art. 28 und 29 CEDAW besteht damit ein deutlicher Unterschied zwischen den materiellrechtlichen CEDAW-Normen und der Streitbeilegungsklausel.

Der IGH ordnet menschenvertragliche Streitbeilegungsklauseln bisher als rein verfahrensrechtliche Normen ein. Dies bestätigte er jüngst im Mai 2025[102] sogar für die *ius cogens*-Norm bzw. *erga omnes*-geltende Verpflichtung zur Bestrafung des Völkermordes.[103] Art. IX Völkermordkonvention[104] und ebenso Art. 22 ICERD[105] sind nach Ansicht des IGH als prozedurale Normen zu verstehen, weil sie lediglich eine verfahrensrechtliche Streitbeilegungsoption bereitstellen. Zu Art. 29 Abs. 1 CEDAW hat der IGH diese Ansicht zwar nicht vertreten. Dies gilt aber nur deshalb, weil er sich für die einzige Klage, die via Art. 29 Abs. 1 CEDAW vor ihn gelangte (Kongo gegen Ruanda), als nicht zuständig erachtete und somit schlicht keine Gelegenheit dazu hatte.[106]

Sollte Art. 29 Abs. 1 CEDAW rein prozedural verstanden werden, können die Menschenrechtsverletzungen von Frauen in Afghanistan für mehrere Jahre zum Gegenstand zwischenstaatlicher Verhandlungsmasse werden.[107] Ihr Menschenrechtsschutz wäre dann, in der Formulierung des EGMR, doch nur theoretisch und illusorisch[108]. Eine beträchtliche Anzahl an IGH-Richtern lehnt das rein prozedurale Verständnis von Streitbeilegungsklauseln

101 III. 3. a).

102 IGH, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan* (Sudan v. United Arab Emirates), Order, 5. Mai 2025, General List Nr. 197, Rn. 30-33.

103 Konvention über die Verhütung und Bestrafung des Völkermords (Völkermordkonvention), 78 UNTS 277.

104 IGH, *Legality of the Use of Force* (Yugoslavia v. Spain), Provisional Measures, Order v. 2. Juni 1999, ICJ Reports 1999, 761 (772 Rn. 32-33); IGH, *Legality of the Use of Force* (Yugoslavia v. United States of America), Provisional Measures, Order v. 2 Juni 1999, ICJ Reports 1999, 916 (924 Rn. 24-25); IGH, *Armed Activities* (Fn. 4), Rn. 67-70, 76-79; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Admissibility of the Declarations of Intervention, Order v. 5. Juni 2023, ICJ Reports 2023, 354 (375-377 Rn. 90-98); IGH, *Genocide in Sudan* (Sudan v. United Arab Emirates) (Fn. 102), Rn. 30-33.

105 IGH, *Armed Activities* (Fn. 4), Rn. 71-79.

106 I.

107 III. 2.

108 Die Nachweise in Fn. 99.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

dementsprechend zu Recht ab.[109] Wenn mutmaßliche Menschenrechtsverletzungen dem IGH durch eine Streitbeilegungsklausel angetragen werden, sei eine „[s]trict adherence to legal formalities […] not appropriate"[110].

Die Frage, ob Art. 29 Abs. 1 CEDAW einen materiellen Einschlag hat, steht letztlich beispielhaft für die generelle Meinungsverschiedenheit innerhalb des IGH, wie er die staatlichen Souveränitätsrechte mit dem Menschenrechtsschutz vereinbaren kann. In den Worten des englischen Völkerrechtsprofessors *Russell Buchan*:

„Compromissary clauses reveal the tension within the ICJ between, on the one hand, adopting a decision that is protective of state sovereignty but, on the other hand, pushing for an interpretation of international law that is protective of human dignity."[111]

c) Die Diskrepanz zwischen Verfahrens- und materiellem Recht

In seiner bisherigen Rechtsprechung legte der IGH Streitbeilegungsklauseln souveränitätsschonend-formalistisch aus.[112] Dies bewirkt eine Diskrepanz zum materiellen Recht des jeweiligen Vertrags. Denn durch eine souveränitätsschonend-formalistische Auslegung werden hohe verfahrensrechtliche Hürden geschaffen, welche die gerichtliche Beurteilung von Vertragsverletzungen verzögern oder in Gänze ausschließen können. Der ehemalige IGH-Präsident *Owada* sowie die Richter *Simma*, *Abraham*, *Donoghue* und *Ad Hoc Gaja* sprachen diesbezüglich für Art. 22 ICERD von einem „formalism inconsistent with the spirit of [the clause which is] not to erect needless and over-exacting procedural obstacles liable to delay or impede the applicant's access to international justice"[113].

---

109 Die Nachweise des folgenden Abschnitts.

110 IGH, *Armed Activities* (Fn. 4), Dissenting Opinion of Judge Ad Hoc Mavungu, Rn. 39.

111 Russell Buchan, 'The International Court of Justice and the Idea of Liberal International Law' in: Achilles Skordas and Lisa Mardikian (Hrsg.), *Research Handbook on the International Court of Justice* (Edward Elgar Publishing 2025), 142-165 (159).

112 'excessively formalistic': IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge Ad Hoc Gaja, Einleitung, Rn. 43, 50, 54-55, 58 , 65; 'Reliance on formalistic formulas, focus on State "interests" or intentions': *ICERD* (Georgia v. Russian Federation) (Fn. 13), Dissenting Opinion of Judge Cançado Trindade, Rn. 139.

113 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge Ad Hoc Gaja, Rn. 43, 58, so auch Dissenting Opinion of Judge Cançado Trindade, Rn. 132, 139, 161, 214; IGH, *Armed Activities* (Fn. 4), Declaration of Judge Kooijmans, Rn. 7, 11, 15, Separate Opinion of Judge Al-Khasawneh, Rn. 7, 9-13, Dissenting Opinion of Judge Koroma, Rn. 14-17, 22, 24-27, Dissenting Opinion of Judge Ad Hoc Mavungu, Rn. 2, 40-46, Joint Separate Opinion of Judges

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Hinsichtlich der Gründe für eine souveränitätsschonende Auslegung äußerte *Bruno Simma* nach seiner Zeit als IGH-Richter die Vermutung, dass „at least a part of its clientele might be somewhat less enthusiastic if the ICJ assumed more pronounced-features of a human rights court"[114]. Der Hintergrund von *Simmas* Beobachtung ist die konsensbasierte Zuständigkeit des IGH. Als zwischenstaatliches Hauptrechtsprechungsorgan der UN (Art. 96 Satz 1 UN-Charta) ist der IGH weder mit einer obligatorischen und umfassenden Zuständigkeit ausgestattet, noch handelt es sich bei ihm um einen spezialisierten Menschenrechtsgerichtshof, wie es auf den EGMR und den IAGMR zutrifft. In diesem konsensbasierten Zuständigkeitssystem ist es zu befürchten, dass Staaten als Reaktion auf eine weniger souveränitätsschonende Auslegung von Streitbeilegungsklauseln diese entweder durch Vorbehalte abbedingen oder den Vertrag erst gar nicht ratifizieren.[115]

Diese Gefahr ist ebensowenig von der Hand zu weisen wie das Spannungsfeld, in dem sich der IGH aufgrund seiner konsensbasierten Zuständigkeit bewegt. Hieraus ergibt sich die Diskrepanz zwischen dem Verfahrens- und dem materiellen Recht: Einerseits muss der IGH seiner Stellung als dem Hauptrechtsprechungsorgan der internationalen Gemeinschaft gerecht werden. Andererseits ist er darauf bedacht, den Interessen der ihm unterworfenen Staaten nicht allzu eklatant zuwider zu handeln. In diesem Ansinnen legt sich der IGH eine juristische Zwangsjacke an („jurisdictional straitjacket"[116]). Sie führt dazu, dass Menschenrechte vor dem IGH aus prozeduralen Gründen nicht durchsetzbar sein können.

Die Diskrepanz zwischen dem Verfahrens- und dem materiellen Recht kann nur durch ein auch-materielles Verständnis von Streitbeilegungsklauseln

---

Higgins, Kooijmans, Elaraby, Owada and Simma, Rn. 21-23, 25-28; IGH, *Genocide in Sudan* (Sudan v. United Arab Emirates) (Fn. 102), Declaration of Judge Ad Hoc Simma, Rn. 5-12; IGH, *ICERD* (Qatar v. United Arab Emirates) (Fn. 35), Separate Opinion of Judge Cançado Trindade, Rn. 62-70; IGH, *ICERD* (Ukraine v. Russian Federation) (Fn. 14), Separate Opinion of Judge Cançado Trindade, Rn. 4-8, 12-27.

114 Bruno Simma, 'Human Rights Before the International Court of Justice: Community Interest Coming to Life?' in: Holger P. Hestermeyer et al. (Hrsg.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum*, Bd. I (Brill Nijhoff 2012), 577-604 (600).

115 Simma (Fn. 114), 599-601; Ishizuka (Fn. 19), 123.

116 Simma (Fn. 114), 599; IGH-Richter Cançado Trindade spricht diesbezüglich von 'judicial self-restraint', die er als 'Kunst des Nicht-Tuns' beschreibt: IGH, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), Order v. 16 Juli 2013, Provisional Measures, ICJ Reports 2013, 230, Dissenting Opinion of Judge Cançado Trindade, Rn. 4; vgl. weiter z. B. Antônio Augusto Cançado Trindade 'International Law for Humankind: Towards a New *Jus Gentium* (II) – General Course on Public International Law' in: RdC 317 (2005), 19-312 (41-43).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

aufgelöst werden. Erst dadurch werden die materiellen Garantien eines Menschenrechtsvertrags gerichtlich durchsetzbar und erlangen praktische Wirksamkeit. Ein rein prozedurales Verständnis beraubt den Vertrag demgegenüber seiner praktischen Wirksamkeit, da der IGH-Zugang durch formalistische Hürden erschwert oder ausgeschlossen wird. Streitbeilegungsklauseln sind deshalb nicht als von den materiellen Menschenrechtsgarantien losgelöste, technische Zuständigkeitsklauseln zu sehen, sondern als integraler Bestandteil des menschenvertraglichen Schutzmechanismus.

Wenn Streitbeilegungsklauseln die prozedurale Flanke des materiellen Menschenrechtsschutzes bilden, muss ihre Auslegung mit der Art und Schwere der zugrunde liegenden Rechtsverletzungen verknüpft sein.[117] Für Art. 29 Abs. 1 CEDAW bedeutet dies, dass das Verhandlungskriterium unter Berücksichtigung der Schwere der CEDAW-Verletzungen in Afghanistan auszulegen ist. Dadurch erlangt die Wehrlosigkeit und Not der Betroffenen rechtliche Relevanz. Ihr höherer *materieller* Schutzbedarf erfordert einen umso niedrigschwelligeren *prozeduralen* Zugang zum IGH.[118] Richter *Cançado Trindade* brachte dies in mehreren Fällen treffend wie folgt auf den Punkt:

> „[T]he rationale of human rights conventions cannot be overlooked by the ICJ's 'mechanical and reiterated search for State consent' continued in time and placed above the 'fundamental values' underlying those conventions.[119] […] Under human rights treaties, the individuals concerned, in situations of great vulnerability or adversity, need a higher standard of protection."[120]

Diese „protection" kann erst erreicht werden, wenn eine Klage unter Berücksichtigung der konkreten Rechtsverletzungen zügig vor den IGH gelangt.[121]

---

117 IGH, *Armed Activities* (Fn. 4), Dissenting Opinion of Judge Koroma, Rn. 25.

118 So auch IGH, *Armed Activities* (Fn. 4), Dissenting Opinion of Judge Koroma, Rn. 25-26; Dissenting Opinion of Judge Ad Hoc Mavungu, Rn. 39, 42, 46; Declaration of Judge Kooijmans, Rn. 7; Joint Seperate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, Rn. 25, 28; IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Dissenting Opinion of Judge Cançado Trindade, Rn. 139, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge Ad Hoc Gaja, Rn. 56.

119 IGH, *ICERD* (Ukraine v. Russian Federation) (Fn. 14), Separate Opinion of Judge Cançado Trindade, Rn. 5.

120 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Dissenting Opinion of Judge Cançado Trindade, Rn. 162; so auch IGH, *ICERD* (Qatar v. United Arab Emirates) (Fn. 35), Separate Opinion of Judge Cançado Trindade, Rn. 63-65, 70.

121 IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Dissenting Opinion of Judge Cançado Trindade, Rn. 210; *Armed Activities* (Fn. 4), Separate Opinion of Judge Al-Khasawneh, Rn. 12-13, Declaration of Judge Kooijmans, Rn. 7-11, vgl. auch Dissenting Opinion of Judge Koroma, Rn. 24, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

d) Die Berücksichtigung der Schwere der CEDAW-Verletzungen

In beiden Fällen, in denen Art. 29 Abs. 1 CEDAW als Zuständigkeitsgrundlage für den IGH herangezogen wurde bzw. wird, sind die Menschenrechtsverletzungen von Frauen und Mädchen umfassend dokumentiert. Im Falle der CEDAW-Verletzungen durch Ruanda wurden Rechtsverletzungen unter anderem während der 57. UN-Generalversammlung[122] sowie durch die UN-Sonderberichterstatterin[123] zur Menschenrechtslage im Kongo als schlimmste Formen der sexuellen Gewalt festgestellt („rape followed by mutilation of the mouth and amputation of the legs"[124]).

Für Afghanistan stellte der UN-Sonderberichterstatter in insgesamt vier sowie in einem gemeinsamen Bericht mit der UN-Arbeitsgruppe zur Diskriminierung von Frauen massive CEDAW-Verletzungen fest. Diese treten in immer kürzeren Abständen auf und verschlechtern die Situation afghanischer Frauen und Mädchen zunehmend.[125] In der Einleitung wurden beispielhaft einige frappierende Rechtsverletzungen genannt.[126] Die Einhaltung der Dekrete, Verordnungen und Gesetze, auf denen die CEDAW-Verletzungen beruhen, wird durch die afghanische Sittenpolizei (Muhtasib[127]) willkürlich kontrolliert und unter Gewaltanwendung durchgesetzt.[128]

Die Massivität der Rechtsverletzungen in Afghanistan zeigt sich schließlich darin, dass sie als Katalysator einer Reihe völkerrechtlicher Entwicklungen wirkt. So wird unter Verweis auf die CEDAW-Verletzungen in Afghanistan

---

and Simma, Rn. 25-29; IGH, *ICERD* (Georgia v. Russian Federation) (Fn. 13), Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge Ad Hoc Gaja, Rn. 64-72; *IGH, ICERD* (Qatar v. United Arab Emirates) (Fn. 35), Separate Opinion of Judge Cançado Trindade, Rn. 63-65.

122 UNGA, Situation of Human Rights in the Democratic Republic of the Congo, 26. September 2002, UN Doc. A/57/437, Rn. 71-75.

123 Commission of Human Rights, Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World. Report on the Situation of Human Rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Ms. Iulia Motoc, in accordance with Commission on Human Rights Resolution 2002/14, 15. April 2003, UN Doc. E/CN.4/2003/43, Rn. 63-65.

124 Commission of Human Rights (Fn. 123), Rn. 65.

125 UNGA, Report, 9. Februar 2023 (Fn. 8), Rn. 7-8, 14-23; UNGA, Report, 1. September 2023 (Fn. 8), Rn. 5; UNGA, Report, 20. Februar 2025 (Fn. 8), Rn. 1, 123; UNGA, Joint Report, 15. Juni 2023 (Fn. 8), Rn. 17-62; UNGA, 'Vice and Virtue Report', 25. Februar 2025 (Fn. 8), Rn. 12.

126 I.

127 Zum Ursprung und den Befugnissen der Muhtasib: Kristen Stilt und Mehmet Safa Saraçoğlu, 'Hsiba and Muhtasib' in: Anver M. Emon and Rumee Ahmed (Hrsg.) *The Oxford Handbook of Islamic Law* (Oxford University Press 2018), 327-356 (333-341, 348-352).

128 UNGA, 'Vice and Virtue Report', 25. Februar 2025 (Fn. 8), Rn. 75-86.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

gefordert,[129] den Tatbestand der „gender apartheid" als ein Verbrechen gegen die Menschlichkeit in das Statut des Internationalen Strafgerichtshofs (IStGH-Statut[130]) sowie in die Entwurfsartikel[131] zu einem völkerrechtlichen Vertrag über die Verhütung und Bestrafung von Verbrechen gegen die Menschlichkeit aufzunehmen. Die Völkerrechtskommission (ILC) stellte die Entwurfsartikel im Jahr 2019 fertig. Sie definieren Apartheid aber nach wie vor als institutionalisierte und systematische Unterdrückung einer „racial group" (Art. 2 Abs. 2 lit. h)). Gegenwärtig werden die ILC-Artikel von einer Arbeitsgruppe beraten, deren Ergebnisse auf zwei Konferenzen in den Jahren 2028 und 2029 vorgestellt werden.[132] Das Verbrechen der Apartheid stellt nach herrschender Meinung *ius cogens* dar.[133] Durch die Anerkennung der geschlechtsbezogenen Apartheid würde die systematische und institutionalisierte Unterdrückung von Frauen und Mädchen wie in Afghanistan ebenfalls zu *ius cogens* und einer *erga omnes*-wirkenden Völkerrechtsnorm werden.

IV. Schlussfolgerungen

Die CEDAW schützt Frauen materiellrechtlich umfassend vor jeder Form der Diskriminierung, was die Nachprüfung durch den CEDAW-Ausschuss und als *ultima ratio* durch den IGH einschließt. Die Kontrolle durch den

129 UNGA, Draft Articles on Prevention and Punishment of Crimes Against Humanity. Recommendations from the Working Group on Discrimination Against Women and Girls, 15. Februar 2024, UN Doc. A/HRC/WG.11/40/1, Rn. 7-11; UNGA, Report, 1. September 2023 (Fn. 8), Rn. 19; UNGA, Report, 30. August 2024 (Fn. 8), Rn. 19; UNGA, Joint Report, 15. Juni 2023 (Fn. 8), Rn. 95-96; Working Group on Discrimination Against Women and Girls, Gender Apartheid Must Be Recognized as a Crime Against Humanity, UN Experts Say, 20. Februar 2024, <https://www.ohchr.org/en/press-releases/2024/02/gender-apartheid-must-be-recognised-crime-against-humanity-un-experts-say>, zuletzt besucht 22. Januar 2026; UN Women, Executive Director Sima Bahous, 'The Women's Rights Crisis: Listen To, Invest In, Include, and Support Afghan Women, 26. September 2023, <https://www.unwomen.org/en/news-stories/speech/2023/09/speech-the-womens-rights-crisis-listen-to-invest-in-include-and-support-afghan-women>, zuletzt besucht 22. Januar 2026.

130 2187 UNTS 90.

131 ILC, Report, Seventy-first session (29. April-7. Juni and 8. Juli-9. August 2019), UN Doc. A/74/10, Text of the draft articles on prevention and punishment of crimes against humanity, 11-22.

132 UNGA, Resolution 19/122. United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity, 12. Dezember 2024, UN Doc. A/RES/79/122.

133 Statt vieler ILC, Report, Seventy-third session (18. April-3. Juni and 4. Juli-5. August 2022, UN Doc. A/77/10 (Advance version v. 12. August 2022), Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), Conclusion 23. Non-exhaustive list, 87 Rn. 11, 89 Annex (e).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

IGH wird durch die Vorschrift des Art. 29 Abs. 1 CEDAW ermöglicht, die das Spannungsverhältnis zwischen zwei gegensätzlichen völkerrechtlichen Prinzipien wiederspiegelt: Einerseits können Staaten nach dem Prinzip der souveränen Gleichheit der Staaten (Art. 2 Ziff. 1 UN-Charta) nur insoweit der IGH-Gerichtsbarkeit unterworfen werden, als sie ihr zustimmen. Deshalb kann von der Voraussetzung gescheiterter Verhandlungen in Art. 29 Abs. 1 CEDAW grundsätzlich nicht abgewichen werden. Andererseits spricht der individualschützende Zweck von Menschenrechtsverträgen für das Zurücktreten staatenzentriert-reziprozitätsbasierter Interessen in der Auslegung von Streitbeilegungsklauseln. In seiner bisherigen Rechtsprechung legte der IGH menschenrechtsvertragliche Streitbeilegungsklauseln gleichwohl souveränitätsschonend-formalistisch aus. Dies führte dazu, dass Menschenrechtsverletzungen prozedural nicht vor dem IGH durchsetzbar waren.

Dieser Durchsetzungsschwäche ist dadurch zu begegnen, dass Streitbeilegungsklauseln wie Art. 29 Abs. 1 CEDAW neben ihrer prozeduralen eine materiellrechtliche Bedeutung beigemessen wird, da durch sie das materielle Recht erst „practical and effective" (EGMR) wird. Im Lichte dieser Bedeutung ist das Verhandlungskriterium des Art. 29 Abs. 1 CEDAW unter Berücksichtigung der konkreten Rechtsverletzungen auszulegen: Je schwerer die gerügten Rechtsverletzungen, desto niedriger muss die Schwelle der Verhandlungserschöpfung angesetzt werden. Angesichts der alarmierenden CEDAW-Verletzungen ist im Falle Afghanistans deshalb ein rascher IGH-Zugang geboten. Konkret sollten nach Aufforderung zur Aufnahme von Verhandlungen durch die Initiativstaaten bei gleichzeitiger Zurückweisung[134] der Vorwürfe durch die Taliban keine weiteren Verhandlungsversuche unternommen werden müssen, um das Verhandlungskriterium des Art. 29 Abs. 1 CEDAW zu erfüllen.

Allerdings ist es nicht sehr wahrscheinlich, dass der IGH seine bisherige Auslegung ändert und die CEDAW-Verletzungen in Afghanistan zu einem „clean-cut, ‚unpolitical' human rights case"[135] macht. Zwar zeigt sich seit einigen Jahren IGH-intern eine gewisse Neigung zu einer stärker teleologischen Auslegung von Streitbeilegungsklauseln. Die Mehrheit der IGH-Richter hält jedoch an einer souveränitätsschoned-formalistischen Auslegung fest, und es scheint unwahrscheinlich, dass sich dies mit der Klage gegen Afghanistan ändert. In jedem Fall bietet sich dem IGH die Gelegenheit, seine im *Kongo*-Fall unterbliebene Auseinandersetzung mit Art. 29 Abs. 1 CEDAW nachzuholen und das Verhandlungskriterium zu präzisieren.

134 III. 2. (Fn. 63).

135 Simma (Fn. 114), 594.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

Summary: The Failed-Negotiations Requirement in CEDAW's Compromissory Clause

Claims before the ICJ for alleged human rights violations are increasingly based on the compromissory clauses in human rights treaties. The requirement that the claimant state must have negotiated with the defendant state before bringing the case before the ICJ leads to a delay of several years between the allegations have first occurred and the actual adjudication by the ICJ. The failed-negotiation requirement can thereby seriously impair the protection of human rights. This article examines the failed-negotiation requirement in CEDAW's compromissory clause. Based on the CEDAW violations in Afghanistan, it argues that CEDAW's compromissory clause has substantive legal implications and should thus enable expeditious access to the ICJ.

Keywords

Human rights – CEDAW – ICJ jurisdiction – compromissary clauses – Afghanistan – women's rights

 DOI 10.17104/0044-2348-2026-3-921

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

The German Doctrine of Normative Authorisation as an Inspiration for US Administrative Law after *Loper Bright*

Johann Remé*
Hannover, Germany
johannreme@posteo.de

Abstract 947
Keywords 948
I. Introduction 948
II. The End of *Chevron* Deference 950
1. *Chevron* Deference 950
2. *Loper Bright: Chevron's* End 951
3. Possible Consequences 955
III. Doctrine of Normative Authorisation in German Administrative Law 958
1. Concept and Development of the Doctrine of Normative Authorisation 959
2. Constitutional and Conceptional Foundations of the Doctrine of Normative Authorisation 962
IV. German-Style Doctrine of Normative Authorisation in US Administrative Law 966
1. Notion of a Doctrine of Normative Authorisation in *Loper Bright* 966
2. Proposal: Focus on Authorising Provision to Determine Discretionary Powers in US Administrative Law 967
3. Contextualisation and Counterarguments 970
4. Arguments in Favour of the Proposal 975
V. Conclusion 979

Abstract

In the summer of 2024, the United States (US) Supreme Court overruled the decades-old *Chevron* doctrine in *Loper Bright*. In doing so, it redefined judicial review of discretionary decisions by administrative agencies. This is particularly relevant in the area of executive rulemaking. For some, the decision was considered as the beginning of the long-awaited decline of the administrative state. Others mourn the end of *Chevron*. For some, the decision marks a disruption in administrative law. Others see continuity rather than a shift in the allocation of powers. Further developments remain unclear. This

* The author (Dr. iur.) is a trainee lawyer at the Higher Regional Court of Celle. An initial draft of this article was written as part of his LL. M. studies at the University of Chicago Law School. It was supported by a scholarship from the German Academic Exchange Service (DAAD). The author is grateful to Prof. David A. Strauss for his helpful comments.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

article describes the developments and possible consequences of the landmark decision. It contributes to the growing literature by putting it in the context with German administrative law, namely the doctrine of normative authorisation. The German doctrine can be an inspiration for navigating the unclear developments in this area of US administrative law after *Loper Bright*.

Keywords

comparative administrative law – judicial review of discretionary agency decisions – doctrine of normative authorisation – *Chevron* deference – *Loper Bright*- German and US administrative law

I. Introduction

US administrative law and the administrative state are in stormy waters. Big waves have capsized conventional doctrine and are perceived as a threat to the flagship, i. e. the rule of law[1]. A rough sea is also already visible on the horizon, but it is not yet clear how things will develop.[2] This article focuses

1 See the various opinions by Aziz Huq et al., 'The "Recklessness Itself Sends a Message": 35 Legal Experts Assess Trump's Return', The New York Times, 28 April 2025, <www.nytimes.com/2025/04/28/opinion/trump-constitution-rule-of-law.html>, last access 9 April 2026; see also Lorenz Dopplinger, 'Die Transformation des amerikanischen Administrative State', Staat 64 (2025) 441-471 (471).

2 This concerns at least two areas. Firstly, it relates to the reintroduction of the nondelegation doctrine in a dissent written by Justice Gorsuch (US Supreme Court, *Gundy v. United States*, judgment of 20 June 2019, 588 U. S. 128, 149), according to which rulemaking would be largely reserved for Congress, which could only authorise the executive branch to 'fill up the details', to carry out fact-finding and to conduct non-legislative tasks. On the relation between our topic and the nondelegation doctrine Kristin E. Hickman and Amy J. Wildermuth, 'Harmonizing Delegation and Deference After *Loper Bright*', N. Y. U. L. Rev. 100 (2025), 1924-1983 (1950-1958, 1974-1983); Mila Sohoni, '*Chevron*'s Legacy', Harv. L. Rev. Forum 138 (2025), 66-88 (72-76). Secondly, this concerns the debate surrounding the unitary executive theory and the for-cause removal protection of heads of independent agencies. The Trump administration has announced its intention to push the Supreme Court to overrule the relevant precedent (US Supreme Court, *Humphrey's Executor v. United States*, judgment of 27 May 1935, 295 U. S. 602) if it is in the way of firing principal officers, see a letter from Sarah M. Harris (Acting Solicitor General), 'Restrictions on the Removal of Certain Principal Officers of the United States', 12. February 2025, <https://fingfx.thomsonreuters.com/gfx/legaldocs/movawxboava/2025.02.12-OUT-Durbin-530D.pdf>, last access 9 April 2026. In US Supreme Court, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, judgment of 29 June 2020, 591 U. S., the court has already shown a tendency towards the unitary executive theory; in US Supreme Court, *Trump v. Slaughter*, judgment of 29 June 2026, 609 U.S., the court finally overruled *Humphrey's Executor*.

 DOI 10.17104/0044-2348-2026-3-947

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

on the disruption that has taken place in June 2024 through the overturned doctrine. It is the end of *Chevron* deference that had granted administrative agencies judicial deference in interpreting statutes.[3] This is a landmark event, as the *Chevron* doctrine had been considered as a 'cornerstone' of US administrative law.[4] The article argues that, for what lies ahead for the US administrative law, the German doctrine could offer orientation from across the Atlantic. The end of *Chevron* will require courts in the United States to deal more explicitly with an issue that German administrative law has addressed for quite some time: the issue concerning the question of when an administrative agency is authorised to decide at its own discretion and when, accordingly, only limited judicial review exists. This article proposes that the German doctrine of normative authorisation (*normative Ermächtigungslehre*) can serve as an inspiration for the US approach on judicial review of discretionary agency decisions after the end of *Chevron*. The main message of the German doctrine is that administrative agencies are authorised to decide at their own discretion with corresponding judicial deference if this is provided for by parliamentary statute.

To substantiate this, Part II outlines the end of *Chevron* deference in US administrative law and considers the legal movement that had contributed to it. In addition, the article considers the possible consequences of the overturning of the doctrine. Part III summarises and builds on the corresponding doctrine of normative authorisation in German administrative law. Part IV examines whether the German doctrine is a worthwhile inspiration for the US, and does so by contextualising and focusing on the potential downsides and advantages of its application in the US system. Part V concludes in the affirmative.

Two small caveats: Since the end of *Chevron* was decided at and is discussed with regard to the US federal level, this article does not take the sub-federal levels into consideration.[5] Furthermore, it does not claim to deductively solve any specific challenges that US administrative law faces. Rather, the article aims to offer a general orientation by comparing the administrative law doctrines.

---

3 US Supreme Court, *Chevron U. S. A., Inc. v. Natural Resources Defense Council*, judgment of 25 June 1984, Inc., 467 U. S. 837.

4 US Supreme Court, *Loper Bright Enterprises v. Raimondo*, judgment of 28 June 2024, 603 U. S., (Kagan, J., dissenting), 1.

5 Accordingly and with a brief comparison of the federal systems in relation to administrative law Jonas Plebuch and Simon Pielhoff, 'Verwaltungsstaat als Demokratieideal – Administrative State als Demokratiegefahr?', Staat 61 (2022), 167-203 (169-172).

DOI 10.17104/0044-2348-2026-3-947

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

II. The End of *Chevron* Deference

The forty years old US doctrine of *Chevron* deference regarding judicial review of discretionary agency decisions (1.) was overturned by the US Supreme Court in *Loper Bright Enterprises v. Raimondo, Secretary of Commerce*[6] (2.). The consequences of the end of *Chevron* are contentious and difficult to predict (3.).

1. *Chevron* Deference

Chevron deference was introduced by the US Supreme Court in 1984.[7] In two steps, the doctrine considered whether federal courts must defer to a federal administrative agency's interpretation of a statute. Deference depended, first, on whether Congress had directly spoken to the precise question at issue, that is, whether the term was unambiguous; and second, on whether the agency's interpretation was reasonable.[8] If Congress had directly addressed the issue, agencies had to follow Congress' view. If Congress had not directly spoken and if the interpretation of an ambiguous statutory term was reasonable, the courts had to defer to the agency's interpretation. An unreasonable interpretation of an ambiguous statute was impermissible. If Congress had created an administrative program and left some gaps, either explicitly or implicitly, this was regarded as an authorisation of the agency to discretionarily concretise the ambiguous provisions.[9]

Chevron deference was a core doctrine of US administrative law.[10] While the doctrine was initially celebrated by conservatives,[11] it was later supported primarily by progressives and fell into discredit among conservatives.[12] *Chevron* deference was a fundamental doctrine for the formation of the administrative state, which has increasingly become the scapegoat of the conservative side.[13] Accordingly, the doctrine was met with strong headwinds

6 US Supreme Court, *Loper Bright* (n. 4).

7 US Supreme Court, *Chevron* (n. 3).

8 US Supreme Court, *Chevron* (n. 3), 842-843.

9 US Supreme Court, *Chevron* (n. 3), 843-844. On ambiguity as implicit delegation in the *Chevron* doctrine Thomas W. Merrill, 'The Demise of Deference – And the Rise of Delegation to Interpret?' Harv. L. Rev. 138 (2024), 227-272 (252-254).

10 Cary Coglianese and Daniel E. Walters, 'The Great Unsettling: Administrative Governance After *Loper Bright*', Admin. L. Rev. 77 (2025), 1-64 (39).

11 See Merrill (n. 9), 248-250.

12 See at n. 32.

13 See Plebuch and Pielhoff (n. 5), 183-184; Cass R. Sunstein and Adrian Vermeule, *Law & Leviathan* (Belknap Press of Harvard University Press 2020), 132.

 DOI 10.17104/0044-2348-2026-3-947

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

and its scope was narrowed by quite a few Supreme Court decisions, lastly by invoking the major question doctrine.[14]

2. *Loper Bright*: *Chevron's* End

On June 28, 2024, the US Supreme Court overruled *Chevron* in *Loper Bright*.[15] The majority opinion, written by Chief Justice Roberts draws upon § 706 of the Administrative Procedure Act (APA)[16], which states that a 'reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions'.[17] Courts now have to determine the 'single, best meaning' of a statute and decide independently the questions of law.[18] Since the best meaning of a statute can still be that it delegates discretionary power to an agency, discretionary decisions of agencies are still possible after *Loper Bright*.[19] However, neither an ambiguity alone nor the authorisation to promulgate rules inherently implies a discretionary

14 US Supreme Court, *West Virginia v. EPA*, judgment of 30 June 2022, 597 U.S.; the major question doctrine says that 'in certain extraordinary cases, […] a merely plausible textual basis for the agency action' is not enough but rather 'clear congressional authorization' is needed (*West Virginia (n. 14), 19*); see also US Supreme Court, *Biden v. Nebraska*, judgment of 30 June 2023, 600 U.S. After the end of *Chevron*, some no longer consider the doctrine to be relevant, see Richard J. Pierce, 'Two Neglected Effects of *Loper Bright*', The Regulatory Review, 1 July 2024, <https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/>, last access 9 April 2026; differing view by Blake Emerson, 'The Existential Challenge to the Administrative State', Geo. L.J. 113 (2025) 1263-1337 (1297-1301); Eric R. Bolinder, 'Litigating *Loper Bright*: Interpretive Challenges and Solutions for the Post-*Chevron* Era', W. Va. L. Rev. 128 (2025), 219-264 (254-260). On further limitations of *Chevron* deference, see US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 11-12.

15 US Supreme Court, *Loper Bright* (n. 4). On the same day, the Supreme Court also decided a companion case: US Supreme Court, *Relentless, Inc. v. Department of Commerce,* argued on 17 January 2024, 603 U.S. In these cases, the Supreme Court did not overrule the *Auer* deference, given to an agency's interpretation of its own regulation, see Robin Kundis Craig, 'The Impact of *Loper Bright v. Raimondo*: An Empirical Review of the First Six Months', Minn. L. Rev. 109 (2025), 2671-2748 (2710-2711). This deference has been narrowed by US Supreme Court, *Kisor v. Wilkie,* judgment of 26 June 2019, 588 U.S. 558. On the relation between *Loper Bright* and *Auer* deference Adrian Vermeule, 'The Old Regime and the *Loper Bright* "Revolution"', Sup. Ct. Rev. 2024, 235-270 (260-261). On the relation between *Loper Bright* and further deregulatory phenomena Renee Farmer and Daniel G. Aaron, '*Loper Bright*'s Deregulatory Synergies', Seton Hall Law Review 55 (2025), 1697-1719.

16 5 U.S. Code § 706.

17 US Supreme Court, *Loper Bright* (n. 4), 13-14; against the majority's reasoning, drawing upon APA § 706, see US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 15-19, 23-24; Merrill (n. 9), 236-241.

18 US Supreme Court, *Loper Bright* (n. 4), 22.

19 US Supreme Court, *Loper Bright* (n. 4), 16-18; see Cass R. Sunstein, 'Our *Marbury*: *Loper Bright* and the Administrative State', Duke Law Journal 74 (2025), 1893-1916 (1902).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

authority.[20] In general, judges must now consider the question of whether the agency's interpretation is consistent with the law. *Chevron's* two-step approach is outdated.

In the Supreme Court's view, the APA 'incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of a statutory provision'.[21] The Court rejects the argument that the interpretation of ambiguous statutes constitutes a political judgment and therefore falls within the sphere of political institutions rather than the judicial branch.[22] Interpreting ambiguous statutory provisions is considered as a matter of conventional tools, not of individual preferences.[23] In this sense, the *Loper Bright* Court refers to a traditional and rather strict[24] understanding of the separation of powers: 'Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches.'[25]

With this view of the role of the judiciary in relation to the administrative state, the *Loper Bright* Court attempts to resolve not only the separation of powers issue, but also the practical problems associated with *Chevron* deference. Two problems should briefly be mentioned.[26] First, when is a statutory provision sufficiently ambiguous under *Chevron*'s step one?[27] Here, the Court considered *Chevron* as 'unworkable'.[28] Second, in the Court's view, the uncertainty surrounding *Chevron* undermined reliance interests in the applicability of the doctrine and the results of its application by allowing agencies within a hard to define scope of ambiguity to replace an interpretation with another as often as they liked; it 'foster[ed] unwarranted instability in the law'.[29]

---

20 On ambiguity US Supreme Court, *Loper Bright* (n. 4), 22-23. The fact that the delegation to issue rules does not imply a discretionary authority in US administrative law is implicit in US Supreme Court, *Loper Bright* (n. 4), 27 et passim. This differs from the German approach, see at n. 121.

21 US Supreme Court, *Loper Bright* (n. 4), 16.

22 US Supreme Court, *Loper Bright* (n. 4), 26.

23 US Supreme Court, *Loper Bright* (n. 4), 26.

24 The Court is in favour of a strict or formalistic understanding of the separation of powers rather than mutual dependence and interaction between institutions, see Cary Coglianese and David B. Froomkin, '*Loper Bright's* Disingenuity', U. Pa. L. Rev. 174 (2025), 91-156 (103-104); this is consistent with the arguments against the administrative state in general, see Plebuch and Pielhoff (n. 5), 170.

25 US Supreme Court, *Loper Bright* (n. 4), 26.

26 The discussion about the flaws and merits of *Chevron* cannot be replicated in detail here. The literature on that is vast, and *Loper Bright* marks a caesura. Therefore, this article focuses on a forward-looking perspective.

27 See Brett M. Kavanaugh, 'Fixing Statutory Interpretation', Harv. L. Rev. 129 (2016), 2118-2163 (2121, 2136-2144).

28 US Supreme Court, *Loper Bright* (n. 4), 30.

29 US Supreme Court, *Loper Bright* (n. 4), 33.

 DOI 10.17104/0044-2348-2026-3-947

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Besides those important practicalities, the central argument in *Loper Bright* addresses the proper role of the judiciary in relation to administrative agencies. While the majority opinion by Chief Justice Roberts bases this argument on § 706 APA,[30] Justice Thomas' concurrence is more far-reaching: In his view, *Chevron* also violated the Constitution's principle of separation of powers by forcing judges to waive their judicial power and by allowing agencies to exercise powers not conferred upon the executive branch.[31]

Loper Bright marks a milestone that the conservative legal movement in the United States has been working towards for some time. This movement and its opposition to the administrative state can be understood as a reaction to the growth of the latter.[32] The administrative state grew at the federal level in the United States particularly with Franklin D. Roosevelt's New Deal in the 1930s, which marked the establishment of powerful agencies such as the Federal Communications Commission (FCC), the Securities and Exchange Commission (SEC), and the National Labor Relations Board (NLRB). This was followed in the 1960s and 1970s by the creation of environmental, consumer, and labour protection agencies. Eventually in the course of history, the Obama administration was very active in terms of progressive regulation.

This process was accompanied by a number of fundamental Supreme Court rulings that – though certainly not one-sided – significantly supported the growth of the administrative state as a whole. For example, in *Humphrey's Executor* in 1935,[33] the Court established the basis for independent agencies that are not directly subordinate to the President and whose leaders are protected against at will removals, so that the President cannot fire officers at will at any time for any reason. Also important in this context is the 1997 case of *Auer v. Robbins*,[34] in which the Supreme Court recognised the binding effect of interpretations by agencies when interpreting the regulations they had issued themselves, so that the courts had to defer to those

30 US Supreme Court, *Loper Bright* (n. 4), 14: 'The APA […] codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment.'

31 US Supreme Court, *Loper Bright* (n. 4), (Thomas, J, concurring), 2-3; see also US Court of Appeals for the 10th Circuit, *Gutierrez-Brizuela v. Lynch*, judgment of 23 August 2016, no. 14-9585 (Gorsuch, concurring).

32 Overview by Plebuch and Pielhoff (n. 5), 181-183; Dopplinger (n. 1), 448-454; Gillian E. Metzger, 'Foreword: 1930 s Redux: The Administrative State Under Siege', Harv. L. Rev. 131 (2017), 1-95 (51-71), focusing on anti-administrative approaches.

33 US Supreme Court, *Humphrey's Executor* (n. 2).

34 US Supreme Court, *Auer v. Robbins*, judgment of 19 February 1997, 519 U. S. 452.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

interpretations. Undoubtedly, *Chevron*, the famous case from 1984, is one of the most landmark decisions for expanding the magnitude of the administrative state.[35]

In the recent past, these important cases have been judicially curtailed,[36] or as in the case of *Chevron*, explicitly overruled. Such a development should not be traced back to a single cause. Nevertheless, such downgrading of administrative power can also be attributed to the influence of the conservative legal movement, which continues to push for a limitation or even capsizing of the doctrines that enable the administrative state.[37] Conservatives are considered to fear the abuse of administrative power.[38] They believe that the Constitution, which they often interpret in an originalist manner, is on their side.[39] Conservatives have seen Roosevelt's New Deal as a moment of and, in general terms, the growth of the administrative state as an erosion of the US democracy, whereby a constitutionally limited legislative power in the hands of Congress was undemocratically substituted by an unaccountable far-reaching regulatory bureaucracy.[40] In particular, a broad delegation of law-making powers is deemed unconstitutional.[41] Some are calling for the revival of the nondelegation doctrine, which, for constitutional reasons, restricts the delegation of rulemaking powers from Congress to administrative agencies.[42] We are not there (yet). However, since *Chevron* was considered an important reason for the shift of public policy-making

35 However, during the time of Justice Scalia on the Supreme Court, *Chevron* deference was initially considered a conservative doctrine by enabling deregulation, see Merrill (n. 9), 230.

36 Cutting back *Humphrey's Executor*: US Supreme Court, *Seila Law* (n. 2): a single head of the Consumer Financial Protection Bureau with a 'for cause' removal protection violates the separation of powers; US Supreme Court, *Free Enterprise Fund v. PCAOB*, judgment of 28 June 2010, 561 U.S. 477, invalidating a two-stage 'for cause' removal protection; finally overruling *Humphrey's Executor*: US Supreme Court, *Trump v. Slaughter* (n. 2). *Auer* deference was limited by US Supreme Court, *Kisor* (n. 15).

37 See, e.g., Steven G. Calabresi and Gary S. Lawson, 'The Depravity of the 1930s and the Modern Administrative State', Notre Dame L. Rev. 94 (2019), 821-866 (859-861 et passim); overview by Emerson (n. 14), 1274-1306, particularly 1280-1283, considering that liberal Supreme Court Justices have also contributed to this trend, Emerson (n. 14), at 1270-1271, 1286-1294, 1299-1300, 1304-1306. The conservative legal movement often supports specific litigations through conservative advocacy organisations, see Ann Southworth, 'Conservative Legal Advocacy Organizations and Constitutional Change in the Roberts Court', Fordham L. Rev. 93 (2025), 1239-1256.

38 Sunstein and Vermeule (n. 13), 30.

39 See Metzger (n. 32), 42-46.

40 See, e.g., Calabresi and Lawson (n. 37), 853-859 et passim; Gary S. Lawson, 'The Rise and Rise of the Administrative State', Harv. L. Rev. 107 (1994), 1231-1254; overview of the diverse motives by Sunstein and Vermeule (n. 13), 1-3, 20-37.

41 Calabresi and Lawson (n. 37), 853-859.

42 US Supreme Court, *Gundy* (n. 2).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

power away from Congress,[43] its overruling also appears to significantly limit the regulatory powers of agencies.[44]

The conservative legal movement opposes the administrative state, but not greater presidential power.[45] The administrative state is seen in conflict with the separation of powers, since the three functions of government are partly combined in administrative agencies.[46] In addition, a powerful administrative state raises concerns that it is outside the executive control and therefore unaccountable and undemocratic.[47] Against this backdrop, courts have strengthened presidential control over agencies.[48] The unitary executive theory, which claims that all executive power lies in the hands of the President and is subject to his control, seems to be becoming an institutional reality.[49] Therefore, it would be undifferentiated to solely claim that the conservative legal movement aims at a libertarian state: The motivations are complex.[50] *Loper Bright*, however, can be seen as part of the traditional line of the conservative legal movement, which seeks to downsize the administrative state.

3. Possible Consequences

Although *Loper Bright*'s key message is that legal issues ought to be resolved through an independent judicial review, *Loper Bright* accepts that the judiciary should give attention to the interpretations by agencies: The judicial approach in reviewing agencies' interpretation of law falls back to *Skidmore*

43 Ted Cruz, Mike Johnson and Others, Amicus Brief in Support of Petitioners, *Loper Bright*, No. 22-451, 8-9.

44 See in part II. 3.

45 Metzger (n. 32), 3.

46 See Lawson (n. 40), 1248-1249; prominent and detailed Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago University Press 2014), 1, 26-29, 347-354; descriptive Metzger (n. 32), 7, 17-24.

47 US Supreme Court, *Free Enterprise Fund* (n. 36), 499.

48 See at n. 36; Emily R. Chertoff and Jessica Bulman-Pozen, 'The Administrative State's Second Face', N. Y. U. L. Rev. 100 (2025), 727-784 (748).

49 Chertoff and Bulman-Pozen (n. 48), 754-758, though excluding a 'second face' of the administrative state, consisting primarily of security and intelligence agencies.

50 Chertoff and Bulman-Pozen (n. 48) describe the conservative idea of the administrative state as a paradox with two faces: While conservatives fear and fight the first face, e. g. far-reaching influence by the Environmental Protection Agency (EPA), the Department of Health and Human Services (HHS) or the Consumer Financial Protection Board (CFPB), they consider intrusions into individual liberties with few legal checks necessary to ensure security and public order – the second face of the administrative state. The second face is neither libertarian-minimal nor limited to safeguarding physical security, see Chertoff and Bulman-Pozen (n. 48), 777-779 et passim.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

deference,[51] which means that courts give weight to an agency's interpretation if it is persuasive: '[T]he rulings, interpretations, and opinions of the Administrator […], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance'; in order to assess the weight of the agency's judgment, courts have to look at 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade'.[52]

While it is generally accepted that *Skidmore* deference applies after *Loper Bright*, scholars now debate upon the consequences of *Loper Bright* beyond that.[53] Further developments appear to be quite uncertain.[54] There are a variety of different expectations regarding the consequences of the end of *Chevron*.

Some see *Loper Bright* as a dramatic shift in US administrative law.[55] This assessment comes from very different directions. For House-Speaker Mike Johnson, *Loper Bright* is the awaited 'beginning of the end of the administrative state'.[56] From a different perspective, but also indicating a disruption, Justice Kagan noted in her dissent in *Loper Bright* that it is a 'massive shock to the legal system, "cast[ing] doubt on many settled constructions" of statutes and threatening the interests of many parties who have relied on them for years'.[57]

In contrast, some expect continuity rather than disruption.[58] *Skidmore* and the remaining possibility of delegations of rulemaking authority, which the

51 The Court explicitly refers to *Skidmore*, US Supreme Court, *Loper Bright* (n. 4), 16, 21, 25. Detailed on the *Skidmore* doctrine before and after *Loper Bright* Kristin E. Hickman, 'Anticipating a New Modern *Skidmore* Standard', Duke Law Journal Online 74 (2025), 111-138; see also Bolinder, 'Litigating *Loper Bright*' (n. 14), 229-238; Merrill (n. 9), 266-267.

52 US Supreme Court, *Skidmore v. Swift & Co.*, judgment of 4 December 1944, 323 U.S. 134, 140.

53 A collection of various early reactions to *Loper Bright* is provided by Coglianese and Walters (n. 10), 15-23 et passim.

54 Coglianese and Walters (n. 10), passim.

55 Coglianese and Walters (n. 10), 2: 'Loper Bright *has shaken up the legal landscape*', 4: 'great unsettling', 19-20 with further statements that see a substantial disruption, 38-39, 43-45; Bolinder, 'Litigating *Loper Bright*' (n. 14), 226-229, 263-264; Dopplinger (n. 1), 459; Sapna Kumar, 'Scientific and Technical Expertise after *Loper Bright*', Duke Law Journal 74 (2025), 1749-1789 (1766-1773).

56 Mike Johnson, @SpeakerJohnson, 'My joint statement with @SteveScalise and @GOPMajorityWhip on *Loper Bright v. Raimondo*', X (28 June 2024, 11:19 AM), <https://x.com/SpeakerJohnson/status/1806724236616065364>, last access 9 April 2026.

57 US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 24.

58 Vermeule, 'Old Regime' (n. 15), 243-245 et passim; see also David A. Strauss, 'University of Chicago Law School, Supreme Court Preview: 2024 Term', Youtube (17 September 2024), <www.youtube.com/watch?v=S-dA5ULmDpE>, last access 9 April 2026, at 45:00: *Loper Bright* rather as a mood than a substantial difference; on further corresponding comments Coglianese and Walters (n. 10), 21-22.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Loper Bright court explicitly acknowledges,[59] could also lead to the result that many agency rulings will be upheld.[60] Accordingly, *Loper Bright* is understood as being in large part merely a relabelling of *Chevron* deference and not the perceived dramatic disruption.[61] What was formerly *Chevron* deference could have become the '*Loper Bright* delegation'.[62] Now, courts could simply interpret the statute independently and, in doing so, say that the statute is best understood as delegating a question of law to be decided by agencies.[63] In that sense, conceding 'conservative-libertarians' a 'headline victory' and upholding most of the substance of the *Chevron* regime is seen as a 'pseudo-revolution'.[64]

There are several assessments between the poles of disruption and continuity. For some, US administrative law is moving towards libertarianism.[65] Regarding the question of whether an agency's interpretation will be invalidated, it might be particularly important whether the judges ruling on the case were appointed by a Republican or a Democrat, and whether the agency's interpretation is rather left or right.[66] *Loper Bright* is likely to cause disagreement among federal judges and thus legal inconsistency and uncer-

59 US Supreme Court, *Loper Bright* (n. 4), 17; see in part IV. 1.

60 Sunstein (n. 19), 1904.

61 Adrian Vermeule, '*Chevron* By Any Other Name', The New Digest (28 June 2024), <https://thenewdigest.substack.com/p/chevron-by-any-other-name>, last access 9 April 2026; Vermeule, 'Old Regime' (n. 15), 236, 248-249 et passim. See also Lisa Schultz Bressman, 'Lower Courts After *Loper Bright*', Geo. Mason L. Rev. 31 (2024), 499-513 (504-505, 510, 513); Coglianese and Froomkin (n. 24), 121-132; Richard Pierce, '*Loper Bright Enterprises v. Raimondo: Chevron* is Dead; Long Live *Skidmore*', Geo. Wash. L. Rev. On the Docket, 8 July 2024; Anuj C. Desai, '*Loper Bright* as Jurisprudence: Institutional Choice and the Expressive Value of Law', Ari. L. Rev. 67 (2025), 585-628 (608-612 et passim). Arguments against the relabelling approach provided by Bolinder, 'Litigating *Loper Bright*' (n. 14), 226-229; Eric R. Bolinder, 'Fishing for Justice: The Legal and Moral Case for *Loper Bright*', Liberty University Law Review 19 (2024), 357-402 (385-389).

62 Vermeule, '*Chevron*' (n. 61); Vermeule, 'Old Regime' (n. 15), 236, 248-249 et passim.

63 Vermeule, 'Old Regime' (n. 15), 248-249.

64 Vermeule, 'Old Regime' (n. 15), 264-265.

65 See Sunstein (n. 19), 1913-1914; Michele Benedetto Neitz, 'Ready or Not: How Congressional Dysfunction and *Loper Bright v. Raimondo* Will Shift U. S. Regulation of Emerging Technologies to the Federal Bench', SMU L. Rev. 78 (2025), 119-156 (137-138): 'large gap in technology regulation'.

66 Sunstein (n. 19), 1906-1907, 1912, 1916; Nicholas R. Bednar, '*Chevron* on the Eve of *Loper Bright*', Widener Commonwealth Law Review 34 (2024), 1-42 (39-41); see also Kent Barnett, Christina L. Boyd and Christopher J. Walker, 'Administrative Law's Political Dynamics', Vand. L. Rev. 71 (2019), 1463-1526 (1470); Merrill (n. 9), 231, 246; US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 28; Nicholas R. Bednar, 'What to Do About *Chevron* – Nothing', Vand. L. Rev. 72 (2019), 151-176 (160-161): '*Chevron* successfully curtail [ed] the influence of judges' own political preferences'.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

tainty.[67] This poses a threat to the political legitimacy of the legal framework.[68] Furthermore and broadly speaking, the end of *Chevron* and judicial pessimism towards the administrative state could lead to an increase of the number of invalidations of agency regulations.[69] *Loper Bright* expresses the notion that the judiciary should engage in statutory interpretation more extensively.[70]

Time will tell which expectations will be realised.[71] However, despite all the uncertainties, one trend seems quite clear: The decision is directed against a broad agency authority and could therefore encourage courts to interpret legal issues creatively rather than deferring to the agency's view. *Loper Bright* will probably increase the number of challenges against administrative rulemaking. Consequently, many regulations are at risk.[72] Furthermore, the decision could have a chilling effect on agencies which may be hesitant to adopt far-reaching regulations due to the (perceived) increased likelihood of the regulations being invalidated.[73] Accordingly, whether from a conservative or progressive perspective, one can disagree with the mentioned view that rather sees continuity than disruption. Against this background and despite the uncertainty concerning further developments, the trend is moving towards less discretion and more judicial control. In this respect, US administrative law comes closer to the general German approach to the relationship between judicial review and administrative discretion,[74] which we now turn to.

III. Doctrine of Normative Authorisation in German Administrative Law

The following section first discusses the concept and development of the doctrine of normative authorisation (1.) and subsequently, its constitutional and conception foundations (2.).

67 Merrill (n. 9), 246; Neitz (n. 65), 140-141; see also Bednar, 'What to Do' (n. 66), 160; Sohoni, (n. 2), 86; Daniel E. Walters, 'A New Era of Deference: From *Chevron* to *Loper Bright*', CPI Antitrust Chronicle, October 2024, 1-10 (7-8); Coglianese and Walters (n. 10), 29-30, 34: *Loper Bright* could make judicial review less predictable.

68 Sohoni, (n. 2), 87.

69 Sunstein (n. 19), 1893, 1915-1916; see also Coglianese and Walters (n. 10), 47-48.

70 Sunstein (n. 19), 1903.

71 An empirical study covering the first six months after *Chevron* was overturned shows that lower federal and state courts are dealing with the new legal situation differently, Craig, (n. 15).

72 See the data provided by Craig, (n. 15), 2724, 2732-2745; see also Emerson (n. 14), 1294.

73 Bolinder, 'Fishing' (n. 61), 390-391; Mark Buse, '*The Supreme Court v. the Administrative State II*', Verfassungsblog, 3 July 2024, <https://verfassungsblog.de/chevron-supreme-court-loper-bright/>, last access 9 April 2026; Coglianese and Walters (n. 10), 31; Pierce (n. 61); Sunstein (n. 19), 1910.

74 Referring to the time before *Loper Bright* Plebuch and Pielhoff (n. 5), 196-197.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

1. Concept and Development of the Doctrine of Normative Authorisation

In Germany, based on the right to effective judicial protection in Art. 19 para. 4 of the Basic Law, courts, in general, exercise full control over agency decisions.[75] It is broadly accepted practice that it is the courts that resolve questions of law.[76] In general, this also applies to administrative actions based on ambiguous legal terms. However, early on under the Basic Law, scholars developed approaches that give administrative agencies a greater leeway in decision-making and reduce the degree of judicial control.[77] According to Otto Bachof's doctrine – in general terms –, the use of ambiguous legal terms can be interpreted as granting administrative agencies discretionary powers, a scope for assessment that cannot be reviewed by courts. Only the limits of this scope should be reviewable, namely whether the agency could indeed reach its conclusion on the basis of the facts asserted; courts should review whether those facts were true.[78] Another approach deemed an agency decision lawful in cases where several decisions were within the limits of reasonableness.[79] These and other early approaches in Germany showed similarities:[80] By using ambiguous legal terms, the legislature was seen as authorising agencies to decide with discretion, subject to only limited judicial review. Since various decisions are possible and fall within the limits of the law, it was not assumed that agencies have to find a single right answer. Administrative agencies have expertise and are closer to the problems and therefore need their own sphere of non-reviewable deci-

75 BVerfGE 15, 275 (282); BVerfGE 129, 1 (para. 68); BVerwGE 167, 33 (para. 12); Markus Ludwigs, 'Kontrolldichte der Verwaltungsgerichte', DÖV 73 (2020), 405-415 (409-410); Thorsten Siegel, 'Verwaltung' in: Klaus Stern, Helge Sodan and Markus Möstl (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund*, Vol. II (C. H. Beck 2022), § 46, para. 60.

76 Eberhard Schmidt-Aßmann, 'Art. 19 Abs. 4' in: Roman Herzog, Rupert Scholz, Matthias Herdegen and Hans H. Klein (eds), *Grundgesetz-Kommentar* (108th update, C. H. Beck 2025), para. 184c.

77 Fundamental Otto Bachof, 'Beurteilungsspielraum, Ermessen und unbestimmter Rechtsbegriff im Verwaltungsrecht', JZ 10 (1955), 97-102; Carl Hermann Ule, 'Zur Anwendung unbestimmter Rechtsbegriffe im Verwaltungsrecht', in: Otto Bachof, Martin Drath, Otto Gönnenwein and Ernst Walz (eds), *Gedächtnisschrift für Walter Jellinek* (Günter Olzog 1955), 309-330; see also Carl Hermann Ule, 'Rechtsstaat und Verwaltung', VerwArch 76 (1985), 1-23 (15-19). Overview of early approaches by Mattias Wendel, *Verwaltungsermessen als Mehrebenenproblem* (Mohr Siebeck 2019), 11-21.

78 Bachof (n. 77), 100-101 et passim.

79 Ule, 'Zur Anwendung' (n. 77), 325-328.

80 To the following Hartmut Maurer and Christian Waldhoff, *Allgemeines Verwaltungsrecht* (21st edn, C. H. Beck 2024), § 7, para. 32.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

sion-making. The proposed doctrines show some parallels to the *Chevron* doctrine.[81]

The early approaches have received a lot of approval, and based on them, a path dependency has become apparent. The German discussion still deals with the critical question of when a final decision-making power of agencies that is not fully reviewable by the courts should be recognised. The prevalent opinion emerged that a margin of discretion with limited judicial review is justified if the relevant statute authorises such an independent and final assessment.[82] This is the core of the doctrine of normative authorisation: It focuses on the question of whether the statute allows for a margin of discretion. The doctrine's main message is that the final administrative decision-making power must be traceable to a parliamentary statute.[83]

In the case of individual adjudications, an explicit authorisation is not considered necessary. However, the ambiguity of the legal term alone is not sufficient to assume a final administrative decision-making power.[84] At least an implicit authorisation is required, which must be determined by interpreting the statutory provision.[85] Attempts are made to overcome the difficulties in finding a clear answer to the question of the existence of implicit authorisations by focusing on functional considerations.[86] Based on this, statutory authorisations of final decision-making powers to agencies are deemed to exist if the essential questions cannot be resolved by courts. If the judge is unable to assess the case using judicial tools, then no judicial review should take place.[87] This represents a synthesis of the doctrine of normative authorisation and a functional approach, which rejects the former and seeks to rely on function-related considerations.[88]

---

81 See in part II. 1.

82 Maurer and Waldhoff (n. 80), § 7, paras 33-34.

83 Matthias Jestaedt, 'Maßstäbe des Verwaltungshandelns' in: Dirk Ehlers and Hermann Pünder (eds), *Allgemeines Verwaltungsrecht* (16th edn, C. F. Müller 2022), § 11, para. 39.

84 Jestaedt (n. 83), para. 29; Schmidt-Aßmann, 'Art. 19 Abs. 4' (n. 76), para. 191; Jan Ziekow, 'Verwaltungsrecht und Verwaltungsprozessrecht' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. I (C. F. Müller 2021), § 14, para. 65.

85 BVerfGE 129, 1 (para. 74); Eberhard Schmidt-Aßmann, 'Einleitung', in: Friedrich Schoch and Jens-Peter Schneider (eds), *Verwaltungsrecht-VwGO* (46th update, C. H. Beck 2024), para. 189.

86 See Eckhard Pache, *Tatbestandliche Abwägung und Beurteilungsspielraum* (Mohr Siebeck 2001), 76-80; Markus Ludwigs, 'Dogmatische Grundlagen und Typologie behördlicher Entscheidungsspielräume' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts* Vol. V (C. F. Müller 2023), para. 34.

87 Maurer and Waldhoff (n. 80), § 7, para. 34.

88 Ralf Poscher, 'Geteilte Missverständnisse', in: Ivo Appel, Georg Hermes and Christoph Schönberger (eds), *Festschrift für Rainer Wahl* (Duncker & Humblot 2011), 527-551 (539, 549-551 et passim); see also Maurer and Waldhoff (n. 80), § 7, paras 33-34. Against this approach Jestaedt (n. 83), para. 40. In favour of a synthesis Ludwigs 'Kontrolldichte' (n. 75), 410-411; see also BVerwGE 167, 33 (para. 15).

 DOI 10.17104/0044-2348-2026-3-947

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Judicial practice has taken up the doctrine of normative authorisation.[89] Due to the requirement for effective legal protection under Art. 19 para. 4 of the Basic Law, courts generally assume that ambiguous legal terms are subject to full judicial review, but in exceptional cases, they consider a reduced level of judicial control to be appropriate if the statute provides for this. In this respect, there is no difference between a margin of discretion on the part of the statutory requirements and facts[90] and on the part of the legal consequences when the facts of a provision are present.[91] The doctrine of normative authorisation applies to both parts of an authorising provision with a conditional norm structure.[92] However, the differentiation between the two parts has often been emphasised. Both in terms of statutory requirements and factual findings, as well as in terms of legal consequences, judicial review depends on whether the statute grants the agency a final discretionary power. Regarding statutory requirements and facts an implicit authorisation must often be derived from the provision, whereas in terms of legal consequences there is generally an explicit statutory authorisation. The latter can be seen when the statute provides that the agency 'may' or 'can' act in a certain way or in several ways.

The development and discussion of the doctrine of normative authorisation have so far been predominantly based on the perspective of individual case scenarios. However, this path dependency should be left behind and the view broadened. Other spheres of discretionary decisions by agencies should be included in our thinking about the doctrine of normative authorisation.[93] Conventional German doctrine of discretionary agency decisions shows idiosyncrasies, particularly with regard to the path-dependent differentiation between the statutory requirements and the legal consequences within the framework of

89 BVerfGE 61, 82 (111); BVerfGE 129, 1 (paras 68-76); BVerfGE 140, 197 (para. 93); BVerfGE 149, 407 (para. 34); BVerfGE 152, 345 (para. 73); BVerwGE 62, 86 (98); BVerwGE 129, 27 (para. 26); BVerwGE 153, 36 (para. 17); BVerwGE 170, 273 (para. 14).

90 This has been recognised by courts namely in the following categories: examinations and evaluations (BVerfGE 84, 34 (52)), personal assessments in the public sector (BVerwGE 128, 329 (para. 44)), judgmental decisions by pluralistic bodies (BVerwGE 91, 211 (215-216), but constrained by BVerwGE 167, 33 (para. 19)), and science-based and prognostic decisions (BVerwGE 72, 300 (316-317)). See on further (counter-)examples Schmidt-Aßmann, 'Art. 19 Abs. 4' (n. 76), para. 197.

91 For abandoning the distinction, which goes back to Bachof (n. 77), between discretionary powers on the part of legal requirements and on the part of legal consequences Jestaedt (n. 83), paras 14-26, 31; Ludwigs, 'Kontrolldichte' (n. 75), 407-409; Ludwigs, 'Dogmatische Grundlagen' (n. 86), para. 65; Wendel (n. 77), 26-28.

92 The doctrine also applies to provisions with a final structure, see Jestaedt (n. 83), paras 18, 22.

93 This enables to identify general structures of a decision-making power with limited judicial review, see Jestaedt (n. 83), para. 21.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

a conditional norm structure.[94] For the purpose of opening up German doctrine to comparison, attention should be shifted away from this hardened dichotomy and from the perspective limited to individual case scenarios – the perspective needs to be widened to include other areas, in particular discretionary rulemaking powers.[95] Accordingly, some scholars include this power within the domain of the doctrine,[96] even though this is clearly not (yet) its main focus. In order to link the doctrine of normative authorisation to discretionary rulemaking and to open it up for the comparative analysis pursued here, the doctrine's constitutional foundations should be addressed. Since the literature on the topic of judicial review on agency decisions is vast – a never-ending topic, also in Germany[97] –, the constitutional and conceptional foundations can only be discussed in sufficient depth to provide a useful frame of reference.

2. Constitutional and Conceptional Foundations of the Doctrine of Normative Authorisation

Institutionally, the doctrine of normative authorisation is based on the German constitutional understanding of a parliament that politically, and in terms of democratic legitimacy, occupies an elevated position in the power structure.[98] The doctrine operates within the framework of a variety of constitutional principles, which are specified by the doctrine, but which in turn also guide and justify the doctrine.

94 Shu-Peng Hwang, 'Allgemeines Verwaltungsermessen' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. V (C. F. Müller 2023), § 128, para. 7.

95 Ludwigs, 'Kontrolldichte' (n. 75), 409; Ludwigs 'Dogmatische Grundlagen' (n. 86), paras 64-66; see also Jestaedt (n. 83), paras 21, 31-33.

96 Christian Bickenbach, 'Exekutives Normsetzungsermessen' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. V (C. F. Müller 2023), § 132, paras 32-37; Matthias Herdegen, 'Gestaltungsspielräume bei administrativer Normgebung – Ein Beitrag zu rechtsformabhängigen Standards für die gerichtliche Kontrolle von Verwaltungshandeln', AöR 114 (1989), 607-643 (613, 620-623); see also Peter Badura, 'Das normative Ermessen beim Erlaß von Rechtsverordnungen und Satzungen' in: Peter Selmer and Ingo von Münch (eds), *Gedächtnisschrift für Wolfgang Martens* (Walter de Gruyter 1987), 25-37; Armin von Bogdandy, *Gubernative Rechtsetzung* (Mohr Siebeck 2000), 368-369; Markus Möstl, 'Normative Handlungsformen, Allgemeiner Teil' in: Dirk Ehlers and Hermann Pünder (eds), *Allgemeines Verwaltungsrecht* (16th edn, C. F. Müller 2022), § 19, paras 6, 28; Christian Weitzel, *Justitiabilität des Rechtsetzungsermessens* (Duncker & Humblot 1998), 110-111; Johanna Wolff, 'Rechtsverordnung' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. V (C. F. Müller 2023), § 153, paras 12, 14.

97 Christoph Külpmann, 'Anmerkungen zum gegenwärtigen Stand des Umweltrechtsschutzes', DVBl 134 (2019), 140-145 (143).

98 See Ludwigs, 'Dogmatische Grundlagen' (n. 86), para. 29; Schmidt-Aßmann, 'Art. 19 Abs. 4' (n. 76), para. 187.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

a) In Germany, the principle of *separation of powers* is understood as an intertwining of powers in which the functions are not strictly separated between different organs, but are often interrelated, with a system of mutual checks and balances.[99] Furthermore, the principle requires a functional allocation of powers, so that government tasks should be assigned to the body that has the best organisational, material, and functional resources to carry out the tasks appropriately.[100]

The doctrine of normative authorisation concretises the postulate of checks and balances by placing the degree of judicial control of discretionary agency decisions in the hands of the legislature: checks and balances as determined by the parliament which cannot decide entirely freely on the authorisation of agencies, but is subject to the constitutional requirement for a sufficiently substantial reason.[101] In principle, judicial review must not be undermined.[102] A further check is provided by the parliamentary procedure and its publicity.[103] The fact that the parliament is not entirely free to normatively authorise the executive branch is particularly apparent in the delegation of rulemaking power, for which Art. 80 of the Basic Law provides specific requirements.[104]

Furthermore, the doctrine of normative authorisation enables an allocation of powers that is appropriate to the organisational, material, and functional resources of institutions. By assigning final decision-making authority to agencies, the legislature can take into account the functional limits of the judiciary and place the decision in the hands of agencies, which have expertise in the relevant area and may have the appropriate problem-solving skills.[105] The same is true when the parliament delegates rulemaking power to the executive branch. In doing so, it can make use of the executive's proximity to the subject matter and its expertise and relieve itself of some workload. Regardless of whether a statute authorises agencies to decide at their own discretion in individual cases or to issue rules, the doctrine of normative authorisation concretises the principle of the separation of powers in the German understanding by enabling control and an allocation of powers suitable to institutional functions and capacities.

---

99 BVerfGE 3, 225 (247); BVerfGE 96, 375 (394); BVerfGE 126, 78 (120); BVerfGE 143, 101 (para. 118).

100 BVerfGE 150, 1 (para. 197); BVerfGE 157, 30 (para. 60).

101 BVerfGE 129, 1 (22-23); BVerwGE 170, 273 (para. 14).

102 Ludwigs, 'Dogmatische Grundlagen' (n. 86), para. 28.

103 Bernd Grzeszick, 'Vorrang und Vorbehalt des Gesetzes' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. III (C. F. Müller 2022), § 72, para. 5.

104 According to Art. 80 para. 1 of the Basic Law, the authorising statute must be sufficiently determined with regard to content, purpose and scope of the authorisation.

105 See Maurer and Waldhoff (n. 80), § 7, para. 32.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

b) The doctrine of normative authorisation is also subject to the influence of the *principle of democracy* and its German idiosyncrasies.[106] Former Judge of the Federal Constitutional Court, Ernst-Wolfgang Böckenförde, introduced the theory of the chain of legitimacy, according to which all exercise of state power must be derived from, as well as determined and controlled by, the people.[107] Firstly, this traceability can be achieved through personal legitimacy, i. e. through the appointment and dismissal of civil servants; secondly, it can be achieved through institutional legitimacy, i. e. through the recognition of institutions and their functions by the constitutional order; thirdly, the traceability of state power to the people is achieved through legitimacy in terms of content and substance.[108] The latter can be attained both by the statute to which the government agency is bound and by institutional control.[109] It is not necessary for all three elements of legitimacy to be fully satisfied in every exercise of state power; rather, it is necessary that a sufficient level of legitimacy is always achieved.[110] In this context, a compensation can come into play.[111] If there is less institutional control, e. g. by the courts, this can be compensated for by substantive instructions by the statute: less legitimacy through less control, but at the same time more legitimacy through stricter statutory instructions.[112] This applies to the topic discussed here: Limited judicial review of agency decisions results in a legitimacy deficit. This deficit, however, is compensated for by the legitimacy-creating statutory provision that judicial review should be limited. A sufficient traceability to the will of the people and thus sufficient democratic legitimacy is not present if the agencies' discretionary power is not based on a statutory authorisation. In this case, agency decisions are indeed personally and institutionally legitimised, but not in terms of content and substance.

The doctrine of normative authorisation places the parliamentary legislator at the centre. Its authorisation is required in order to justify limited judicial

106 See Ludwigs, 'Kontrolldichte' (n. 75), 410.

107 Ernst-Wolfgang Böckenförde, 'Demokratie als Verfassungsprinzip' in: Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. II (3rd edn, C. F. Müller 2004), § 24, para. 12.

108 Böckenförde (n. 107), paras 14-22.

109 Böckenförde (n. 107), paras 21-22.

110 Böckenförde (n. 107), paras 22-23.

111 Böckenförde (n. 107), para. 23.

112 However, this idea of compensation must take into account that Böckenförde considered subject-matter legitimacy primarily in *intra*institutional control, rather than in *inter*institutional control, as applied in judicial review of agency decisions, see Böckenförde (n. 107), paras 21-22. Nevertheless, when it comes to the question of whether agency decisions are lawful (in contrast to expedient), they are also legitimised by *inter*institutional control.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

review and executive discretionary decisions. The parliament is also the main political decision-making body according to the theory of the chain of legitimacy: It is directly elected by the people and acts through statutes that shape the executive and judicial branches.[113] The parliament is the operational centre which, within constitutional limits and with its elevated democratic legitimacy[114], decides on limited judicial control and agency discretion. The doctrine of normative authorisation ensures that agencies' final discretion and the associated judicial deference can effectively be traced back to the will of the people.

c) Furthermore, in German constitutional law, the principles of democracy and the rule of law give rise to the idea that *decisions on major questions by the executive must be based on a parliamentary act* that has, as mentioned, a prominent democratic function.[115] Significant issues must be decided in parliament, which increases publicity and legitimacy.[116] The statutory guidance of agency actions is in the sense of this concept realised through the doctrine of normative authorisation: The question of agencies' final discretionary powers, which is a significant issue, must be decided by the parliament and cannot be left to other bodies. This is bolstered by the prevailing German understanding of what is a major question and therefore requires a parliamentary decision. An act of parliament is particularly indispensable when fundamental rights are affected,[117] such as in the issue of agencies' final discretionary powers: the fundamental right to effective legal protection under Art. 19 para. 4 of the Basic Law.[118]

In Germany, the requirement for a parliamentary act on significant issues is particularly clear when it comes to rulemaking by the executive branch. In this respect, the doctrine of normative authorisation is explicitly prescribed in constitutional law. Under Art. 80 para. 1 of the Basic Law, executive rulemaking requires an authorisation in the form of a parliamentary statute.[119] A popular interpretation of Art. 80 of the Basic Law is that this

113 Horst Dreier and David Kuch, 'Demokratische Legitimation der Verwaltung' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. III (C. F. Müller 2022), § 124, para. 28.

114 BVerfGE 147, 50 (para. 198); Böckenförde (n. 107), para. 16.

115 BVerfGE 41, 251 (259 f.); BVerfGE 141, 143 (para. 59); BVerfGE 166, 93 (para. 182); see Grzeszick (n. 103), paras 24-25.

116 Grzeszick (n. 103), para. 5.

117 BVerfGE 47, 46 (79); BVerfGE 141, 143 (para. 59); BVerfGE 143, 38 (para. 38).

118 This also applies to the rulemaking power of the executive branch, which falls under Art. 19 para. 4 of the Basic Law, see BVerfGE 115, 81 (92); Andreas Funke, 'Art. 19 IV' in: Frauke Brosius-Gersdorf (ed.), *Dreier Grundgesetz-Kommentar*, Vol. II (4th edn, Mohr Siebeck 2023), para. 13.

119 See Michael Brenner, 'Art. 80' in: Peter M. Huber and Andreas Voßkuhle (eds), *Grundgesetz-Kommentar*, Vol. II (8th edn, C. H. Beck 2024), para. 28.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

provision has a blocking effect on executive rulemaking that has not been expressly delegated.[120] The authorisation to issue rules inherently implies discretionary powers on the part of the issuing body, within the limits of the statutory authorisation.[121] The only matters that can be judicially reviewed are a) whether the delegation itself is lawful, b) whether the legal limits, in particular those set by the delegating law, are observed, c) whether the decision is sufficiently informed and d) whether the relevant circumstances and interests are sufficiently considered.[122]

IV. German-Style Doctrine of Normative Authorisation in US Administrative Law

After considering whether the *Loper Bright* Court recognises something like a doctrine of normative authorisation as a limit of judicial review of discretionary agency decisions (1.), this section presents the proposal that US administrative law could focus on the authorising provision in order to determine discretionary powers and the corresponding judicial deference, thereby converging with the German doctrine (2.). It contextualises and elaborates on potential counterarguments (3.) before introducing arguments in favour of the proposal (4.).

1. Notion of a Doctrine of Normative Authorisation in *Loper Bright*

The *Loper Bright* Court acknowledges normative authorisations: 'In a case involving an agency, of course, the statute's meaning may well be that the

120 Hartmut Bauer, 'Art. 80' in: Horst Dreier (ed.), *Grundgesetz-Kommentar*, Vol. II (3rd edn, Mohr Siebeck 2015), para. 13; Kathrin Groh, 'Verwaltungsvorschrift' in: Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, Vol. V (C. F. Müller 2023), § 155, para. 8; Möstl (n. 96), paras 8-10; Johannes Saurer, *Die Funktionen der Rechtsverordnung* (Duncker & Humblot 2005), 341; see also BVerwGE 121, 103 (110); Grzeszick (n. 103), paras 38-46 (within the realm of major questions that are relevant for fundamental rights). Differing view von Bogdandy (n. 96), 482-483. With respect to executive law-making in the form of ordinances within the framework of administrative self-government, e. g. at the municipal level, an authorisation by law is also required for the acceptance of regulatory discretion, see Bickenbach (n. 96), para. 18.

121 Bickenbach (n. 96), para. 7-8, 18; Schmidt-Aßmann, 'Art. 19 Abs. 4' (n. 76), paras 217-217a; see also von Bogdandy (n. 96), 347-354, 366; Saurer, (n. 120), 260-265; detailed Thomas von Danwitz, *Die Gestaltungsfreiheit des Verordnungsgebers* (Duncker & Humblot 1989).

122 See Schmidt-Aßmann, 'Art. 19 Abs. 4' (n. 76), para. 217a.

 DOI 10.17104/0044-2348-2026-3-947

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

agency is authorised to exercise a degree of discretion. [The U. S.] Congress has often enacted such statutes. For example, some statutes "expressly delegate" to an agency the authority to give meaning to a particular statutory term. […] Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, […] or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," […] such as "appropriate" or "reasonable."'[123]

This section of *Loper Bright* shows that US administrative law also knows normative authorisations as a limit of judicial control of agency decisions. At least before *Loper Bright*, US administrative law acknowledged both explicit and implicit authorisations.[124] But the same is true after *Loper Bright*.[125] These delegations refer to both the authorisation of rulemaking power and of adjudicatory decisions in individual cases. The formulation that statutes 'empower an agency to prescribe rules to "fill up the details"' should not be understood as excluding adjudicatory agency decisions from a doctrine of normative authorisation. The *Chevron* doctrine already referred to decisions in individual case scenarios,[126] and there is no reason why, after *Loper Bright*, normative authorisation should now be treated more strictly in individual case decisions than in rulemaking. Rather, it can be argued that if authorisation for discretionary rulemaking is expressly recognised, as the cited section shows, this must also apply to individual decisions that have less far-reaching social implications than rulemaking. The specific wording chosen by the *Loper Bright* court reflects the special significance of rulemaking in US administrative law[127] and does not exclude the delegation of discretionary powers with regard to individual cases.

2. Proposal: Focus on Authorising Provision to Determine Discretionary Powers in US Administrative Law

German doctrine of normative authorisation recognises both explicit and implicit authorisations. With regard to the delegation of rulemaking power,

123 US Supreme Court, *Loper Bright* (n. 4), 17.

124 On further typology Hickman and Wildermuth (n. 2), 7-19.

125 It is critical now to find those implicit delegations see Matthew C. Stephenson, 'The *Gray* Area: Finding Implicit Delegations to Agencies after *Loper Bright*', Admin L. Rev. 78 (2026), 99-199.

126 US Supreme Court, United States v. *Mead Corp.*, judgment of 18 June 2001, 533 U. S. 218.

127 See in part IV. 3.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

according to Art. 80 of the Basic Law, an explicit and narrowly defined delegation is required.[128] The delegation of rulemaking power, however, does include a scope for discretionary decisions, a sphere for self-programming. Applying this approach to US administrative law, an explicit, narrowly defined delegation would be required for executive rulemaking. And a delegation to the agency to issue rules could, depending on the interpretation of the delegating parliamentary act, also mean an authorisation to decide discretionarily. The judiciary has to review whether the delegation itself is lawful, whether the limits of the delegation have been complied with and whether the delegation also contains the authorisation for the agency to decide discretionarily. An implicit authorisation of discretionary powers without the need for an explicit delegation would suffice for adjudicatory decisions in individual case scenarios. In all circumstances, whether individual case scenarios or rulemaking, normative authorisation in a parliamentary act is crucial in order to assume final discretionary powers on part of agencies, which cannot be fully reviewed by courts. In line with the German doctrine, the question of discretionary decisions and, correspondingly, judicial deference would be closely linked to the parliamentary act.

Although this is not claimed here, one might think about going beyond the German doctrine and requiring not only explicit delegation of rulemaking power, but also an explicit authorisation for discretionary agency decisions and corresponding judicial deference. In Germany, implicit statutory authorisations for discretionary decisions are sufficient.[129]

The proposal presented here is not a result that can be deduced from US law, whether from the Constitution, statutes, or case law. In the section cited above, the *Loper Bright* court seems to acknowledge explicit and also implicit delegations of discretionary rulemaking authority.[130] However, this is contested and it remains unclear to what extent implicit delegations are to be accepted.[131] That US administrative law could be oriented towards

128 See at n. 104.

129 Art. 80 of the Basic Law establishes the requirement for an explicit delegation of rulemaking power, but does not require explicit authorisation for discretionary decisions, see at n. 121.

130 See US Supreme Court, *Loper Bright* (n. 4), 17.

131 Coglianese and Walters (n. 10), 42-43; Merrill (n. 9), 264-265; considering implicit delegations to be sufficient Adrian Vermeule, 'Implied Delegations After *Loper*', Yale Journal on Regulation, Notice & Comment, 9 July 2024; Vermeule, 'Old Regime' (n. 15), 249-251; reading *Loper Bright* as if it required an explicit ('clear') granting of authority Bolinder, 'Litigating *Loper Bright*' (n. 14), 240-245; Hickman and Wildermuth (n. 2), 16-18, treating 'general authority/housekeeping delegations' differently from specific delegations, Hickman and Wildermuth (n. 2), 36.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

the German doctrine of normative authorisation regarding the requirement for a statutory authorisation of discretionary powers is rather a proposal that could be taken up by Congress[132] or courts. The basic orientation towards German doctrine cannot be seen as the only correct solution to deal with the uncertainty left behind by *Loper Bright*. However, Congress could be encouraged to either pass a law providing that explicit delegations are required to authorise agencies to issue rules at their own final discretion. Alternatively, informed by the German approach, Congress could be aware that it is especially reasonable to explicitly authorise the agency. US Courts could use the German doctrine as a point of reference to clarify the question of when there is a statutory authorisation for agency discretion.

No suggestion based on the German doctrine is made here as to when implicit authorisation for discretionary powers in individual case scenarios should be assumed in US administrative law. In this regard, the article must confine itself to a few comments on convergences and divergences: In German administrative law, the mere ambiguity of the statutory norm does not suffice to justify discretionary powers in individual cases.[133] In light of the doctrine of normative authorisation, it depends on whether the norm, taking precedents into account, can be interpreted in such a way that it recognises discretionary power. In the US, the ambiguity of the norm was decisive in the first step of the *Chevron* doctrine. The vagueness could be seen as an implicit authorisation. It remains to be seen whether the ambiguity of the norm plays a similar critical role after *Loper Bright*.[134] If one follows the relabelling approach,[135] ambiguity could continue to be decisive in the sense that courts now understand implicit delegation as the only correct interpretation of an ambiguous provision. Ambiguity seems to be a necessary condition – without it, an implicit authorisation can hardly be assumed. However, it must be doubted whether ambiguity is also a sufficient condition.[136] Following *Loper Bright*'s reasoning – given that the case expressly overrules *Chevron* –, it is hardly possible to assume that ambiguity is a sufficient condition for proceeding to a second step and conducting a reasonableness test.[137] If so, *Chevron* would have survived its

132 On the role of Congress in building a new administrative state Emerson (n. 14), 1325-1331.

133 See at n. 84.

134 It is critical now to find implicit delegations, see Stephenson (n. 125).

135 See at n. 61.

136 Hickman and Wildermuth (n. 2), 16; Merrill (n. 9), 257, 259-260.

137 Additionally, the Supreme Court (*Loper Bright* (n. 4), 21) explicitly states, that '*Chevron* cannot be reconciled with the APA […] by presuming that statutory ambiguities are implicit delegations to agencies'.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

overruling. Therefore, the critical question is: What needs to be added to the unclear statutory provision in order for an implicit authorisation to be assumed? This question also arises in Germany. However, the starting points diverge: While cases with precedential value exist in Germany that help to determine whether discretionary authority has been granted by statute,[138] *Loper Bright* has somewhat reset the situation in the US back to zero.[139] Case law must be established to serve as a guide for assessing whether the statute contains an implicit authorisation of agency discretion. So ironically, due to its precedents, German administrative law is currently better suited to determining statutorily authorised discretionary powers of agencies than the US common law system, which heavily relies on precedents and case law.

The proposal presented here concerns the basic principle that, as in Germany, in US administrative law it should depend on the statute and its interpretation whether an authorisation to decide discretionarily exists and, correspondingly, whether the judiciary must defer to the agency decision. In addition, this article suggests, that detailed explicit parliamentary authorisation should be required when delegating rulemaking power and that this can imply a power on part of the agencies to decide discretionarily. A discussion of whether other features of the German doctrine of normative authorisation, such as the case categories in which an implicit authorisation for discretionary powers in individual case scenarios can be assumed,[140] could or even should be transferred to US administrative law would require detailed further considerations. Such an extensive transfer of the doctrine of normative authorisation runs a particular risk of failing to take relevant contexts into account.

3. Contextualisation and Counterarguments

In order to be acceptable, the proposal made here must be contextualised[141] and counterarguments must be considered. The following takes into account divergences between the legislative bodies' capabilities to pass laws

138 See in n. 90.

139 The remaining *Skidmore* deference (see at n. 51) does not change that, because it does not refer to an implicit delegation, but rather recognises that the agencies' interpretations can help the courts in their task of determining the law.

140 See in n. 90.

141 On the need for a contextual comparative approach, see Uwe Kischel, *Rechtsvergleichung* (C. H. Beck 2015), 187-188 et passim; Eberhard Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht', ZaöRV 78 (2018), 807-862 (824-836).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

(a), between a parliamentary and a presidential system of government (b), and the conventional differences in the significance of statutory instructions for agency actions (c).

a) One can perceive an important difference in the institutional set up in the capability of the legislative bodies to act. This could be invoked as an argument against the requirement for an explicit delegation for discretionary rulemaking authority and against the general idea that judicial deference should depend on a statutory authorisation. Executive rulemaking could be necessary on a large scale if Congress itself were unable to regulate.

Indeed, many observers have concluded that the US Congress often has difficulties enacting legislation due to dysfunctions; these include strict bicameralism, party polarisation, and filibuster.[142] In contrast, no parliamentary gridlock can be observed at the federal level in Germany.[143] This has a significant impact on the importance of executive rulemaking. If parliamentary statutes are completely lacking or cannot be enacted with sufficient detail, the government can either use executive regulations to steer policies, provided this is legally permissible, or it must refrain from doing so in a libertarian manner, diminishing its capacity to operate on a general level. Against this background, executive rulemaking has a different status in the US than it has in Germany.[144]

Congressional paralysis puts pressure on US courts to give more leeway to agencies, because the rulemaking by agency can, to a certain extent, replace congressional law-making. In order to serve as a substitute, administrative rulemaking must be efficient. The efficiency hinges on the agencies' independent ability to interpret their empowering statutes. Without this ability, the validity of agency rules is threatened. Executive rulemaking was therefore easier under the *Chevron* doctrine and has been downgraded

142 In detail Sara A. Binder, *Stalement: Causes and Consequences of Legislative Gridlock* (Brookings Institution Press 2003); Sarah A. Binder, 'The Dysfunctional Congress', Annual Review of Political Science 18 (2015), 85-101; Marc S. Jacob, Barton E. Lee and Gabriele Gratton, 'From Gridlock to Polarization', UNSW Economics Working Paper 2023-11, 8 February 2024, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521276>, last access 9 April 2026; Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks* (Basic Books 2012); Andrew Reeves and Jon C. Rogowski, 'Unilateral Inaction: Congressional Gridlock, Interbranch Conflict, and Public Evaluations of Executive Power', Legislative Studies Quarterly 47 (2022), 427-457; Michael J. Teter, 'Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction', Notre Dame L. Rev. 88 (2013), 2217-2232; see also Buse (n. 73); Neitz (n. 65), 124-131; Plebuch and Pielhoff (n. 5), 194-195.

143 Plebuch and Pielhoff (n. 5), 194-195, 199.

144 Nevertheless, in Germany, the necessity of executive rulemaking is also generally recognised, see Maurer and Waldhoff (n. 80), § 4, para. 22; Brenner (n. 119), para. 22.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

under *Loper Bright* – particularly if one understands this case as a disruption.[145]

There is an expectation that a lowering of the government's ability to act due to the restriction of executive rulemaking powers will not occur because the willingness to compromise in Congress increases with this restriction.[146] However, such an expectation depends on the degree of polarisation and the strength of libertarian forces.[147] Deregulation is booming under the Trump administration,[148] so such an expectation will likely remain an unfulfilled hope for the time being.[149] Therefore, the loss of executive regulatory powers as a result of *Loper Bright* is unlikely to be compensated for by increased congressional activity. With a parliament that is active in steering policies, as in Germany, the possibility of executive rulemaking is less important. The state apparatus is able and willing to exercise power, even if administrative agencies do not predominantly take on the rulemaking task.

However, the argument about congressional gridlock against the requirement for explicit, narrowly defined delegations of rulemaking authority does not carry too much weight, because Congress is not required to agree on details and decide on them, but simply to provide delegations. Congress must

145 See at n. 55.

146 Yuval Levin, 'The Supreme Court Thinks That by Arguing More, We Can Be Less Divided', The New York Times, 28 June 2024, <www.nytimes.com/2024/06/28/opinion/supreme-court-chevron-congress.html>, last access 9 April 2026; Adam White, 'Constitutional Government After *Chevron*?', Law & Liberty, 1 May 2024, <https://lawliberty.org/forum/constitutional-government-after-chevron/>, last access 9 April 2026; see also Bolinder, 'Fishing' (n. 61), 391-392; Bolinder, 'Litigating *Loper Bright*' (n. 14), 263; Eberhard Schmidt-Aßmann, *Das Verwaltungsrecht der Vereinigten Staaten von Amerika* (Nomos 2021), 356; corresponding statements collected by Daniel E. Walters, 'Will *Loper Bright* Spur a Congressional Renaissance?', Texas A&M University School of Law Legal Studies Research Paper, 16 April 2024, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4792884>, last access 9 April 2026, 5-9.

147 It is not surprising that libertarian commentators welcome governmental gridlock, see Marcus E. Ethridge, '*The Case for Gridlock',* Cato Institute Policy Analysis No. 672, *27 January 2011,* <https://www.cato.org/sites/cato.org/files/pubs/pdf/PA672.pdf>, last access 9 April 2026; see also Bolinder, 'Fishing' (n. 61), 391.

148 See, e. g., Executive Order No. 14192 (6 February 2025), prescribing that, in general, whenever an agency promulgates a new regulation, it shall identify at least 10 regulations to be repealed (Sec. 3 (a)); overview provided by Coral Davenport, 'Inside Trump's Plan to Halt Hundreds of Regulations', The New York Times, 15 April 2025, <https://www.nytimes.com/2025/04/15/us/politics/trump-doge-regulations.html>, last access 9 April 2026.

149 This is bolstered by an empirical study, referring to the state level, on the question of whether *Loper Bright* will positively effect Congress activity; it does not find a significant empirical basis for the assumption that Congress will become more active, Walters (n. 146), 9-33.

 DOI 10.17104/0044-2348-2026-3-947

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

decide whether agencies should be authorised to issue regulations at their own discretion and whether they, correspondingly, should enjoy judicial deference. Congress can transfer decisions that it does not want or is unable to make itself in the hands of the executive branch,[150] which has the necessary expertise.[151]

b) The difference between a presidential and a parliamentary system of government[152] does not preclude the US from being inspired by the German doctrine. A criticism, however, could be formulated as follows: The persuasiveness of the doctrine of normative authorisation is based on the primacy of the democratically legitimated parliament.[153] As described, in the German parliamentary system the Bundestag occupies a prominent position within the political structure.[154] In the case of a presidential system, in contrast, democratic legitimacy is also established through a chain of legitimacy leading to the elected president, so that there seems to be no need for the same connection to a parliamentary authorisation as in a parliamentary system of government, for example in Germany.

It is true that this divergence could stand in the way of an approach that requires agencies to be more closely bound by a parliamentary act. Democratic legitimacy of discretionary agency decisions, ensured through oversight by a directly elected president, can be achieved without the need for a legally certain parliamentary statute,[155] which is required in a parliamentary system of government such as that in Germany. However, in the consequence of *Loper Bright*, it is not the agencies that have the final say, but rather judges that have to deal with the question of whether agencies are authorised to decide at their own final discretion.[156] The courts seem to have *de facto*

150 Skeptical about Congress' efforts to amend regulatory regimes accordingly Craig (n. 15), 2747.

151 In Germany this is also a common reason for the delegation of legislative powers, see Bickenbach (n. 96), para. 27; Brenner (n. 119), paras 12, 17. On the discussion about expertise in and after *Loper Bright* Kumar (n. 55).

152 Overview by Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 21-22.

153 See in part III. 2.

154 See Ludwigs, 'Dogmatische Grundlagen' (n. 86), para. 29; Schmidt-Aßmann, 'Art. 19 Abs. 4' (n. 76), para. 187.

155 However, personal democratic legitimacy is also considered to be weak in the US, see Hermann Pünder, *Exekutive Normsetzung in den Vereinigten Staaten von Amerika und der Bundesrepublik Deutschland* (Duncker & Humblot 1995), 98-99. This supports the point made here. The issue is not mitigated by participatory elements, as is basically the case with executive rulemaking in the US (see p. 248), since there is a shift in power towards the courts and away from executive power, where participatory elements of legitimacy are relevant.

156 See at n. 66.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

discretionary power in deciding that. If courts have the final say, it is an issue that is independent of the differences between a parliamentary and a presidential system of government. If we think about applying the doctrine of normative authorisation to the US presidential system, the persuasiveness of the doctrine remains intact.

c) Compared to Germany, US administrative law provides weaker instructions of executive actions, particularly rulemaking, by parliamentary statutes.[157] This can also be attributed to the difference between a presidential and a parliamentary system of government: The stand-alone democratic legitimacy of the executive branch strengthens its position and can justify less statutory guidance.[158] Furthermore, the legitimising effect of parliamentary statutes is not given such high priority in the US system because administrative decisions are also legitimised to a considerable extent through participation and communication.[159] In this sense, unlike its German counterpart, US administrative law allows for extensive public participation through the notice-and-comment rulemaking procedure under § 553 APA. In Germany, however, in line with the theory of the chain of legitimacy,[160] parliamentary statutes are particularly important instruments for establishing democratic legitimacy.[161] The principle that requires a statutory provision on major questions[162] therefore does not play a role in US administrative law comparable to the German system.[163]

As described earlier, the doctrine of normative authorisation is based on the German focus on parliamentary acts. The proposal to adopt a stronger orientation towards parliamentary authorisations in US administrative law in accordance with the German doctrine is moving in a new direction. This offers the opportunity to distribute power in the spirit of the separation of powers at a time when the President is considered unassailably powerful.

157 See Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 187.

158 See Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 21.

159 Hermann Pünder, 'Democratic Legitimation of Delegated Legislation', ICLQ 58 (2009), 353-378 (369-371); Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 384-385.

160 See Böckenförde (n. 107).

161 See Dreier and Kuch (n. 113).

162 See at n. 115.

163 Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 21, 92-93; see also Oliver Lepsius, *Verwaltungsrecht unter dem Common Law* (Mohr Siebeck 1997), 207-208. This principle should not be confused with the US major question doctrine (see at n. 14), as the latter concerns the requirement for clear legal authorisation for major questions, whereas the German principle concerns the prior question of which issues must be decided by parliamentary act. The German principle is rather comparable to the nondelegation doctrine (see at n. 2).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

However, it is not primarily the executive branch that is being removed from power by the proposal for a stronger focus on parliamentary authorisation. This power had already been curtailed by *Loper Bright*. Rather, in the consequence of *Loper Bright*, it is primarily up to the judiciary to decide whether agencies have been authorised to exercise discretionary powers to which the courts defer.[164] The proposal for a focus on the parliamentary authorisation clarifies the crucial criterium for courts to decide that. The idea does not ignore the legitimising effect of participation in executive rulemaking. It does not shift power from the executive branch, which is to some extent legitimised through participation, to parliamentary statutes, but rather clarifies the criterion for courts and thus shifts power to some extent from them to Congress.

The proposal calls for statutory authorisations and, thereby, for a stronger orientation towards Congress. Thus, the proposal also addresses, to a certain extent, the criticism from a conservative perspective that the limited legislative power in the hands of Congress was undemocratically substituted by an unaccountable bureaucracy.[165] Legislative power is primarily assigned to Congress, which, however, may delegate and thus cope with its difficulties in acting and make use of administrative expertise.

4. Arguments in Favour of the Proposal

In order to reason for an orientation of the US administrative law towards the German doctrine, this paper considers a general convergence between both systems regarding judicial review of discretionary decisions after *Loper Bright* (a), and the transferability of the rationale behind Art. 80 para. 1 of the Basic Law to the US level, particularly in light of the expected consequences of the end of *Chevron* (b).

a) The tendency to downgrade executive rulemaking in the US by *Loper Bright* brings the legal systems closer together, so that the abovementioned difference in the significance of executive rulemaking[166] has been diminished. This convergence is in addition to the similarity that both (and other) legal systems have generalist courts and specialised administrative agencies with their own expertise, which raises comparable issues about the allocation of power.

164 See at n. 66.
165 See at n. 40.
166 See in part IV. 3.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

If one sees the end of *Chevron* as a disruption,[167] there is a strong shift from executive discretion to stricter judicial review. If one sees *Loper Bright* more as a relabelling,[168] then the starting point of *Chevron* is confirmed: After *Loper Bright*, the delegation of discretionary power is still crucial. In both assessments, there is an alignment with the traditional German understanding. The disruption version gets closer to the German 'full control' variant. The relabelling version is comparable to the doctrine of normative authorisation, according to which the construction of the statute is decisive.[169] In this respect, especially after *Loper Bright*, one can conclude that American administrative law is becoming more German.[170] It depends on further developments whether this will also lead to a convergence of the characteristics of the administrative states or whether the basic tendency will persist that the US system is relatively proactive,[171] while its German counterpart is more executive in nature.

To illustrate how the approaches of the US and Germany to judicial review have converged with *Loper Bright*, it is worth looking at the facts underlying the *Chevron* case.[172] The case concerned the interpretation of 'source' of air pollution in the Clean Air Act. Because the Act itself did not contain a definition of the term, the Environmental Protection Agency (EPA) defined it on its own. Initially, the EPA understood the term as including any considerable change to a factory. Later, in a regulation, EPA changed the definition of 'source' so that the term meant only the entire plant, the so called 'bubble concept'. As a result, a company could now add new air-polluting buildings, as long as it made changes elsewhere in the plant to reduce emissions, so that overall there was no increase in pollution. If that was the case, the company did not have to go through the complex and time-consuming EPA review process. Since Congress had not directly addressed the issue and the EPA's construction was not unreasonable,[173] the Supreme

167 See at n. 55.

168 See at n. 61.

169 Observing a convergence between *Chevron* deference and the German doctrine Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 293.

170 Dopplinger (n. 1), 458-459; see also Plebuch and Pielhoff (n. 5), 196-197. On the differences in earlier times Uwe Kischel, 'Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law', Admin. L. Rev. 46 (1994), 213-256.

171 This observation stems from progressive and libertarian perspectives, of course with differing assessments, see Schmidt-Aßmann, *Verwaltungsrecht der Vereinigten Staaten* (n. 146), 348, with further proof.

172 US Supreme Court, *Chevron* (n. 3).

173 On *Chevron*'s two-step-test see part II. 1.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Court ruled in *Chevron* that courts had to defer to the agency's interpretation of the ambiguous term such as 'source'. In contrast, in the German system, a statutory authorisation to exercise discretionary powers would be required and, since the regulation involves rulemaking, the rulemaking powers would have to be explicitly provided for in accordance with Art. 80 of the Basic Law. In Germany, without a specific delegation of rulemaking power, it is up to the courts to determine the correct interpretation of a legal term such as 'source' of air pollution. Courts cannot simply defer to an agency's interpretation, even if it is reasonable.[174] Likewise, after *Loper Bright*, US courts cannot defer to the agency's interpretation of 'source', although agency opinions have weight in accordance with the *Skidmore* standard; they still 'constitute a body of experience and informed judgement to which courts […] may properly resort for guidance'.[175] Despite this standard, the agency's interpretation of an ambiguous term is no longer controlling upon the courts. As in Germany, US courts would have to determine the meaning of the term 'source' of air pollution, unless they interpret the relevant parliamentary act as authorising the agency to define the word within a scope of discretion.[176]

However, observing convergence in some respects – stricter judicial review – cannot in itself indicate the accuracy of a convergence of the doctrines in other respects – requirement for narrowly defined explicit delegations of rulemaking powers. Otherwise, describing legal systems would become a normative assessment that goes beyond the description. Rather, the observation of general convergence reduces concerns that one compares apples with oranges.

b) In Germany, the requirement for narrowly defined, explicit delegation is rooted in Art. 80 para. 1 of the Basic Law. If the rationale behind that provision also applies to the US system, it could be seen as bolstering the proposal made here.

The requirement for explicit delegations of agency rulemaking powers in Art. 80 of the Basic Law specifies the constitutional principles of separation of powers, legal certainty and democracy.[177] The limitation to explicit and

174 Given the technical nature of the subject, German environmental law involves extensive delegations of rulemaking powers to the executive branch (see, e. g., §§ 4, 7, 48a BImSchG) and knows other regulations that specify the law, such as the TA-Luft (Technical Instructions on Air Quality Control).

175 US Supreme Court, *Skidmore* (n. 52), 134, 140.

176 See Coglianese and Froomkin (n. 24), 113-121: regarding the facts of *Chevron*, Congress delegated the authority to specify the meaning of the statutory term.

177 Bauer (n. 120), paras 3-4; Brenner (n. 119), para. 15.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

narrowly defined delegations shapes the relationship between the executive and legislative branches by binding executive rulemaking to the express will of the legislature, thereby ensuring that executive rulemaking also has its origin in the parliament. The requirement for an explicit delegation therefore puts the principle of separation of powers into effect.

The restriction of executive rulemaking to explicit and not too broad delegations ensures legal certainty because it is no longer necessary for the courts to derive an implicit delegation of rulemaking powers from ambiguous legal terms (and other circumstances[178]), which depends on the often difficult-to-determine will of the legislature.[179] The above mentioned expectation that the invalidation of executive regulation depends on whether Republican or Democratic-appointed judges decide and whether the regulation tends to be right or left of centre[180] would less likely become reality if the US were to follow the German approach. An unreasonable dependence of the validity of executive regulations on political circumstances, namely possibly subjective views within a politicised judiciary,[181] would be prevented in the interest of legal certainty. This is also in line with the principle of separation of powers because making validity dependent on political sympathies makes the question of validity appear to be a political one itself. The judiciary is not the right body to decide such cases.[182] A demand for a narrowly defined explicit delegation based on the model of Art. 80 of the Basic Law would place this political question more clearly in the hands of Congress as a political body.

Furthermore, the claim for an explicit and not too broad delegation strengthens the principle of democracy. Democratic accountability is ensured because this requirement places the fundamental decision on whether the executive branch can issue abstract rules in the hands of elected members of Congress. Under such a concept, executive rulemaking is implemented by accountable agencies under the supervision of an elected President. It is not dependent on the judiciary to the same extent as would be the case if an implicit but difficult (or impossible?[183]) to determine delegation were considered sufficient. Both Congress and administrative agencies are more

178 See above part IV. 2.

179 Kenneth A. Shepsle, 'Congress Is a "They," Not an "It": Legislative Intent as Oxymoron', International Review of Law and Economics 12 (1992), 239-256.

180 See at n. 66.

181 On such a risk after *Loper Bright* Dopplinger (n. 1), 461-463, 466-471.

182 See US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 10-14, referring to policy trade-offs that should be decided by agencies, judges are unsuited.

183 See Shepsle (n. 179).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

accountable than the judiciary.[184] Without the requirement for an explicit and narrowly defined delegation, the judiciary would have significant influence over the possibility and validity of executive rulemaking because it would *de facto* have greater discretion in assessing whether implicit delegations exist.

The demand for an explicit, more narrowly defined delegation of rulemaking powers enables precise instructions through parliamentary acts in the sense of the German doctrine of normative authorisation. This makes it easier to identify authorisations for discretionary decisions with corresponding judicial deference. The proposal made here is supported by the rationales behind Art. 80 of the Basic Law, which are also relevant in the US – of course, subject to the need for contextualisation.[185]

The need for a narrowly defined, explicit delegation of powers does not exist with regard to decisions in individual case scenarios, but only with regard to the delegation of rulemaking powers. This is because, broadly speaking, abstract general rules are socially more important and affect more people than decisions in individual cases. In the case of far-reaching decisions, there should be a legally certain connection to the legislature, accountability should be guaranteed and the validity of the decision should depend less on courts. *De facto*, courts have greater discretion in determining implicit authorisations, but they are not as democratically accountable as the other branches of government. This distinction ensures that the enactment of abstract rules – the central function of the legislature – is closely linked to the parliament. The separation of powers is guaranteed. Therefore, the German-style doctrine of normative authorisation can also be seen as inspiration for how, after *Loper Bright*, the principle of separation of powers can be upheld without abandoning the role of administrative agencies.

V. Conclusion

The dependence of executive rulemaking powers on explicit and narrowly defined delegations by Congress would correspond to the German approach. This is one part of the proposed idea that US administrative law after *Loper Bright* could be inspired by the German doctrine of normative authorisation.

184 See US Supreme Court, *Loper Bright* (n. 4), (Kagan, J., dissenting), 2, with respect to agencies; Merrill (n. 9), 257-258: Congress is the most accountable institution.

185 See in part IV. 3.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

The doctrine's general notion is that the question of whether the executive branch is authorised to decide discretionarily with corresponding judicial deference depends on the authorising parliamentary act. With regard to the US, this is not a stringent conclusion deduced from supreme law or compelling interpretation, but rather a proposal informed by comparative law to address a relevant problem facing US administrative law after *Loper Bright*. This proposal takes relevant contexts into account, in particular conventional differences in the statutory guidance of administrative agencies, differences in a parliamentary and presidential system of government, and differences in the capacities of legislative bodies to act. With *Loper Bright*, US administrative law is moving closer to its German counterpart with regard to discretionary decisions by administrative agencies and corresponding judicial deference. This applies both to the assumption of a disruption and to the assumption of a relabelling as a consequence of *Loper Bright*. As far as the proposal presented here goes, the German doctrine of normative authorisation can be an inspiration for the US approach to clearing up the murky waters left behind by the end of *Chevron*.

It remains open when agencies are authorised by statutes to decide individual cases with final discretion. Future projects could examine whether the rationales behind cases in which authorisations of discretionary powers in individual cases are recognised in Germany could also inform US administrative law. It also remains to be seen how, in general, the relationship between the discretionary powers of administrative agencies and the functional limits of the judiciary will develop.[186] This issue is relevant in both systems. The proposal made here to harmonise the legal systems with regard to the requirement of statutory authorisation for discretionary decisions by administrative agencies contributes to one aspect of this discussion. Furthermore, it remains a crucial question as to where the limits of delegation lie. However, examining this goes beyond the scope of this article. The question is whether and to what extent the nondelegation doctrine is experiencing a revival and whether the limits for delegating rulemaking power go beyond an 'intelligible principle'[187]. Of course, this issue could also be examined through the lenses of comparative law. From a German perspective, both the constitutional principle that major questions must be addressed in a parliamentary act and Art. 80 of the Basic Law would be relevant and would have

186 See BVerfGE 149, 407 (paras 17-24) – *Rotmilan*; Ludwigs, 'Kontrolldichte' (n. 75), 411-412; Laura Münkler, 'Der Beurteilungsspielraum als dogmatischer Knotenpunkt', DÖV 74 (2021), 615-623.

187 See US Supreme Court, *Gundy* (n. 2), 4-6.

 DOI 10.17104/0044-2348-2026-3-947

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

to be contextualised in relation to US law. Regardless of this, and at this point in time, it can be assumed with the *Loper Bright* Court that authorisations for discretionary decisions with corresponding judicial deference are legally possible.[188]

188 US Supreme Court, *Loper Bright* (n. 4), 17-18; Stephenson (n. 125); Sunstein (n. 19), 1902: 'most fundamental point'.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

Rezensionsaufsatz

Measuring The Rule of Law in Germany

Russell A. Miller*

I. Introducing the *German* Rule of Law 983
II. Translating and Grounding the *German* Rule of Law 985
III. Applying the *German* Rule of Law 988
IV. Contextualising and Complexifying the *German* Rule of Law 989
V. Thickening the *German* Rule of Law 991
VI. Conflicting the *German* Rule of Law 994
VII. Concluding the *German* Rule of Law 996

I. Introducing the *German* Rule of Law

In his ironic masterpiece Measuring the World, Daniel Kehlmann sympathetically depicts the crisis of the German soul.[1] We encounter Alexander von Humboldt obsessively, and absurdly, measuring everything on a perilous ascent of the Andean peak Chimborazo: altitude, air pressure, temperature.[2] Yet, that compulsive scientific work is being carried out even while the data reflects conditions that threaten the great scientist's life. It is a comic scene. The dream that science and system can capture, or even stand in for, reality is harshly repudiated by Humboldt's circumstances. His measurements might be precise, but he seems unable to understand what they mean in the world. After all, they mostly suggest that he should stop collecting data because he is succumbing to hypothermia and altitude sickness. In Kehlmann's telling, Humboldt's scientific conviction was thwarted everywhere he turned. The Amazonian jungle also resisted Humboldt's empiricism. Everything was connected. The plants, the animals, the air, the temperature. Humboldt believed that it was all one system susceptible to measurement. But the project was

* J. B. Stombock Professor of Law, W&L University School of Law (Virginia). Professor Miller is the founder and co-leader of the Rule of Law Academy in Berlin. That initiative is generously supported by the Konrad Adenauer Foundation.

Review of Dana Burchardt and Hannah Birkenkötter, *The Rule of Law in Germany – Bringing the Rechtsstaat Into the 21st Century* (Hart Publishing 2025).

1 Daniel Kehlmann, *Measuring the World* (Carol Brown Janeway trans. 2006).

2 Kehlmann (n. 1), 138-153.

DOI 10.17104/0044-2348-2026-3-983 ZaöRV 86 (2026), 983-997

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

undone by the jungle's magic and chaos. There were too many plants. They grew into one another, over one another, everything at once. 'In case no one had noticed, this was a primeval forest.'[3]

German *Rechtswissenschaft* (legal science) is similarly bedeviled by the conflict between the marvel of systematisation and conceptual integrity, on the one hand, and the insolent elusiveness of reality and justice, on the other hand. Gustav Radbruch, warning against the 'conflict between apparent and real justice', famously acknowledged that the systematisation of law, however well-ordered, however magnificently codified, cannot anticipate or justly resolve every case.[4] Like Humboldt's measurements, the law might be 'correct' but produce meaningless (or worse) results.

Naturally, the 'dazzling' German legal doctrine of the *Rechtsstaat* (we can translate this as the 'rule of law') has not avoided this most German of burdens.[5] Can the principle be coherently defined and systematised, or are German attempts to do that with conceptual certainty merely another futile foray into Humboldt's disordered and defiant jungle? That would seem to be the case, at least for any universal framing of the rule of law. David Bingham acknowledged that 'differing concepts of the rule of law' have been advanced 'until a time came when respected commentators were doubtful whether the expression was meaningful at all'.[6] Judith Shklar is one of the sceptics, complaining that the rule of law is 'just another one of those self-congratulatory rhetorical devices that grace public utterances of Anglo-American politicians. No intellectual effort need be wasted on this bit of ruling class chatter.'[7] Brian Tamanaha also notes the definitional drift afflicting this 'essentially contested concept',[8] characterising it as 'an exceedingly elusive notion giving rise to a rampant divergence of misunderstandings'.[9] Aziz Hug also concedes the noise occluding the principle, suggesting that 'books and papers on the

3 Kehlmann (n. 1), 94.

4 Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law (1946)*, Oxford Journal of Legal Studies 26 (2006), 1-11 (1, 7), (Bonnie Litschewski Paulson and Stanley L. Paulson trans., 2006).

5 Dana Burchardt and Hannah Birkenkötter, *The Rule of Law in Germany – Bringing the Rechtsstaat Into the 21st Century 21* (Hart 2025) (citing Till Patrick Holterhus, Der Rechtsstaat 4 (2022)) [hereinafter Burchardt and Birkenkötter].

6 Tom Bingham, *The Rule of Law* (Allen Lane 2010). Citing, among others, Raz, Finnis, Carouthers, and Waldron.

7 Judith Shklar, 'Political Theory and the Rule of Law', in: Allan C. Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology*, (Carswell 1987).

8 Brian Z. Tamanaha, 'The History and Elements of the Rule of Law', SJLS (2012), 232-247 (quoting Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', Law and Philosophy 21 (2002), 137-164.

9 Brian Z. Tamanaha, *On the Rule of Law* (Cambridge University Press 2000).

 DOI 10.17104/0044-2348-2026-3-983

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

rule of law, many proposing their own novel versions of it, could fill a library wing'.[10]

Now Dana Burchardt's and Hannah Birkenkötter's excellent book *The Rule of Law in Germany* has joined this sprawling section of the library. It is a very welcome addition because it gives non-German legal scholars a thorough survey of Germany's unique conceptualisation of the principle of the rule of law. The reader is carefully guided onto the ramparts of that tradition and exposed to its breadth and complexity, to the 'thickness' or the 'material dimensions' of the German rule of law. Burchardt and Birkenkötter do not hide the immeasurable quality of their subject even while making a heroic – a Humboldtian – effort at measuring the reality of the rule of law in Germany.

II. Translating and Grounding the *German* Rule of Law

The book's major achievement is that the authors show impressive discipline in treating the concept in its *German* context (befitting the Hart Publishing series in which the book appears: 'Rule of Law in Context'). They studiously avoid universalising their thoughtful study of the German *Rechtsstaat*. The book is not another attempt at a global theory of the rule of law. Instead, they intend to present the 'German conceptualization of the *Rechtsstaat* […] [as it is] rooted in a specific [German] intellectual history and liberal tradition.'[11] This is the only sensible way to think about the rule of law. Its content, the elements and institutions that give it life, are drawn from the traditions, practices, and expectations of the community it is meant to serve. To their great merit, the authors embrace this insight. As the book's title insists, this is truly an examination of the rule of law *in Germany*.

Because the book is written in perfectly accessible, often elegant, English, a first step in anchoring their project in its German context involves the choice of terminology. As natives of the German *Begriffsjurisprudenz* tradition, the authors might have had no other choice but to start with a definition (and a translation) of the principle? They explain that they use the German term '*Rechtsstaat*' throughout the book, accepting that they are studying a uniquely German variation of the principle commonly referred to in English as the

10 Aziz Z. Hug, *The Rule of Law – A Very Short Introduction*, (Oxford University Press 2023), 41.

11 Burchardt and Birkenkötter (n. 5), 2-3.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

'rule of law'.[12] As scholars in comparative legal studies understand all too well, sometimes it is necessary to know when *not* to translate a term due to the risk of alienating it from the meaning it possesses in its tongue (and context) of origin. Yet, even while examining the way that the German *Rechtsstaat* has participated in the global development of the principle of the rule of law (Chapter 5), Burchardt and Birkenkötter hold to the commitment that their book is chiefly interested in examining how 'for centuries the German *Rechtsstsaat* has evolved in its own right' with 'considerable [localised] differences'[13]. This aim is admirably realised. The authors consistently qualify their work, writing about 'Germany's rule of law understanding',[14] 'Germany's *Rechtsstaat*',[15] 'the rule of law in Germany',[16] '*Rechtsstaatlichkeit* as a legal notion and practice in Germany',[17] the 'German notion of *Rechtsstaat*',[18] 'the rule of law in Germany',[19] the 'German understanding of the rule of law',[20] the 'German vision of the rule of law',[21] the 'German rule of law discourse',[22] and the 'rule of law experience in Germany'.[23]

The authors' ascent of this discrete jurisprudential peak begins with a consideration of the history of the *Rechtsstaat* in Germany (Chapter 1). Burchardt and Birkenkötter impressively map the development of the principle in Germany, from a formal understanding that drew on Idealism and Kantian reason in the 19th century, to a substantive understanding fashioned under the post-war *Grundgesetz* (Basic Law). The former is summed up by references to the work of Julius von Stahl who explained:

12 The authors graciously reflect on the English language translation Donald Kommers and I adopted ('principle of the constitutional state' rather than 'rule of law') in our treatise Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012). Burchardt and Birkenkötter accept that our translation 'might be the most appropriate' for discussions of the principle in contemporary German jurisprudence, but they lean towards the phrase 'rule of law' because that 'broader term allows [them] to trace the variations in meaning across time'. Burchardt and Birkenkötter (n. 5), 3. This modest and constructive invitation to reflect on my translation of the term '*Rechtsstaat*' was one of this fine book's many valued insights.

13 Burchardt and Birkenkötter (n. 5), 39-40.

14 Burchardt and Birkenkötter (n. 5), 63.

15 Burchardt and Birkenkötter (n. 5), 33, 39, 57, 67.

16 Burchardt and Birkenkötter (n. 5), 105.

17 Burchardt and Birkenkötter (n. 5), 130.

18 Burchardt and Birkenkötter (n. 5), 130.

19 Burchardt and Birkenkötter (n. 5), 133.

20 Burchardt and Birkenkötter (n. 5), 161.

21 Burchardt and Birkenkötter (n. 5), 162.

22 Burchardt and Birkenkötter (n. 5), 163.

23 Burchardt and Birkenkötter (n. 5), 170.

 DOI 10.17104/0044-2348-2026-3-983

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

'By the character of the *Rechtsstaat* I mean solely the steadfastness of the statutory legal order, not its content.'[24] We are told that, in this understanding, law would be based on reason and the state would be based on law. These commitments fostered the principle of legality and the robust role for judicial review that came to characterise German administrative law in the latter part of the 19th century. Otto Mayer, writing in the Weimar era, explained: 'The *Rechtsstaat* is the state of *well-ordered* administrative law.'[25]

The authors then document the substantive approach to the *Rechtsstaat* that emerged following World War II with the implementation of the new West German constitution in 1949. It is a thick (maybe the thickest?) version of the rule of law, an approach that involves the intersection of the old formal commitments while incorporating the material values secured by the Basic Law: the principle of democracy; the social state principle; and fundamental rights protection, especially including human dignity. Anyone familiar with Germany's post-war legal system is deeply aware of the sophistication with which the new, thicker conception of the *Rechtsstaat* has carried forward the old formal elements (legality; legal certainty; proceduralism; proportionality). The dramatic development, however, is the way in which the principle now also integrates a number of substantive values, such as the separation of powers, democracy, the social state, and fundamental rights. Putting particular emphasis on the last of these values, Burchardt and Birkenkötter conclude that 'today's understanding of the *Rechtsstaat* in Germany is a substantive understanding that comprises fundamental rights protection'.[26]

I know that this is the way German jurists instinctively think about the rule of law. When I teach the subject to German students or discuss it with German colleagues, they express curiosity about (if not mild concern for) my reliance on the work of Joseph Raz or Brian Tamanaha. The treatment those theorists give to the principle is mystifyingly, maybe even problematically, thin for the Germans. That consternation builds from Germans' entrenched acceptance of a thicker conception of the rule of law. Burchardt's and Birkenkötter's depiction of the history of the German *Rechtsstaat* reinforces that understanding.

24 Burchardt and Birkenkötter (n. 5), 10 (quoting Friedrich Julius von Stahl, *Die Philosophie des Rechts* (2nd edn, J. C. B. Mohr 1847).

25 Burchardt and Birkenkötter (n. 5), 14 (quoting Otto Mayer, Deutsches Verwaltungsrecht Vol. 1 (1895)).

26 Burchardt and Birkenkötter (n. 5), 34.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

III. Applying the *German* Rule of Law

Chapter 2 documents the problematic distance between 'Germany's [substantive] rule of law aspiration' and 'legal reality' by examining rule of law 'controversies and deficiencies' that have resisted reform, at least absent nudges from European law and European institutions.[27] Burchardt and Birkenkötter identify independent and impartial courts as a core component of the rule of law (particularly the formal or thin understanding of the principle).[28] Judged by that standard, the authors describe the limited self-governance exercised by German courts as one of the country's rule of law deficiencies.[29] Reform on this point, the authors note, has been confounded by diverging understandings of democratic legitimacy, on the one hand, and rule of law enforced separation of powers, on the other hand. 'Those who oppose judicial self-governance', Burchardt and Birkenkötter explain, 'generally refer to the limited and indirect democratic legitimacy of the judiciary'.[30] Similarly, German prosecutors' close relations with political institutions, consistently highlighted as a rule of law problem by the European Union (EU), are justified by the desire to bestow 'democratic legitimacy' on powerful prosecutors.[31] The authors lay the problem of long delays in judicial proceedings, another rule of law deficiency plaguing Germany, at the feet of policymakers who have been unwilling to adopt the necessary procedural reforms or provide the necessary budgetary resources.[32]

Burchardt and Birkenkötter also consider the risk that some judicial decisions might go unenforced in Germany.[33] It is a major credit to the authors that they identify a number of episodes in which there has been resistance to the implementation of judicial decisions in Germany.[34] The problem may be very rare, but it can occur. Judgments of the esteemed Federal Constitutional Court are met with popular and political resistance. And even the Constitutional Court itself is not immune to the impulse. In rare cases it has qualified its duty to conform with – or integrate into German law – the rulings of the European Court of Human Rights or the Court of Justice of the European Union. The unavoidability (if not regularity) of this particular symptom of a breakdown in the rule of law – the potential disregard for judicial decisions –

27 Burchardt and Birkenkötter (n. 5), 70.
28 Burchardt and Birkenkötter (n. 5), 42-43.
29 Burchardt and Birkenkötter (n. 5), 43-47.
30 Burchardt and Birkenkötter (n. 5), 45.
31 Burchardt and Birkenkötter (n. 5), 47.
32 Burchardt and Birkenkötter (n. 5), 52-53.
33 Burchardt and Birkenkötter (n. 5), 55-57.
34 Burchardt and Birkenkötter (n. 5), 55-57.

 DOI 10.17104/0044-2348-2026-3-983

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

raises the question whether the perfect (or even nearly perfect) enforcement of court rulings should be a key measure of the vitality of the rule of law in any system.

Finally, Burchardt and Birkenkötter concede the difficulty in securing a substantive rule of law that delivers equal rights protection and social guarantees.[35] 'Realizing the social state principle', the authors grudgingly admit, 'has long been considered a prerogative of the legislative [sic] with a considerable measure of discretion.'[36] The authors do not note that it has been the strategic choice of Germany's post-war governing elites (both political and legal) to expand the principle to include substantive values that has produced this rule of law dissonance. A thinner version of the principle might suffer from problems with judicial independence and impartiality. But it wouldn't be exposed to the risk of failing to deliver on material, or justice-oriented claims.

IV. Contextualising and Complexifying the *German* Rule of Law

Deepening their contextual treatment of the subject, Burchardt and Birkenkötter present an impressive series of German case studies in the book's second half. This includes 'The Rule of Law Experience in the GDR and after the Reunification' (Chapter 3); 'The Rule of Law Experience in Times of Crisis' (Chapter 4); 'The German *Rechtsstaat* in the European and International Context' (Chapter 5); and 'The *Rechtsstaat* in the Digital World' (Chapter 6). This is terrific work that treats the application of the rule of law in specific developments in German history and politics. The authors tell very distinct German stories across these case studies, and that allows them to add colour and complexity to their survey of the German rule of law. Repeatedly, these case studies show how Germany's thick approach to the rule of law drifts into ambiguity, unrealised ambitions, or tensions with other values such as democracy, the separation of powers, and appeals for justice.

One of the most sensitive case studies involves the rule of law issues implicated by the 2015-2016 'Refugee Crisis' (Chapter 4).[37] Even if much of the book strongly advances a confident German understanding of the rule of law, the authors acknowledge that this episode exposed the principle's ambi-

35 Burchardt and Birkenkötter (n. 5), 57.
36 Burchardt and Birkenkötter (n. 5), 60.
37 Burchardt and Birkenkötter (n. 5), 117-124.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

guity, at least as a matter of public discourse.[38] Commentators and advocates on both sides of the issue demanded respect for the rule of law. Opponents of Germany's reception of a large number of refugees argued that the 'welcome' policy violated the law. Advocates for the open border had their own rule of law arguments, many of which implicitly encompassed substantive rights concerns for the dignity and humanity of the refugees. The authors also resort to detailed doctrinal arguments as a way of dismissing the claims of those who were opposed to the refugee policy, characterising their views as 'discursive (mis)uses of the *Rechtsstaat*'.[39] The analysis needed to credit one rule of law discourse, while discrediting another, leads the reader into the intricacies of the law and politics involved in the episode. Burchardt and Birkenkötter recognise that the large number of refugee arrivals negatively implicated the rule of law in very practical ways. It placed an immense strain on the orderly and effective functioning of the administrative law regime, including the administrative courts' management of their dockets.[40] The authors also concede that the episode exposed the dysfunction of the European Dublin system, and characterised this as a 'challenge for the rule of law'.[41]

But the authors are determined to dispute the claim that domestic law had been disregarded during the episode. Ultimately, they try to dispose of that claim through a doctrinal argument that suggests that German authorities had no obligation to close, and no obligation to leave open, the border. For this reason, the authors conclude, no law was broken and no pressure was exerted on the rule of law. The delicacy of all of this is captured by the authors' strained explanation: 'The doctrinal principle of the *Rechtsstaat* does not, however, contain a general obligation to abide by the law – this is contained in the very notion of the law and would mean that any violation of the law by the state would amount to a violation of the constitution.'[42] I'm not sure what this means. And, in any case, legality – an obligation to abide by the law – *is* one of the core elements of the rule of law. Even if the absence of a legal obligation might rebut claims that the law had been broken, and thereby deflect rule of law critiques, it nevertheless suggests that the German state enjoyed unguided discretion in that moment. That portrayal of the situation betrays one of the chief purposes of the rule of law. The principle of legality, as the centrepiece of any conception of the rule of law, aims to place public power under the mandate of law. 'Dicey', Bingham explained, 'was

38 Burchardt and Birkenkötter (n. 5), 117.
39 Burchardt and Birkenkötter (n. 5), 117.
40 Burchardt and Birkenkötter (n. 5), 119.
41 Burchardt and Birkenkötter (n. 5), 120.
42 Burchardt and Birkenkötter (n. 5), 122.

 DOI 10.17104/0044-2348-2026-3-983

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

adamantly opposed to the conferment of discretionary decision-making powers on officials'.[43] According to Bingham, discretion 'is the antithesis of the rule of law'.[44] This sentiment may have distinctly English origins. But it has been perfected in Germany's understanding of the *Rechtsstaat*, especially as it is expressed through the *Legalitätsprinzip* (legality principle).

V. Thickening the *German* Rule of Law

The case study of the 2015-2016 'Refugee Crisis', and the others that are given such thorough and thoughtful treatment in the book, do as much to complicate the notion of the rule of law in Germany as they do to clarify it. It's a distinctly Humboldtian challenge. In one scene, Kehlmann depicts Humboldt deliberately exposing himself to electric shock treatments in order to study their effect. Instead of treating those health risks as something to avoid, he embraces physical danger and pain and records the results as data.[45] In a similar manner, by pulling back the curtains to show the messy existence of the *Rechtsstaat* in Germany, Burchardt and Birkenkötter show the principle a great deal of respect. From this effort they reach one of the essential conclusions about the rule of law, worrying that:

> 'the term *Rechtsstaat* has been appropriated not only by right-wing populists, but also by respected members of public law scholarship to elevate purported violations of the law – decisions that were not unlawful and on some accounts even legally warranted – to fundamental challenges to the German legal order. This bears the risk of overextending the notion of the *Rechtsstaat*, rendering it meaningless.'[46]

The authors' disciplined, contextual focus is a commendable achievement. Still, it means that their engagement with the 'German understanding of the rule of law' exhibits some uniquely German blind spots relating to the principle.

One of these revealing gaps involves the story Germans tell about the emergence of their substantive expectations for the *Rechtsstaat*. The theory explaining Germany's departure from the strictly formal approach to the rule of law is underdeveloped. Burchardt and Birkenkötter note that the formal approach to the *Rechtsstaat* operated all the way through the Weimar era.[47] Then there was the Third Reich. Out of the ashes, it is suggested, the new substantive under-

43 Bingham (n. 6), 48.
44 Bingham (n. 6).
45 Kehlmann (n. 1), 23-25.
46 Burchardt and Birkenkötter (n. 5), 129.
47 Burchardt and Birkenkötter (n. 5), 17.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

standing of the rule of law arose, more or less fully formed, ascending on the wings of the Basic Law. That tectonic transmogrification unfolds, and is explained, over a mere three pages of the book.[48] I do not have to dispute this narrative to wish for a more thorough consideration of the jurisprudential, social, and political developments, many extending deeper into German history than the National Socialist era, that fostered and informed this dramatic development. Is it really enough to simply (albeit accurately) note that 'the Third Reich was marked by a high degree of arbitrariness and terror, which are generally seen as antipodes to any rule of law conception'.[49]

In fact, the authors make the point that the Nazi tyranny and terror was as much a consequence of an abandonment of the formal approach to the rule of law as it was a product of the regime's disregard for the principle's material potential. A return to, a reaffirmation of, the formal approach to the rule of law would have been an equally reasonable response to the *Machtstaat* or the *Unrechtsstaat*. And, it would have been the move most aligned with the established German legal mentality, which the authors thoughtfully document across the 19th century and into the early 20th century. The long, stubborn shadow of that formalist legal mentality is actually what one finds in Radbruch's seminal article 'Gesetzliches Unrecht und übergesetzliches Recht'.[50] While clearly appealing for justice beyond mere positivism and formalism, Radbruch himself could not wholly shake Germans' entrenched juristic *Weltanschauung*.[51] In the eponymous 'formula,' Radbruch insisted: 'The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people.'[52] This approach should be abandoned, Radbruch explains, *only* in the most extreme cases.[53] Brian Bix, among others, sees as much (rule of law) formalism as (substantive) natural law in Radbruch's post-war project.

There is another gap in the narrative that insists that Germany's post-war shift to a material understanding of the rule of law was chiefly accomplished by the *Grundgesetz*. The Basic Law's text doesn't explicitly prioritise the *Rechtsstaat* principle. It barely uses the term, which is only invoked as a standard against which other polities (the European Union and its Member States; the German *Länder*) should be judged.[54] The Basic Law does not

48 Burchardt and Birkenkötter (n. 5), 17-20.

49 Burchardt and Birkenkötter (n. 5), 20.

50 Radbruch (n. 4).

51 'But legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: purposiveness and justice.' Radbruch (n. 4), 6.

52 Radbruch (n. 4), 7.

53 Radbruch (n. 4).

54 Grundgesetz (GG) [Constitution], Arts 16, 23 and 28 (F. R. G.).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

explicitly apply the principle to the new *Bundesrepublik*. Burchardt and Birkenkötter admit that there are 'scant explicit references [to the *Rechtsstaat*] in the constitutional text'.[55] Instead, in Article 20(1), the Basic Law emphasises other values among the new regime's core constitutional principles: 'The Federal Republic of Germany is a *democratic* and *social* [and] *federal* state.'[56] Even if they were satisfied that the principle is implicitly established by related mandates and structures in the constitution, the framers of the Basic Law might have easily included the principle among the canon of values enshrined in Article 20(1).

The textual omission of the *Rechtsstaat* conforms with the Basic Law's formative background. In the Frankfurt Documents, the Allies demanded that the new German constitution be 'democratic' and that it establish a government of a 'federal type' before remembering, almost as an afterthought, that it should also 'guarantee individual rights and freedoms'.[57] Similarly, the term *Rechtsstaat* did not feature prominently in the Report from the Constitutional Convention at Herrenchiemsee, which included the draft constitution that was debated at the Bonn Parliamentary Council.[58] In the handful of instances in which the principle is mentioned in the Herrenchiemsee Report (it only appears in the notes and commentary accompanying the draft constitution), it refers to something closer to the formal or thin conception of the *Rechtsstaat*.[59] Burchardt and Birkenkötter acknowledge all of this, explaining that discussions surrounding the Basic Law (*Grundgesetz*), '[…] were marked by calls for a 'return' to the traditional [formal] elements of the *Rechtsstaat*: independence of justice, no extraordinary courts, no double punishment, protection from arbitrary deprivation of liberty.'[60]

---

55 Burchardt and Birkenkötter (n. 5), 22-23.

56 Grundgesetz [GG] [Constitution], Art. 20 (F. R. G.).

57 Frankfurt Documents, Handed Over by the Military Governors to the Eleven German Minister-Presidents in Frankfurt am Main, 1 July 1948, Document No. I.

58 Prime Ministers' Conference of the Western Occupation Zones, Report on the Constitutional Convention at Herrenchiemsee from 10 to 23 August 1948.

59 For example, the commentary to the proposed Article 98, which establishes the jurisdiction of the (new) Federal Constitutional Court, remarks that the principle of the *Rechtsstaat* requires the review of the regime's highest court when imposing the suspension of an individual's basic rights. The notes to proposed Article 134 (which requires that court hearings be held in public) and Article 135 (guaranteeing the right to be heard in court with the assistance of defense counsel) similarly attribute these protections to the *Rechtsstaat*. The existence of well-functioning, independent and impartial, courts is one of the minimal components of a thin or formal understanding of the rule of law. Report from the Constitutional Convention at Herrenchiemsee (1948).

60 Burchardt and Birkenkötter (n. 5), 20 (citing Michael Stolleis, *Öffentliches Recht in Deutschland: Eine Einführung in Seine Geschichte (16.-21. Jahrhundert)*, (C. H. Beck 2013), 144).

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

As the story goes (and as it is again told by Burchardt and Birkenkötter), the Basic Law elevated the principle of the rule of law (now also encompassing a new substantive dimension) as a 'clear normative reaction to the atrocities of the Third Reich'.[61] But the Basic Law itself does not explicitly require all of this, maybe because the concept remained disputed and uncertain in the founding period.[62] And, to the degree that it attracted attention, engagement with the *Rechtsstaat* seemed mostly concerned with its formal understanding. Meanwhile, other principles were explicitly singled out for emphasis in the text of the Basic Law. These questions about the principle's re-emergence and expansion after the War usually go unremarked. That's true in this book, too. Germans, Burchardt and Birkenkötter included, could tell us more about the political and jurisprudential debates, the mid-century political developments, and the institutional struggles that fostered Germany's shift towards a wholly new understanding of the *Rechtsstaat*. That would be especially incisive if the material rule of law is meant to enjoy the crowning, integrative role in the Basic Law that Burchardt and Birkenkötter – and many other Germans – attribute to it.[63]

VI. Conflicting the *German* Rule of Law

The gaps in the narrative about the emergence of a material approach to the rule of law in post-war Germany seem particularly important because the expanded, thicker notion of the *Rechtsstaat* that developed under the Basic Law can be understood to be in conflict with democracy, which *is* one of the constitutional regime's explicitly invoked core commitments.[64] Why the im-

61 Burchardt and Birkenkötter (n. 5), 20.

62 Burchardt and Birkenkötter, drawing confidence from Wolfgang Abendroth who was writing in 1954, conceded that 'it is difficult to pin down the principle of the *Rechtsstaat* from a doctrinal point of view and there is agreement that there is no unequivocal definition of what precisely the *Rechtsstaat* entails'. Burchardt and Birkenkötter (n. 5), 23.

63 The Rechtsstaat is said to consist of 'guarantees that are specified elsewhere in the Basic Law', while also serving 'declaratory' and 'constitutive' functions that allow it to be used 'as an expression of a general and systematic principle that informs the Basic Law as a whole'. Burchardt and Birkenkötter (n. 5), 24.

64 Martin Krygier summed up the conclusion of many theorists who see an inevitable tension between the two principles: 'If this section began with allegedly joyful copulations of democracy and the rule of law (not to mention human rights), the, it might be thought to have ended with recommendations for divorce. On such a view, it is easier to choose between one or other partner than to join them. At best, the union seems fated to a life of dramatic tension, both partners living at the other's expense. A sad story for partisans of them both.' Martin Krygier, 'Democracy and the Rule of Law', in: Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021), 406, 419.

 DOI 10.17104/0044-2348-2026-3-983

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

plicit *Rechtsstaatprinzip* should prevail over the explicit *Demokratieprinzip*, should they find themselves in tension, is a conclusion that Burchardt and Birkenkötter (or Germans more broadly) don't really question. Instead, the unexamined, robust embrace of the most robust possible understanding of the rule of law might be the most German characteristic of the *Rechtsstaat*.

But democracy – expressed as respect for the will of the majority – is often seen as being in conflict with the mandates of the rule of law. In fact, democracy is a significant contributor to the complex stories the authors tell in the book's case studies. Law (and its rule) is positioned as being in tension with popular views on refugee policy, COVID policy, and anti-terrorism policy. A major line of debate in the theory of the rule of law seeks to resolve or diminish the potential tension between the two principles.

Burchardt and Birkenkötter engage this issue, insisting that one cannot operate in isolation of the other. 'Today', they explain, 'democracy and the rule of law are seen as interdependent and in need of a unifying interpretation'.[65] They consistently make the case for this claim as a distinct feature of Germany's material understanding of the rule of law. But Tamanaha strongly disagrees. Working from his formal, thin understanding of the rule of law, he explains that his 'definition of the rule of law focuses only on law – it does not include democracy'.[66] He insists that 'the rule of law is an ideal that relates to legality' while 'democracy is a system of governance'.[67] One of his chief concerns about including democracy as an element of a material approach to the rule of law is that doing so involves a problematic expression of cultural superiority. Liberal democracy, he says, is a 'contestable normative presupposition' that, through this manoeuvre, is imported into the principle of the rule of law so that it can be imposed 'by definitional fiat on anyone seeking the narrower benefits of legality'.[68] To make the point that there is an important conceptual separation between the rule of law and democracy, Tamanaha reminds us that 'a society and government may comply with the rule of law, yet still be seriously flawed or wanting in various respects', or that a society that possesses the rule of law, while rejecting democracy, may produce its own social goods that are valued by the community and should be credited.[69] One advantage with Tamanaha's thinner approach, of course, is that it eliminates any internal contradiction resulting from a substantive

65 Burchardt and Birkenkötter (n. 5), 67 (citing Eberhard Schmidt-Aßmann, 'Der Rechtsstaat', in: Josef Isensee and Paul Kirchhof (eds), Handbuch des Staatrechts: Band 2, Verfassungsstaat (3rd edn, C. F. Müller 2004), 541, 597).

66 Tamanaha (n. 8), 233.

67 Tamanaha (n. 8), 234.

68 Tamanaha (n. 8).

69 Tamanaha (n. 8), 236.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

understanding of the rule of law that strives to harmonise the rule of law and democracy.

The interesting thing is that Burchardt and Birkenkötter, when appealing for a unifying interpretation between the *Rechtsstaat* and democracy, don't linger over the work of the German theorist seen as having done the most to conceptualise a reconciliation of these 'antagonistic' values.[70] As Gerstenberg explains, 'Habermas found the solution to the "paradox" of achieving legitimacy through legality in the very idea of a democratic procedure itself'.[71] Habermas argued for the rigorous application of the rule of law (enforced through judicial review) chiefly for the protection of the limited slate of rights and interests that are essential for effective and legitimate democratic participation: 'The principle of popular sovereignty is expressed in rights of communication and participation that secure the public autonomy of citizens; the rule of law is expressed in those classical basic rights that guarantee the private autonomy of members of society.'[72] Diminished in this way, the substantive dimension of the rule of law does not have to be in tension with democracy. Martin Krygier explains that, pursuant to this understanding, 'democracy is enabled by the rule of law, which in turn is supported by democracy'.[73] But, shrinking from the widest possible scope of the substantive approach to rule of law was one of Habermas' least German manoeuvres, and it doesn't fit neatly with the broad, material understanding that Burchardt and Birkenkötter correctly attribute to the Germans' *Rechtsstaat*.

VII. Concluding the *German* Rule of Law

The point in all of this is that Burchardt's and Birkenkötter's excellent book avoids the unmeasurable diffusion of the rule of law principle that would result from engaging with it as an abstract, universal concept. The book is a competent, critical, and creative treatment of the 'considerable differences' – the contradictions and conflicts – that characterise the German approach to the rule of law.[74] But, when focusing their microscope on the German *Rechtsstaat*, the authors reveal the many ambiguities and conflicts

70 Oliver Gerstenberg, 'Radical Democracy and the Rule of Law: Reflections on J. Habermas' Legal Philosophy,', I.CON 17 (2019), 1054-1058.

71 Gerstenberg (n. 70), 1055.

72 Jürgen Habermas, 'On the Internal Relation Between Rule of Law and Democracy', European Journal of Philosophy (1995), 3 (1995), 12-20 (15, 16).

73 Krygier (n. 64), 422 (citing Stephen Holmes, *Passions and Constraint*, (University of Chicago Press 1995), 28-29.

74 Burchardt and Birkenkötter (n. 5), 40.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

that also operate with respect to the principle *in* Germany. What we are shown is that Germany's thick or material *Rechtsstaatlichkeit* is particularly ambiguous and harder to systematise or 'measure' in the Humboldtian fashion than thinner or formal understandings of the rule of law might be. That is a great credit to the book. It is a triumph that Burchardt and Birkenkötter have so thoroughly embraced and exposed the truth that 'the precise content and contours of the German *Rechtsstaat* are – as in any jurisdiction – anything but clear'.[75]

As Kehlmann depicts it, Humboldt tried to believe that all his measuring of the world had 'brought the end in sight […] the cosmos would be understood.'[76] But, as his days dwindled with his faculties, Humboldt understood that he had measured everything that could be measured, and yet it seemed to him that nothing was coherent or complete. In the end, Humboldt admits 'he knew nothing, but he had spent his whole life trying to change this, he had acquired some knowledge and travelled the world, but that was all'.[77]

75 Burchardt and Birkenkötter (n. 5), 1.
76 Kehlmann (n. 1), 204.
77 Kehlmann (n. 1), 245.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

Buchbesprechungen

***Deeks, Ashley S.*: The Double Black Box. National Security, Artificial Intelligence, and the Struggle for Democratic Accountability**. Oxford UK: Oxford University Press, 2025. ISBN 978-0-19-752090-1. x, 260 pp. £18.99

In February 2026, a dispute between the Department of War (DoW) and the US-based Artificial Intelligence (AI) company Anthropic, once again underscored how little is publicly known about the use of AI in warfare. The disagreement centred on Anthropic's insistence that Claude, its large language model, cannot be used safely or reliably in fully autonomous weapons or for mass domestic surveillance.[1] The DoW refused to accommodate Anthropic's demands, designating the company a supply chain risk instead.[2] Beyond a few heated exchanges, however, the public record quickly becomes thin: it remains unclear how the United States deploys Claude; how it interfaces with the broader targeting support system used by the DoW, Palantir's Maven System; what safeguards, if any, are operative; and what it would mean in practice for such use to satisfy legal requirements. Disconcertingly, shortly after the dispute, reports suggested that Claude may have been used in US strikes on Iran.[3] This has prompted speculation as to whether this frontier model played a role in the specific attack on the Shajareh Tayyebeh Elementary School in Minab, which killed at least 175 people.[4] At the time of writing, key facts remain elusive.

Although these events occurred after the publication of Ashley Deeks' 'The Double Black Box: National Security, Artificial Intelligence, and the Struggle for Democratic Accountability', they proved difficult to set aside while reading it. The book is written at a time when the need to understand and penetrate the layers of secrecy surrounding AI-enabled military operations feels particularly acute. Deeks elegantly guides the reader through what she terms the 'double black box': the familiar opaqueness of national security

1 'Statement from Dario Amodei on our discussions with the Department of War,' <https://www.anthropic.com/news/statement-department-of-war>, last access 9 June 2026.

2 Lily Jamali and Kali Hays, 'Anthropic Vows to Sue Pentagon Over Supply Chain Risk Label', BBC News, 6 March 2026, <https://www.bbc.com/news/articles/cn5g3z3xe65o>, last access 22 May 2026.

3 'Anthropic's AI tool Claude Central to US Campaign in Iran, Amid a Bitter Feud', The Washington Post, 4 March 2026, <https://www.washingtonpost.com/technology/2026/03/04/anthropic-ai-iran-campaign/>, last access 22 May 2026; Ed Pilkington, 'US Military Reportedly Used Claude in Iran Strikes Despite Trump's Ban', The Guardian, 1 March 2026, <https://www.theguardian.com/technology/2026/mar/01/claude-anthropic-iran-strikes-us-military>, last access 22 May 2026.

4 See, for example, Akshaya Kumar, 'Was the Attack on an Iranian Primary School a War Crime?', Lawfare, 16 April 2026.

DOI 10.17104/0044-2348-2026-3-999

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

decision-making, compounded by the additional inscrutability introduced by AI systems. The author's central claim is straightforward: as these layers of opacity converge, 'a range of actors who serve as surrogates for the US public – who already seek, and sometimes fail, to check the Executive in the national security space – will have an increasingly hard time doing so' (p. 11).[5] Deeks' diagnosis is as persuasive as it is disquieting.

'The Double Black Box' considers the national security applications of AI, including target nomination, the automation of kinetic and cyber operations, border-related arrest decisions, and counterterrorism activities. Paradoxically, although these uses present some of the most significant risks, they remain among the least regulated. While jurisdictions such as the United States and the European Union have developed domestic frameworks governing civilian AI uses, military applications continue to operate largely outside dedicated regulatory regimes, whether at the international, EU, or national level. As Sullivan observes, 'even modest international efforts to legally constrain military AI appear dead on arrival, while domestic regulatory frameworks show little appetite for constraining national military initiatives'.[6]

Much of the scholarly debate on military AI and opacity has focused on its implications for users' understanding of AI-generated outputs, for example, whether individuals can comprehend or subsequently explain the basis of a system's recommendation.[7] Relatedly, the concern with AI opacity has also led to an important strand of literature on meaningful human control.[8] Deeks' main contribution is the shift from the challenges faced by end-users individually to societal questions of democratic accountability more broadly. She convincingly demonstrates that opacity in national security contexts is more complex, layered, and compounded than commonly assumed. Its implications are correspondingly more profound, with the potential to systematically erode what she calls 'public law values': (i) legal compliance,

5 Secrecy surrogates in this context refers to 'actors who are given access to secret information that average US citizens are not and who can improve secret executive operations and help mitigate abuses' (p. 62).

6 Scott Sullivan, 'Military AI as "Abnormal" Technology,' Lawfare, 12 March 2026.

7 See, for example, Arthur Holland Michel, 'The Black Box, Unlocked: Predictability and Understandability in Military AI', Geneva, Switzerland: United Nations Institute for Disarmament Research (2020), doi: 10.37559/SecTec/20/AI1, 9-11; Nathan G. Wood, 'Explainable AI in the Military Domain', Ethics and Information Technology 26 (2024), 29 <https://doi.org/10.1007/s10676-024-09762-w>.

8 See, for example, Michel (n. 7), p. 13; Bérénice Boutin and Taylor K. Woodcock, 'Aspects of Realizing (Meaningful) Human Control: a Legal Perspective' in: Robin Geiß and Henning Lahmann, Research Handbook on Warfare and Artificial Intelligence, (Edward Elgar Publishing 2024), <https://doi.org/10.4337/9781800377400.00016>.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

(ii) competence and rational decision-making, (iii) accountability for decisions made, and (iv) justification or reason-giving to appropriate actors (p. 13).

The book will be of interest to scholars, policy-makers and the general public alike – to all those concerned with the impact of AI on the broader socio-political processes within domestic systems and in international relations. As Deeks highlights, what is at stake in the double black box is the potential for the concealment of mistakes and abuses, the avoidance of accountability, and the perpetuation of problematic policies or systems without any critique (pp. 31-38). In itself, this is not a new problem, as governments have obscured troubling practices for decades. However, AI's integration can make it harder to detect and correct errors before they cause serious damage (p. 107). This is largely because AI's opacity can prevent those involved from recognising unfair, inaccurate, or misleading outputs relied upon in the national security context, for instance, for targeting or detention. Indeed, the nature of AI systems impedes not only public oversight but also the ability of Congress, the judiciary, journalists, and even officials within the Executive to pose the necessary questions or conduct scrutiny that might prevent costly, widespread mistakes.

A noteworthy element of Deeks' argument is that opacity in AI-enabled processes is not only a feature of the model's complexity, as it is commonly perceived. It is also the speed of AI-enabled military operations, especially in relation to the cyber domain, that further exacerbates the black box problem. This is because the tempo at which AI-enabled decisions and effects occur outpaces the capacity of users to report concerns to oversight bodies, in turn also undermining the ability of competent authorities to intervene to prevent violations in a timely manner (pp. 128, 146-147). The argument could further be strengthened by recognising that, in addition to speed, the potential for large volume of AI outputs also contributes to the problem of opacity, as users and institutions become practically unable to meaningfully review or verify such vast quantities of AI recommendations.[9] Taken together, AI contributes to the opaqueness of operations not only because of the inscrutability of its models, but because of the speed and volume of outputs. As a result, as Deeks argues, the conditions created by AI dramatically narrow the space for effective oversight, prevention of errors, and democratic accountability.

In my view, it is important to acknowledge, as Deeks does in passing, that AI companies and the choices they make in the design and development phases of these technologies significantly exacerbate the double black box. For example, designers intentionally develop complex AI models or decline to reveal

9 Jessica Dorsey and Marta Bo, 'Symposium on Military AI and the Law of Armed Conflict: The "Need" for Speed – The Cost of Unregulated AI Decision-Support Systems to Civilians', OpinioJuris, 4 April 2024.

DOI 10.17104/0044-2348-2026-3-999

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

the datasets on which the systems were trained (pp. 61, 81, 193). They may also be non-transparent about the assumptions underpinning the model. As other authors have also noticed, the opacity of AI systems is a choice that advances commercial interests but undermines the ability of government agencies to meaningfully understand and review the systems they acquire.[10]

The strategic role of secrecy and how actors exploit it to exercise power resonate with agnotology studies in international relations. In this regard, the work of Aradau and Huysmans is of particular relevance, in which they examine how knowledge surrounding data and algorithmic practices is produced.[11] They argue that the opacity of those practices allows actors to assemble authority and power, by rendering only certain forms of knowledge credible.[12] Those denied access to such knowledge – for example, technical information about AI systems – are effectively barred from advancing meaningful critique of those practices. These dynamics of power exemplify the 'double black box': government actors and increasingly private technology companies, exploit the opacity of AI-enabled operations and institutionalise that opacity to consolidate and advance their power.

A common response to the black box problem is to seek transparency. However, 'opening up' the black box is not, in itself, a sufficient solution to concerns surrounding opacity. Or, as Deeks observes, it may in practice prove both insufficient and uninformative (p. 74). This is especially the case with respect to the algorithmic 'black box'; even where source code is made accessible, the scale and complexity of contemporary models – often comprising millions of lines of code – render it exceedingly difficult to reconstruct how the model functions, to identify its underlying assumptions, or to trace the origins of specific errors.[13] These challenges are further compounded in contexts involving interoperable systems or when the code is AI-generated and thus introduces additional layers of opacity.[14]

10 Roy Lindelauf and Herwin Meerveld, 'Building Trust in Military AI Starts with Opening the Black Box', War on the Rocks, 12 August 2025. Rudin also observed a similar dynamic by noting that, in some circumstances, similar performance could be achieved by employing interpretable algorithmic models, but that companies are more interested in opaque models as those can be more easily made proprietary. Cynthia Rudin, 'Stop Explaining Black Box Machine Learning Models for High Stakes Decisions and Use Interpretable Models Instead', Nature Machine Intelligence (2019), 206-215, <https://doi.org/10.1038/s42256-019-0048-x>.

11 Claudia Aradau and Jef Huysmans, 'Assembling Credibility: Knowledge, Method and Critique in Times of "Post-Truth"', Security Dialogue 50 (2019), 40-58, <https://doi.org/10.1177/0967010618788996>.

12 Aradau and Huysmans (n. 11).

13 Michel (n. 7), 9.

14 See, for example, Daniel Trusilo, 'Autonomous AI Systems in Conflict: Emergent Behavior and Its Impact on Predictability and Reliability', Journal of Military Ethics 22 (2023), 2-17, <https://doi.org/10.1080/15027570.2023.2213985>.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Fortunately, the book offers elegant solutions that do not necessarily involve 'opening up' the proverbial 'black box'. Deeks instead argues that actors within the national security apparatus should, at a minimum, be able to explain why particular AI systems were acquired or developed, and what measures were adopted to ensure their legally compliant use. Reliance on generic or abstract justifications – such as a broad appeal to the utility of algorithmic recommendations – is unlikely to satisfy public scrutiny or accountability demands (p. 118). Instead, 'strategic transparency', the effort to convey to the public the difficult trade-offs related to the use of AI capabilities, explaining 'how the tools are used, by whom, and pursuant to what legal rules' (p. 170), offer the advantages of engaging with the critics, diffusing objections, lowering public anxiety or even obtaining public buy-in, and in doing so, hopefully, learning something from the process that can improve the AI-assisted decision-making processes (pp. 170-175). Deeks' suggestions are of great value including to the current US administration. The Anthropic-DoW dispute, for example, was a missed opportunity for the government to explain how it operationalises legal obligations in its use of AI, how it verifies and assures the reliability of large language models, or the measures it takes to prevent abuses, especially in the ongoing armed conflicts in which the US is involved.

Another proposal described in the book is the introduction of a legislative requirement for explainable AI (xAI), which could have the effect of disincentivising the deployment of highly complex models, including large language models, where their opacity renders them insufficiently explainable (p. 150). This entails, first, that companies supplying such systems are able to provide meaningful explanations of their functioning, and second, that government actors retain the capacity to articulate and transmit those explanations to relevant audiences, including end-users and, subsequently, those tasked with assessing or contesting the legality of their use. The calls for explainable AI, however, require refinement, for example, in specifying the type of explanations required, the audiences to whom they are addressed, and the appropriate structure and format such explanations should take (p. 154).

I further agree with Deeks' argument that the double black box challenge cannot be solved without greater AI literacy amongst those organs and institutions that are tasked with oversight or monitoring of the AI-enabled practices. What is meant by AI literacy is not necessarily an ability to inspect the models themselves, but rather the capacity to ask appropriate questions and seek justifications for the use of AI (p. 127). Similarly, officers working at other national security agencies or even foreign security partners that have access to information about classified programs would benefit from the necessary training or prior expertise to be able to serve in their role of non-

DOI 10.17104/0044-2348-2026-3-999

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

traditional checks (p. 158). This includes understanding the risks involved in the use of AI, common concerns around biases, errors, performance fluctuations, opacity, and vulnerability to adversarial attacks. In my experience, the US and other governments are increasingly investing resources in training that will strengthen these skills.

There is, however, one proposal in the book that I remain unconvinced by. While Deeks acknowledges that AI companies have a commercial interest in creating opaque models, she also places great hope in their role as secrecy surrogates, that is, actors that are able to identify, report, and mitigate abuses of national security actors (p. 62). She argues that, through the provision of technologies and related services, AI companies become privy to intimate knowledge about national security practices, putting them in a unique position to act.

In some ways, Anthropic's demands to exclude Claude from use in autonomous weapons or mass surveillance can be seen precisely as a successful example of how AI companies can play the role of secrecy surrogates. Indeed, the Guardian even reported that Anthropic 'is functioning as one of the only checks on what appears to be the military's expansive desires for weaponizing AI'.[15] At the same time, Anthropic was not able to uphold the red lines it proposed. As Deeks predicted, any refusal to cooperate with the government by one company results in its replacement (p. 195). In this case, several days after the dispute was made public, OpenAI has already signed an agreement with the DoW to offer its large language model as an alternative.[16] Even more importantly, in my view, it must not be underestimated how entangled AI companies are in the contemporary national security practices. The commercially-driven choices in AI design and development generate structural dependencies of the national security actors on the private sector and reliance on their expertise.[17] As also shown through the Anthropic-DoW dispute, even when disagreements emerge, it takes time for the national security infrastructure to even disconnect or rather untangle its ties with the company. Rather than contributing to unveiling violations, AI companies are deeply entangled and complicit in the military and law enforcement operations.

15 Blake Montgomery, 'Datacenters Are Becoming a Target in Warfare for the First Time', The Guardian, 10 March 2026.

16 'Our agreement with the Department of War', OpenAI, <https://openai.com/index/our-agreement-with-the-department-of-war/>, last access 22 May 2026.

17 Marijn Hoijtink and Jasper van der Kist, 'Platforms on the Frontline: The Rise of the Platform Model in Defense Tech', OpinioJuris, 11 February 2025; Marijn Hoijtink, Jasper van der Kist and Laszlo Steinwärder, 'The Rise of the Tech Oligarchy and Its Military Entanglements: a Platform Approach', Sciences as Culture (2026), 1-15 (7-8), <https://doi.org/10.1080/09505431.2026.2666079>.

 DOI 10.17104/0044-2348-2026-3-999

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

'The Double Black Box' is centered on the US constitutional framework, including its mechanisms of unveiling secretive national security practices through the Executive (pp. 50-56), Congress (pp. 37-44), judicial bodies (pp. 44-49), and whistleblowers (pp. 56-59). However, the lessons learned from this book are going to resonate with an international audience for at least two reasons. Firstly, all democratic States committed to the rule of law should strive to ensure that the use of AI systems does not deepen the veil of secrecy surrounding them. As mentioned by Deeks, we should be cautious 'about the ways in which AI's characteristics affect the ability of actors outside (and inside!) democratic States, including the United States, to oversee, check, and challenge executive national security activities' (p. 18). Given the many dilemmas that accompany the use of AI systems in national security contexts, mechanisms must be in place to check the developments and uses of technologies with such high risks.

Secondly, the US is an actor with a particularly high involvement in armed conflicts around the world and significant AI capabilities. For those who may fall victim to the use of AI systems in US military operations or for other States who wish to ensure respect for international humanitarian law, it is also important that there is greater clarity with respect to how the United States is employing AI capabilities and what checks and balances it has in place to prevent unlawful uses.

Klaudia Klonowska, Sciences Po Paris, Paris, France

DOI 10.17104/0044-2348-2026-3-999

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

***Roth-Arriaza, Naomi*: Fighting Grand Corruption: Transnational and Human Rights Approaches in Latin America and Beyond.** Cambridge: Cambridge University Press, 2025. ISBN 978-1-009-55061-1 (paperback). xxi, 272 pp. £24.99

Few topics have moved so swiftly from the margins of international legal scholarship to claim a recognised place within it as the study of corruption. For much of the twentieth century, the discipline was content to treat it as a domestic pathology, beyond the reach of treaty obligations and largely indifferent to the concerns of human rights lawyers. The picture today is markedly different. The proliferation of investigatory mechanisms, the expansion of 'smart' sanctions regimes, the slow but unmistakable willingness of regional human rights bodies to engage with corruption-related claims, and the calls for an International Anti-Corruption Court – all bear witness to a shift in both perception and practice. Against this background, Naomi Roht-Arriaza's *Fighting Grand Corruption* is a timely and ambitious intervention. It is also, in important respects, a personal one: the author, long associated with the transitional justice literature, here turns the analytical apparatus of human rights advocacy upon a problem whose dimensions she had come to consider as the principal obstacle to the very objectives that movement had set itself.

The book's central claim is at once descriptive and prescriptive. Descriptively, Roht-Arriaza argues that the corruption with which the international legal order must now contend bears little resemblance to the petty bribery that occupied much of the early anti-corruption literature. What she calls 'grand corruption' – she acknowledges the term is imperfect, and at times prefers 'state capture' or 'kleptocracy' – is qualitatively distinct. It is systemic; it co-opts the very institutions designed to constrain it; it weaves together public officials, private enterprise, and organised crime in shifting alliances whose precise contours defy conventional categorisation. Prescriptively, she contends that the existing legal architecture, organised around the United Nations Convention against Corruption (UNCAC) and a constellation of regional instruments, was built upon assumptions that no longer hold. That architecture presupposes a state genuinely committed to combating corruption; it presupposes that mutual legal assistance will flow between cooperating authorities; it treats the state itself as the principal victim of corrupt acts, with the consequence that the very persons responsible for the looting are placed in charge of seeking recovery of the stolen assets. Where corruption is not aberrational but systemic, these presuppositions collapse. The book is, in essence, a sustained argument for what should replace them.

DOI 10.17104/0044-2348-2026-3-1007

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Roht-Arriaza proposes two interrelated responses. The first is internal: opening the respective state's domestic courts – criminal, civil, constitutional, and administrative – to the victims of corruption, whether as direct claimants or through civil society organisations whose mandate is to combat corrupt practices. The second is external: enlisting third-state courts, agencies, and institutions to act where domestic mechanisms have been captured, and thereby to catalyse domestic action. The two strands are presented as complementary, and the book's organisation reflects this: an analysis of the convergence between anti-corruption and human rights at the level of treaty law is followed by chapters examining international support for domestic prosecutions (with the Comisión Internacional contra la Impunidad en Guatemala as the central case study), the use of targeted financial and visa sanctions, and the role of extraterritorial prosecution, market-based incentives, and development bank scrutiny. The middle chapters then turn inward, exploring what it might mean to 'put victims at the centre' (p. 75) of anti-corruption work – an enquiry that occasions a careful, and to this reviewer's mind genuinely original, treatment of asset recovery, of the forms reparation might take in corruption cases, and of the evidentiary and causal problems that arise when one attempts to demonstrate a sufficient nexus between an illicit act and a diffuse harm.

The choice of Latin America as the principal frame of reference is judiciously justified. The region offers, on the one hand, a regrettable abundance of paradigmatic cases: from Pinochet's Riggs accounts to the Fujimori-Montesinos partnership, from the Lava Jato investigation and its Odebrecht ramifications to the more recent erosion of judicial independence in Guatemala. It offers, on the other hand, a vibrant tradition of social mobilisation, a well-developed regional human rights system whose jurisprudence has migrated into domestic constitutional law, and a generation of lawyers and activists whose experience of fighting impunity for grave rights violations equips them, in many respects uniquely, to confront the impunity of the corrupt. The author is candid about the limits of this regional focus, and acknowledges that two of her transitional-justice case studies – South Africa and Tunisia – lie outside it. But the choice is more than autobiographical convenience. It allows her to demonstrate, with a degree of granularity that a global survey could not have achieved, how concepts forged in one area of legal practice migrate across to another: how doctrines developed for the victims of forced disappearance now inform standing rules in anti-corruption proceedings; how presumptions of state responsibility derived from patterns of paramilitary violence are pressed into service in cases involving organised criminal-political networks; how the language of diffuse harm, borrowed from consumer and

 DOI 10.17104/0044-2348-2026-3-1007

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

environmental law, finds purchase in corruption cases involving thousands of indirect victims.

It is in this comparative and cross-doctrinal analysis that the book is at its strongest. Roht-Arriaza is a careful reader of jurisprudence and a still more careful interlocutor of the institutional actors – prosecutors, judges, civil society lawyers – whose practice she records. The chapters on reparation and on the use of plea bargains and non-conviction-based forfeiture are particularly accomplished; they navigate, with sure-footedness, the genuine tensions between the desire to recover stolen assets, the imperative of respecting due process, and the political risk that anti-corruption tools become instruments in the hands of the corrupt themselves. Her treatment of the Brazilian Lava Jato aftermath – where the annulment of Lula da Silva's conviction on grounds of judicial partiality cast a long shadow over a wider edifice of plea agreements that had themselves produced substantial evidence of wrongdoing – is exemplary in its refusal to collapse the analytical question into the political one. The same may be said of her treatment of the CICIG experience, where she gives due weight both to the Commission's spectacular record (over four hundred convictions, including those of presidents and judges) and to the political miscalculations that eventually delivered its enemies the leverage required to shut it down.

The discussion of the proposed International Anti-Corruption Court (IACC), to which the concluding chapter devotes considered attention, deserves particular notice. Roht-Arriaza is sympathetic to the project without being seduced by it. She rehearses, fairly, the principal objections – that kleptocrats will not allow their states to join; that international prosecutions are expensive and dependent on state cooperation; that criminal prosecution is not necessarily the most efficient response to grand corruption – and acknowledges that the experience of the International Criminal Court should chasten enthusiasm. She is alive to the deeper structural choice the proposal poses, between top-down institution-building and the more decentralised, networked approaches that have characterised much of the recent practice in anti-corruption and human rights work alike. Her own preference, prudently expressed, is for an '"all of the above" strategy' (p. 210) that combines the two, while drawing attention to less ambitious proposals (such as a Transnational Asset Recovery Mechanism) which may achieve much at lower cost. Readers will form their own views on whether the IACC is a project worth pursuing; but they will not find in this book the kind of unreflective advocacy that has sometimes characterised the literature.

If the book has weaknesses, they lie less in what it argues than in what it leaves implicit. Three observations may be ventured.

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

First, the treatment of attribution under the law of state responsibility, though astutely framed as a 'threshold question' distinct from causation, is somewhat schematic. The author rightly observes that the rules codified in the International Law Commission (ILC) Articles – the 'effective control' test of *Nicaragua*, the 'overall control' test of *Tadić* – were forged in disputes whose factual matrix differs significantly from that of grand corruption. She suggests, persuasively, that the change in the nature of the problem ought to 'allow for an evolution in doctrine' (p. 207). Yet the precise contours of that evolution remain to be drawn. Where political elites instigate schemes involving organised crime and private corporate actors, where armed groups exercise quasi-governmental functions over substantial territory, the conceptual challenge is not merely one of fact-finding but of doctrine. The book gestures towards Article 9 of the ILC Articles (private actors exercising elements of governmental authority in the absence or default of official authorities) but does not develop the argument with the rigour it merits. A more sustained engagement with the existing scholarship on attribution and complicity – and, perhaps, with the parallel debates in international criminal law concerning modes of liability for organisational criminality – would have strengthened a chapter that, as it stands, opens up more questions than it answers.

Second, while nuanced and attentive to the politics of victimhood, the book's treatment of the obligations of 'enabler' states – those, predominantly Western, in which the proceeds of grand corruption are laundered, invested, or simply enjoyed – remains ultimately more persuasive at the level of policy and pragmatism than of fully elaborated doctrine. Roht-Arriaza correctly identifies the lawyers, accountants, real-estate brokers, and corporate service providers without whose ministrations grand corruption could not flourish at its current scale. She notes the recent efforts of certain jurisdictions to bring them within the perimeter of anti-money-laundering and beneficial-ownership disclosure regimes. What is less developed is the international-law analysis of the obligations that the home states of enablers may bear, whether under existing human rights treaties, under the UNCAC's provisions, or under broader principles concerning the duty not to permit one's territory to be used for acts contrary to the rights of other states. There is, here, a fertile field that the book opens but does not till.

Third, on the question of the 'human rights orientation' itself, the book's argument would have benefited from a more sustained engagement with the doctrinal objections that have been raised, most notably by those who fear that the indiscriminate extension of victim status to all those indirectly affected by corruption will dilute the specificity of human rights protection. Roht-Arriaza is alive to these concerns – her treatment of 'victimhood' in the

 DOI 10.17104/0044-2348-2026-3-1007

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

concluding chapter is nuanced – but the discussion remains largely at the level of policy and pragmatism. The harder doctrinal question, whether the existing corpus of human rights law can accommodate corruption as a stand-alone violation without straining its analytical categories beyond endurance, is canvassed but not, in the end, fully resolved.

These observations should not be taken as detracting from what is a genuinely important contribution. *Fighting Grand Corruption* is the work of a scholar at the height of her powers, writing with the authority of long engagement, the discipline of careful empirical observation, and the moral seriousness that the subject demands. It is also, in a quality too often absent from legal scholarship of this register, an extraordinarily well-written book. The prose is unforced, the case studies are deployed with restraint and to effect, and the author resists throughout the temptation to allow indignation to substitute for analysis. The result is a volume that will be read with profit by international lawyers, by comparative criminal lawyers, by human rights practitioners, by transitional justice scholars, and by the growing community of activists and officials whose business is to give effect, in difficult institutional conditions, to the obligations that the international legal order has accumulated in this field.

It is fitting, in conclusion, to register a more general observation about the trajectory the book traces. The convergence of anti-corruption and human rights is no longer, as it might have been a decade ago, an exhortation; it is a fact of institutional and doctrinal life. The Inter-American Court has begun to engage with corruption-related claims; United Nations human rights mechanisms have integrated corruption into their reporting; targeted sanctions regimes increasingly treat human rights violations and grand corruption as cognate grounds for designation; the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Working Group has acknowledged the human rights dimensions of its remit. The challenge facing the discipline is no longer to argue for the convergence but to work out, with patience and precision, its doctrinal and institutional implications. Roht-Arriaza's book offers no comprehensive answer – no single volume could – but it provides a map of the terrain that is at once accurate, capacious, and unfailingly intelligent. It deserves to be read, and it will repay re-reading. Indeed, the book ultimately advocates what the author herself terms an 'everything, everywhere, all at once' (p. 215) strategy, combining legal, political, financial, environmental, and social-movement tools across jurisdictions.

One closes the book with the sense that the project it announces is far from complete. The author herself, in candid fashion, acknowledges as much: the responses she proposes are admittedly partial; the limitations she identi-

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

fies in the existing UNCAC framework will require, on any view, 'a thorough revision' (p. 203) that her book maps rather than effects. That admission is, in its way, the highest recommendation. The most useful scholarly works are those that open enquiry rather than foreclose it. *Fighting Grand Corruption* opens an enquiry of considerable importance, and equips its readers – lawyers, advocates, and policymakers alike – with the conceptual tools they will need to carry it forward.

Leonardo Borlini, Bocconi University, Milano, Italy

 DOI 10.17104/0044-2348-2026-3-1007

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

***Rossa, Elisabeth*: Die Finalität europäischer Verteidigung. Eine Untersuchung vor dem Hintergrund des Grundgesetzes.** Tübingen: Mohr Siebeck, 2025. ISBN 978-3-16-164678-2, xxv, 491 S. €124,-

I.

Das Thema der Stärkung der europäischen Verteidigungsfähigkeit ist aktueller denn je. Der russische Angriffskrieg auf die Ukraine und die damit verbundene „Zeitenwende" haben nicht nur zu verstärkten Investitionen in die nationale Verteidigungsfähigkeit der Mitgliedstaaten geführt, sondern auch die Diskussion um die Rolle der Europäischen Union (EU) bei der Verteidigung des Kontinents erneut verstärkt. Dazu kommt das bereits mit der US-amerikanischen Fokusverschiebung auf den pazifischen Raum begonnene und durch die erneute Präsidentschaft Donald Trumps verstärkte Bemühen um europäische strategische Autonomie und unabhängige Verteidigungsfähigkeit.

Im März 2025 stellte die Kommission folgerichtig das erste Weißbuch der Europäischen Union für Verteidigung vor und spricht insbesondere vor dem Hintergrund des Krieges in der Ukraine von der Notwendigkeit, Europa wieder aufzurüsten („ReArm EU"). Mit einer Reihe unterschiedlicher Maßnahmen will die Kommission insbesondere die europäische Verteidigungswirtschaft stärken, die Zusammenarbeit unter den Mitgliedstaaten fördern, aber auch die europäischen Beiträge zur NATO-Abschreckungs- und Verteidigungsplanung ausbauen. Am Ende des Weißbuches wird schließlich von der Notwendigkeit der Errichtung einer „Verteidigungsunion" gesprochen, ein Begriff, der jüngst auch von einer parteiübergreifenden Gruppe von EU-Parlamentariern mit der Forderung nach integrierten europäischen Verteidigungsstrukturen und gemeinsamer Beschaffung verknüpft wurde.

Dabei stehen der EU im Rahmen der gemeinsamen Sicherheits- und Verteidigungspolitik bekanntermaßen nur begrenzte Kompetenzen zu. Diese erstrecken sich auf eine gemeinsame Verteidigungspolitik, die in einer gemeinsamen Verteidigung münden kann, sofern der Europäische Rat dies einstimmig beschließt (Art. 42 Abs. 2 UAbs. 1 S. 2 EUV), wobei die Begriffe der „Verteidigung" und „Verteidigungspolitik" notorisch unbestimmt sind. Den im politischen Raum nun immer häufiger verwendeten Begriff der „Verteidigungsunion" kennen die europäischen Verträge ohnehin nicht. Der Bereich der Verteidigung ist damit in den EU-Verträgen evolutiv angelegt, aber

DOI 10.17104/0044-2348-2026-3-1013

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

begrifflich und rechtlich umstritten. Gerade vor dem Hintergrund der geopolitischen Lage und den aktuellen Reformbemühungen stellt sich damit die Frage, wo die europäischen primärrechtlichen und deutschen verfassungsrechtlichen Grenzen einer Weiterentwicklung der europäischen Verteidigungsfähigkeit liegen.

II.

Genau diesen Fragen, mit Fokus auf die verfassungsrechtlichen Grenzen der europäischen Integration im Verteidigungsbereich, geht Elisabeth Rossa in ihrer im Sommer 2025 erschienenen Habilitationsschrift „Die Finalität europäischer Verteidigung" nach. Dabei begreift sie „Finalität" als eben jenen dynamischen Prozess der vertieften Integration (S. 1) und begibt sich auf die Suche nach dessen Grenzen, um den Handlungsrahmen der Politik bei fortschreitender sicherheits- und verteidigungspolitischer Kooperation abzustecken (S. 4). Die Arbeit gliedert sich in fünf Kapitel. Im ersten Kapitel beschreibt die Autorin die Anfänge der europäischen Sicherheits- und Verteidigungspolitik bis zum Vertrag von Lissabon. Im zweiten Kapitel wird dies durch eine Darstellung der aktuellen europäischen Verteidigungsarchitektur ergänzt. Das dritte Kapitel widmet sich den verfassungsrechtlichen Grundlagen der Beteiligung Deutschlands an der europäischen Verteidigungspolitik. Im vierten Kapitel analysiert die Autorin Modelle einer zukünftigen europäischen Verteidigungspolitik anhand der verteidigungspolitischen Strategien der Europäischen Union und Deutschlands. Im Schlüsselkapitel fünf werden schließlich die im zweiten und dritten Kapitel gewonnenen Grundlagen auf die im vierten Kapitel entwickelten Modelle angewendet und damit die verfassungsrechtlichen Grenzen der sicherheits- und verteidigungspolitischen Integration insbesondere mit Blick auf spezifische mögliche Strukturveränderungen, von der Autorin sogenannte „Finalitätselemente", abgesteckt.

III.

Im Eingangskapitel arbeitet die Autorin durch das Nachvollziehen der geschichtlichen Entwicklung der europäischen Sicherheits- und Verteidigungspolitik deren grundlegende historisch gewachsene Charakteristika heraus, die auch die weitere Arbeit prägen. Darunter der bereits mit der Europäischen Gemeinschaft für Kohle und Stahl (EGKS) angelegte Charakter des

 DOI 10.17104/0044-2348-2026-3-1013

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Europarechts als Friedensordnung nach innen (S. 6), welche nunmehr auch nach außen wirkt (S. 24, 42), sowie das Streben nach immer tieferer Integration (S. 6), welches nicht zuletzt die Forschungsfrage nach der Finalität mitbegründet. Ebenso betont wird die zwischenstaatliche Prägung der europäischen Außen- und Sicherheitspolitik (S. 13), die sich in ihrer Aufnahme als (intergouvernementale) zweite Säule im Vertrag von Maastricht manifestierte (S. 15) und der weiteren Integration häufig im Wege steht. Schließlich findet das ambivalente Verhältnis zur NATO Erwähnung, in der von ihren Mitgliedstaaten traditionell der Schwerpunkt der internationalen Verteidigungskooperation gesehen wurde (S. 12).

Im zweiten Kapitel stellt die Autorin die gegenwärtige europäische Verteidigungsarchitektur nach dem Vertrag von Lissabon dar. Dabei arbeitet sie die Intergouvernementalität der gemeinsamen Außen- und Sicherheitspolitik (GASP) und ihre Unterschiede zur sonst weitestgehend supranational konzipierten Union, wie insbesondere das Einstimmigkeitserfordernis, die (weitgehend) fehlende Zuständigkeit des Europäischen Gerichtshofs (EuGH) und die fehlende Durchgriffswirkung ins nationale Recht heraus (S. 47). Ebenso betont wird die nur schwache Rückanknüpfung an supranationale Strukturen wie Kommission und Europäisches Parlament und das daraus resultierende demokratische Legitimationsdefizit (S. 90). Zutreffend weist die Autorin auch auf das schon angesprochene Spannungsverhältnis zwischen der unklaren Bedeutung der Begrifflichkeiten von „gemeinsamer Verteidigungspolitik" und „gemeinsamer Verteidigung" des Art. 42 Abs. 2 UAbs. 1 S. 2 EUV (S. 62) und den gleichzeitig wachsenden realpolitischen Anforderungen an die GASP (S. 91) hin.

Das dritte Kapitel stellt die verfassungsrechtlichen Grundlagen der deutschen Beteiligung an der europäischen Verteidigungspolitik dar, wobei die Autorin die einschlägigen Artikel des Grundgesetzes bereits mit Blick auf ihre Relevanz für die Fragestellung des fünften Kapitels untersucht. Bei der Betrachtung des Art. 87a Abs. 1 S. 1 GG stellt sie fest, dass eine komplette Abschaffung der Streitkräfte (etwa zugunsten einer supranationalen Verteidigungsarmee) mit diesem Artikel und wohl auch mit Art. 79 Abs. 3 GG unvereinbar wäre (S. 133). En passant geht die Autorin auch auf die Reformdiskussion zu Art. 87a Abs. 2 GG ein und unterbreitet einen eigenen Vorschlag. Neben der Überlegung, den Artikel dergestalt neuzufassen, dass dieser Auslandseinsätze zulässt, sofern diese mit dem Völkerrecht in Einklang stehen, schlägt die Autorin vor, die Zulässigkeit von Auslandseinsätzen zusätzlich an den „Friedensbegriff des Grundgesetzes" zu binden (S. 147). Vor dem Hintergrund der von der Autorin selbst konstatierten Unbestimmtheit des Friedensbegriffes des Grundgesetzes und dem zweifelhaften Mehrwert einer Entkopplung des Grundgesetzes vom Völkerrecht vermag dieser

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Vorschlag jedoch wenig zu überzeugen. Mit Bezug zu Art. 24 Abs. 2 GG ordnet die Autorin die EU (mit der neueren Rechtsprechung des Bundesverfassungsgerichts [BVerfG]) als System kollektiver Sicherheit ein. Die reine Erfüllung der Verpflichtung der Beistandsklausel Art. 42 (7) EUV will Rossa mangels Gesamtzusammenhang zur Organisation allerdings nicht ausreichen lassen, um „im Rahmen und nach den Regeln" dieses Systems angesehen zu werden (S. 189 ff.). Folglich scheidet nach der Autorin Art. 24 Abs. 2 GG als verfassungsrechtliche Basis eines entsprechenden Einsatzes aus. Bezüglich des (in der verfassungsgerichtlichen Rechtsprechung ungeklärten) Verhältnisses des Art. 87a GG zu Art. 24 Abs. 2 GG vertritt Rossa jedoch grundsätzlich eine parallele Anwendbarkeit beider Normen, die somit beide als Rechtsgrundlage für Auslandseinsätze der Bundeswehr, auch im Rahmen europäischer verteidigungspolitischer Integration, in Betracht kommen (S. 203 ff.).

Das vierte Kapitel beschreibt Modelle einer zukünftigen Verteidigungspolitik. Dabei wertet die Autorin zunächst die Verteidigungs- und sicherheitspolitischen Strategien der Europäischen Union und der Bundesrepublik Deutschland aus und gewinnt daraus zwei Kernszenarien (S. 274 ff.), wobei die Übergänge zwischen diesen fließend sind. Das erste Szenario setzt auf eine Flexibilisierung innerhalb der GASP und eine Stärkung der Mehrheitsentscheidungen (etwa durch eine Anwendung der in den Verträgen bereits vorgesehenen Abweichungen vom Einstimmigkeitsprinzip wie Art. 31 und 46 EUV) sowie Nutzung des Potenzials des Art. 44 EUV oder der Ständigen Strukturierten Zusammenarbeit (SSZ). Das zweite Szenario geht über diese Ansätze hinaus und beinhaltet eine zumindest partielle Supranationalisierung der GASP etwa durch eine Abkehr von den Prinzipien der Freiwilligkeit (die Mitgliedstaaten entscheiden selbst über die Teilnahme an EU-Militäroperationen), des Rückgriffsprinzips (die Union greift auf Streitkräfte der Mitgliedstaaten zurück) oder des Einstimmigkeitsprinzips. Im Rahmen der Ausarbeitung der Kernszenarien entwickelt die Autorin auch ihr eigenes Verständnis des notorischen Begriffspaars „gemeinsame Verteidigungspolitik" und „gemeinsame Verteidigung" des Art. 42 Abs. 2 EUV (S. 279). Entscheidend für die Entwicklung hin zur gemeinsamen Verteidigung ist für Rossa nicht der formale Beschluss des Europäischen Rates oder die Notwendigkeit primärrechtlicher Änderungen, sondern die materielle Verknüpfung supranationaler und intergouvernementaler Elemente. Je mehr diese von den Prinzipien der Freiwilligkeit und Einstimmigkeit (als Merkmale des intergouvernementalen Charakters der GASP) abweichen, desto tiefer die Integration, die schließlich in einer „Verteidigungsunion", also einer supranationalisierten Verteidigung, enden kann. Daraus ergibt sich aber, dass auch die Verteidigungspolitik bereits supranationale Elemente beinhalten kann, ohne damit

 DOI 10.17104/0044-2348-2026-3-1013

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

die Schwelle zur gemeinsamen Verteidigung zu übertreten. Entscheidend ist nach der Autorin also jeweils der qualitative Charakter der Kombination intergouvernementaler und supranationaler Elemente. Kernszenario 1 bezieht sich somit auf die „gemeinsame Verteidigungspolitik", während Kernszenario 2 sowohl die „gemeinsame Verteidigung" als auch die „Verteidigungsunion" beinhaltet.

Im Schlüsselkapitel fünf untersucht die Autorin schließlich vier mögliche „Finalitätselemente", also mögliche Veränderungen in der Struktur der europäischen Sicherheits- und Verteidigungspolitik im Hinblick auf ihre Vereinbarkeit mit dem deutschen Verfassungsrecht. Dem vorgelagert sind jedoch zwei allgemeine Überlegungen. Zunächst führt die Autorin zur „verteidigungspolitischen Verfassungsidentität" aus und stellt dar, wie das BVerfG insbesondere im *Lissabon*-Urteil die Übertragung des militärischen Gewaltmonopols als Teil der äußeren Souveränität der Bundesrepublik auf die EU (neben dem Parlamentsvorbehalt) als Grenze der Integration (Art. 79 Abs. 3 GG) ansieht und dies insbesondere mit dem Demokratieprinzip begründet (S. 288 ff.). Das militärische Gewaltmonopol interpretiert sie dann wiederum im Lichte der offenen Staatlichkeit, wobei sie zunächst deren spezifische Ausprägungen als Landes- und Bündnisverteidigung herausarbeitet (S. 297 ff.). Während erstere in der Hand des Nationalstaates verbleiben müsse, gelangt die Autorin zu dem Schluss, dass letztere im Lichte der offenen Staatlichkeit durchaus übertragen werden könne. Anders als das Freiwilligkeitsprinzip könne das Rückgriffsprinzip durchbrochen werden, da dieses nicht gleichermaßen mit dem verfassungsrechtlichen Demokratieprinzip verwoben sei. Die Autorin gelangt damit zu einer Auslegung der Rechtsprechung des Bundesverfassungsgerichts, die, anders als gemeinhin angenommen, weitere Integrationsschritte zulässt.

Die zweite Vorüberlegung beschäftigt sich mit dem Friedensgebot des Grundgesetzes als spezifischer Integrationsgrenze (S. 308 ff.). Die Autorin legt an die EU hier (trotz des Art. 23 Abs. 1 GG) den gleichen Maßstab an wie an sonstige kollektive Sicherheitssysteme nach Art. 24 Abs. 2 GG. Damit müsse sich auch die EU am Maßstab des Art. 24 Abs. 2 GG der Einordnung „zur Wahrung des Friedens" messen lassen. Zwar sei der Friedensbegriff nicht von Art. 79 Abs. 3 GG erfasst, bilde aber trotzdem eine eigenständige verfassungsrechtliche Schranke. Die praktische Relevanz dieser Schranke bleibt jedoch vor dem Hintergrund der durch die Autorin selbst festgestellten Konkordanz des grundgesetzlichen mit dem europäischen Friedenskonzept (S. 311) sowie der von der Autorin selbst konstatierten Unbestimmtheit (S. 314) des grundgesetzlichen Friedensbegriffes offen.

DOI 10.17104/0044-2348-2026-3-1013

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Als erstes Finalitätselement untersucht die Autorin in der Folge ein mögliches Abrücken vom Einstimmigkeitsprinzip (Art. 31 EUV) (S. 315 ff.). Dieses sieht sie in direkter Verbindung zum Freiwilligkeitsprinzip und damit entsprechend der Vorüberlegung zur Verfassungsidentität als grundgesetzliche Grenze. Die Unterscheidung zwischen Freiwilligkeitsprinzip und Rückgriffsprinzip dient der Autorin jedoch dazu, den genauen Verlauf dieser Grenze abzustecken. Diese umfasse nicht alle Beschlüsse mit militärischen und verteidigungspolitischen Bezügen (Art. 31 Abs. 4 EUV), sondern nur die konkrete Einsatzentscheidung. Damit ergebe sich für Vorfeldentscheidungen (Finanzierung, Ausrüstung) ein verfassungsrechtlicher Spielraum, vom aktuellen Stand des Primärrechts abzuweichen (S. 324). Gemäß den oben schon geschilderten Ausführungen zu den Begrifflichkeiten würde dies allein noch keinen Übergang zu einer gemeinsamen Verteidigung bedeuten (S. 325).

Das zweite Finalitätselement beschäftigt sich mit einer möglichen Stärkung der SSZ und der Rüstungskooperation. Hier könne nach Rossa zwar eine verpflichtende Einbeziehung aller Staaten in die SSZ erwogen werden, diese Einschränkung der Freiwilligkeit müsste aber durch eine Einräumung eines Vetorechts innerhalb der SSZ ausgeglichen werden, da andernfalls die verfassungsrechtliche Grenze der äußeren Souveränität verletzt wäre (S. 328). Im Rahmen möglicher unional zu verantwortender Rüstungsentscheidungen sei dagegen eine Modifikation des Einstimmigkeitsprinzips nach den im ersten Finalitätselement herausgearbeiteten Grundsätzen möglich, sofern kein Bezug zu einer konkreten Mandatierung bestehe. Eine verpflichtende Mitwirkung an solchen Rüstungskooperationen müsste dagegen wie die verpflichtende Mitwirkung an der SSZ durch ein Vetorecht ausgeglichen werden, damit die verfassungsrechtlichen Grenzen trotz Einschränkung des Freiwilligkeitsprinzips gewahrt blieben (S. 331).

Das dritte Finalitätselement betrifft eine mögliche neue Rolle des Art. 44 EUV. Dieser ermöglicht die Übertragung der Durchführung einer Mission auf einzelne Mitgliedstaaten mit deren Zustimmung. Potenzial, sowohl bei dem Beschluss der Mission als auch der Übertragung vom Einstimmigkeitsprinzip abzuweichen, sieht die Autorin in konsequenter Anwendung der Maßstäbe des ersten Finalitätselements nicht (S. 337). Auch einer möglichen Anwendung des Artikels in der Form, dass er die Übernahme einer Mission durch die EU ermöglicht, die zunächst eine Koalition von Mitgliedstaaten außerhalb des EU-Rahmens übernommen hat („avant-garde-Modell"), steht die Autorin aufgrund zahlreicher Rechtsunsicherheiten skeptisch gegenüber (S. 334 ff.).

Als Letztes und am umfangreichsten beschäftigt sich die Autorin schließlich mit einer möglichen Integration der Streitkräfte (S. 343 ff.).

 DOI 10.17104/0044-2348-2026-3-1013

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Dabei stellt sie drei Modi der Streitkräfteintegration vor: gemischt-nationale Truppenverbände, Handeln im Rahmen von Systemen gegenseitiger kollektiver Sicherheit und schließlich die Aufstellung einer europäischen Armee. Nur bei Letzterer ist eine Zurechnung zu den einzelnen truppenstellenden Staaten nicht mehr gegeben. In der Folge arbeitet die Autorin den ihrer Ansicht nach integrationsfesten Kern des wehrverfassungsrechtlichen Parlamentsvorbehalts heraus (S. 350 ff.). Dabei vertritt sie die Ansicht, dieser sei, neben den ursprünglich durch das BVerfG angeführten Begründungsmustern, auch an die Wesentlichkeitstheorie und damit das Demokratieprinzip rückangeknüpft. Unter Berücksichtigung der Vorüberlegung zur offenen Staatlichkeit ist es nach der Autorin daher eine zentrale Aufgabe des wehrverfassungsrechtlichen Parlamentsvorbehaltes, die Aufrechterhaltung der Wehr- und Bündnisfähigkeit und ihre Umsetzung zu legitimieren (S. 360).

Diese Maßstäbe wendet die Autorin dann auf zwei unterschiedliche Szenarien einer Integration der Streitkräfte an. Zunächst auf eine Vertiefung der Kooperation multinationaler Truppenverbände im Rahmen der Europäischen Union. Nach Rossa soll es möglich sein, das Rückgriffsprinzip zu durchbrechen, womit die EU die Mitgliedstaaten verpflichten könnte, Truppenkontingente für EU-Missionen bereitzustellen. Allerdings müsste die Letztentscheidung über den Einsatz bei den Mitgliedstaaten verbleiben, um dem Freiwilligkeitsprinzip und dem wehrverfassungsrechtlichen Parlamentsvorbehalt Genüge zu tun. Primärrechtlich liege darin entsprechend des von der Autorin herausgearbeiteten qualitativen Begriffsverständnisses nicht notwendigerweise ein Übergang zur gemeinsamen Verteidigung, da darin allein kein überwiegendes supranationales Element zu sehen sei. Eine Übertragung der Befehls- und Kommandogewalt, die auch das „full command" (also im Gegensatz zum bloßen „operational command" die umfassende Befehlsgewalt inklusive truppendienstlicher Befugnisse) umfasst, sei hingegen verfassungsrechtlich unzulässig, da diese die demokratische Rückanbindung der Truppenkontingente an die deutsche Staatlichkeit durchbrechen würde (S. 398).

Schließlich untersucht Rossa als zweites Szenario die Streitkräfteintegration in Form der Aufstellung einer europäischen Armee. Die verfassungsrechtlichen Grenzen sieht sie wie schon zuvor herausgearbeitet primär in dem militärischen Gewaltmonopol sowie dem wehrverfassungsrechtlichen Parlamentsvorbehalt (S. 402). Dabei kommt die Autorin zu dem Befund, dass die Aufstellung einer europäischen Armee, verstanden als Armee von Unionsbürgern unter unionalem Oberbefehl, grundsätzlich verfassungsrechtlich zulässig wäre. Die Bundeswehr müsste daneben als Armee zur Landesverteidigung fortbestehen, um das verfassungsrechtlich notwendige militärische

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

Gewaltmonopol zu wahren (S. 402). Einer Zustimmung des Bundestages zu Einsätzen der europäischen Armee bedürfte es nicht, da dieser allein die Bundeswehr als Bezugsobjekt habe (S. 402, 418). Das Rückgriffsprinzip sei damit (faktisch) durchbrochen, dem Freiwilligkeitsprinzip sei durch einen einstimmigen Ratsbeschluss vor dem Einsatz der europäischen Armee Genüge zu tun (S. 409). Eine konstitutive Stellung des Europäischen Parlaments sieht die Autorin zumindest verfassungsrechtlich nicht angezeigt (S. 410). Primärrechtlich sei allerdings für die Aufstellung einer europäischen Armee aufgrund der zahlreichen primär- und sekundärrechtlichen Auswirkungen die Reichweite der Evolutivklausel erschöpft und ein ordentliches Vertragsänderungsverfahren notwendig (S. 416).

IV.

Insgesamt gelingt es der Autorin, die zahlreichen ungelösten Rechtsfragen im Bereich der europäischen Sicherheits- und Verteidigungspolitik in ein kohärentes Gesamtsystem einzubetten. Viel Arbeit leistet dabei die Interpretation des militärischen Gewaltmonopols im Lichte offener Staatlichkeit, mit der die Autorin zu einer liberalen Lesart der verfassungsgerichtlichen Rechtsprechung und einer möglichen Durchbrechung des Rückgriffsprinzips kommt. Etwas konturlos bleibt daneben der verfassungsrechtliche Friedensbegriff, dessen praktische Konsequenzen wenig konkret werden. Ebenso interessant wären auch Überlegungen dazu gewesen, was normativ daraus folgt, wenn nationale Streitkräfte mit der primären Aufgabe der Landesverteidigung neben europäischen Streitkräften zur Bündnisverteidigung stehen. Insbesondere müssten dann auch normative Maßstäbe dafür aufgestellt werden, wie die verbleibenden nationalen Streitkräfte ausgestattet sein müssten, um nach wie vor die verfassungsrechtlichen Anforderungen an das militärische Gewaltmonopol zu erfüllen. Insgesamt stellt die Arbeit jedoch einen überzeugenden Vorschlag der verfassungsrechtlichen und primärrechtlichen Grenzlinienziehung bei weiterer Integration der europäischen Verteidigungsfähigkeit dar.

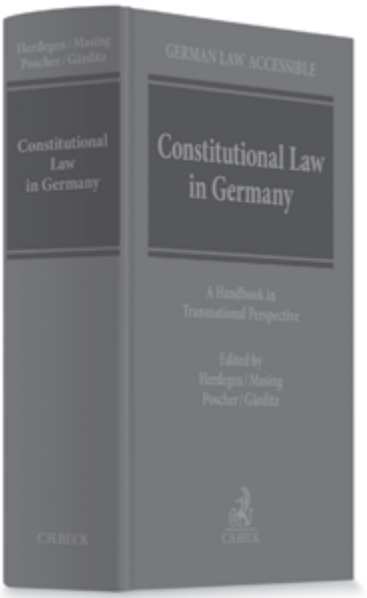
*Alexander Silke**

* Der Verfasser ist Referent im Bundesministerium der Verteidigung. Die vertretenen Ansichten geben allein die private Auffassung des Verfassers wieder.

 DOI 10.17104/0044-2348-2026-3-1013

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access - CC BY

German constitutional law
in Transnational Perspective



Herdegen/Masing/Poscher/Gärditz
Constitutional Law in Germany

2025. XXXII, 1501 pages.
Hardcover € 279,–
ISBN 978-3-406-81608-6

beck-shop.de/36523810

The Handbook

presents German constitutional law in a transnational, comparative perspective that will enable foreign jurists to gain, in the space of a chapter, a solid understanding of both the bases and nuances as well as some of the complexities of German constitutional law. Already published in German, the Handbook will also appear in an English version. The German version focusses on the international, supranational, and comparative influences on German constitutional law.

Advantages at a glance

- a new perspective on German Constitutional Law
- incorporates several legal methods, particularly doctrinal analysis, the interdisciplinary integration of empirical findings from the social sciences, and various sub-methodologies of comparative law and theoretical analysis
- integrated into an analysis of historical developments and experiences

A helpful book

for both German and foreign specialist audiences open to cross-border legal thinking.

Please order at your bookstore or at: **beck-shop.de** | Verlag C.H.Beck GmbH & Co. KG | 80791 München | Fax: +49 (0) 89/381 89-358 | orders@beck.de | 176851
Follow us More information: ch.beck.de/socialmedia

C.H.BECK

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -

beck-online
DIE DATENBANK

4 Wochen kostenlos testen!
bo.beck.de/0219310

Europarecht
Rechtssicheres Know-how garantiert

Schnell, sicher & smart – mit den Fachmodulen von beck-online gestalten Sie Ihre Fallbearbeitung noch rascher, effektiver und zuverlässiger. Einmal mit beck-online gearbeitet, wollen Sie nie mehr darauf verzichten – garantiert!

Europarecht PLUS

PLUS

Die ideale Grundausstattung für Ihre tägliche Arbeit: Führende aktuelle Kommentare zu den europäischen Verträgen, wie z.B. die große Sammlung von **Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union,** oder **Callies/Ruffert, EUV/AEUV,** maßgebende Kommentierungen zum Europäischen Sekundärrecht sowie zum Kartell- und Wettbewerbsrecht, zu Beihilfen, Grundrechten und Rechtsschutz, umfangreiche und aktuelle Rechtsprechung im Volltext, dazu EuZW, EuR, euvr und ZaöRV, aktuelle Vorschriften und vieles mehr, intelligent und komfortabel verlinkt.

€ 134,–/Monat* | Modulvergleich & Preise online: bo.beck.de/021931

Europarecht PREMIUM

PREMIUM

Für komplexe Herausforderungen und ein breiteres Meinungsspektrum: Dieses PREMIUM-Modul kombiniert die aktuellen Kommentierungen mit weiterführender Literatur zum europäischen Primärrecht und ausgewählten Bereichen des Sekundärrechts. Mit Highlights wie **Schwarze/Becker/Hatje/Schoo (Hrsg.) EU-Kommentar (Nomos)** oder **Geiger/Khan/Kotzur/Kirchmair, EUV/AEUV** u. a.m.

€ 210,–/Monat* | Modulvergleich & Preise online: bo.beck.de/109831

*Normalpreis für bis zu 3 Nutzer, Vorzugspreis verfügbar, zzgl. MwSt., 6-Monats-Abo

Verlag C.H.Beck GmbH & Co. KG, Wilhelmstraße 9, 80801 München | 158688 | Folgen Sie uns auf Mehr Infos: ch.beck.de/socialmedia
Irrtümer, Preisänderungen und Druckfehler vorbehalten.

beck-online.DIE DATENBANK genügt.

C.H.BECK

https://doi.org/10.17104/0044-2348-2026-3 https://www.inlibra.com/de/page/agb - Open Access -