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Comment

The Age of the Disaffected Voter: American Democracy and US Foreign Policy under the Second Trump Presidency

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Introduction

The re-election of Donald Trump in 2024 was met with disbelief by many observers in Europe and around the world. Although polls had indicated that the Democratic candidate Kamala Harris would face an uphill battle after incumbent President Joe Biden dropped out of the race due to concerns within the Democratic Party about his electoral viability, few anticipated the scale of Trump's resurgence. Trump did not only manage to flip six of the seven critical swing states,¹ but he secured an outright majority of the popular vote – something he had failed to achieve in 2016 – even if his margin remained narrow at just 1.47 percent.

At first glance, the results demonstrate Trump's ability not only to mobilise his base but also to expand his appeal across a broader range of voter demographics.² Key shifts in voter preferences played a decisive role in Harris's defeat, with Trump making significant gains among Black and Latino voters, particularly men, while Harris struggled to maintain the support levels of her predecessors. The widening gender and educational divides further contributed to Harris's underperformance, as Trump improved his standing among younger and working-class voters, while Harris performed better among affluent, college-educated white voters.

While the 2024 election results suggest a broad political victory for Trump and further consolidation of his influence within the Republican Party, they

¹ Nevada, Arizona, Wisconsin, Michigan, Pennsylvania, and Georgia.

² <<https://www.cfr.org/article/2024-election-numbers>>, last access 17 February 2025.

also highlight deeper fractures within American society. Although it is certainly true that Trump gained the support of a diverse group of voters, to an even unprecedented extent compared to previous Republican candidates, I argue that the American electorate has been increasingly divided between those who seek radical change and those who, exhausted by political turmoil, disengage from political participation entirely.

We are witnessing the rise of the *disaffected voter* – a growing segment of the electorate defined by estrangement from political institutions, distrust in democratic processes, and detachment from both major parties. Unlike traditional swing voters who shift between candidates based on policy preferences, disaffected voters are not motivated by ideological commitment but by a broader dissatisfaction with the political system itself. Their support is often driven by a desire to disrupt the status quo rather than engage in democratic processes to shape policy.

As this comment will show, the rise of the disaffected voter has profound implications for both American democracy and United States (U. S.) foreign policy. It erodes institutional trust, diminishes political participation, and weakens the foundations of democratic stability. These developments are rooted in deeper structural shifts – most notably the decline of social capital, the intensification of polarisation, and the fragmentation of voter alignments, all of which undermine political accountability. Increasingly, large segments of the electorate are either embracing radical disruption or withdrawing from political life altogether rather than working within the system to achieve change.

The following section examines how the disaffected voter has emerged from several interwoven trends that have reshaped American politics over the past few decades. Chief among these is the steady decline of social capital, which has left Americans more isolated, less engaged in civic life, and increasingly cynical about political participation. This decline has coincided with growing polarisation and a fundamental reconfiguration of the electorate, shifting from a two-class system of working- and upper-class voters to a tripartite structure that includes the professional managerial class. Often perceived – particularly by conservatives – as an elite wielding disproportionate cultural and political influence, the professional managerial class has fuelled resentment among working-class voters. Meanwhile, progressive messaging has struggled to bridge the gap between the working class and professional managerial class priorities, further deepening voter alienation.

More critically, as I will argue in a later section, this fragmentation has produced a dysfunctional system of governance in which political opponents are treated as existential threats rather than democratic competitors. This

adversarial climate has eroded democratic legitimacy, fostering disengagement and, in some cases, outright repudiation of democratic governance.

The consequences of this shift are far-reaching. As I will outline in the final section, the disaffected voter weakens traditional mechanisms of political accountability by making it easier for political elites to pursue extreme policies without electoral repercussions. This transformation in voter behaviour and elite incentives not only destabilises American democracy but also has profound consequences for U.S. foreign policy, where symbolic and erratic short-termist decision-making increasingly takes precedence over strategic, long-term planning.

I. The Decline in Social Capital and the Polarisation of American Democracy

The growing disconnect between the American electorate and its political institutions can be traced back to the steady decline of social capital in U.S. society. Social capital – the network of informal norms and relationships – fosters trust, cooperation, and civic engagement, which are critical components of a healthy democracy.³ Unlike economic policies or institutional frameworks, social capital is not easily generated through public policy alone; rather, it emerges organically through deeply ingrained social norms and interactions.⁴

At its core, social capital consists of cooperative norms such as reciprocity, honesty, and commitment within communities. Trust and networks develop as natural byproducts of social interactions, enabling societies to function effectively. However, social capital can produce both positive and negative externalities. On the positive side, religious communities and volunteer organisations cultivate mutual support and civic engagement, while exclusionary groups or echo chambers can foster division and polarisation. The concept of the ‘radius of trust’, originally coined by the political scientist Francis Fukuyama, plays a crucial role in determining how far cooperative norms extend beyond immediate social groups to broader society.⁵

³ Francis Fukuyama, ‘Social Capital, Civil Society and Development’, *TWQ* 22 (2001), 7–20, <<https://doi.org/10.1080/713701144>>, last access 17 February 2025.

⁴ Michael Woolcock, ‘Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework’, *Theory and Society* 27 (1998), 151–208.

⁵ Francis Fukuyama, ‘Social Capital and Civil Society’, Presented at the IMF Conference on Second Generation Reforms, International Monetary Fund, 1999, Washington, DC.

From an economic perspective, social capital plays a vital role in reducing transaction costs by facilitating informal coordination and complementing formal mechanisms such as contracts and bureaucracy. Politically, social capital is indispensable for liberal democracy. It fosters civic engagement, encourages participation in public affairs, and balances state power by promoting self-governance at the community level. Alexis de Tocqueville famously highlighted the role of voluntary associations in countering individualism and strengthening democratic culture.⁶ However, declining social capital correlates with political inefficiencies, rising corruption, and an over-reliance on state intervention to address societal problems.⁷

In his seminal work *Bowling Alone* (2000), the Harvard political science professor Robert Putnam documented the decline of social capital in contemporary America.⁸ His analysis revealed a steady erosion of social trust and civic engagement since the 1970s. Putnam distinguished between two types of social capital: bonding social capital, which reinforces solidarity within homogenous groups (e. g., ethnic associations and clubs), and bridging social capital, which connects diverse groups across social divides (e. g., civil rights organisations). While bonding social capital helps communities endure challenging circumstances, bridging social capital is essential for economic and social mobility.

Putnam's research indicates that social capital in the U.S. rose steadily until the 1970s but has since been in decline. Political participation, civic engagement, religious involvement, workplace relationships, and interpersonal trust have all diminished significantly. He attributes this decline to four primary factors: generational differences, the rise of television and digital media, time and financial pressures, and urban sprawl. Of these, generational differences are the most significant, as older generations, shaped by collective experiences such as World War II, maintained stronger civic habits than younger cohorts. The growing prevalence of television and digital technologies has fundamentally altered social habits, reducing face-to-face interactions and fostering isolation. Meanwhile, increased work demands and suburbanisation have further fragmented social networks.

The consequences of this decline in social capital are profound and far-reaching. Reduced social cohesion weakens collective problem-solving, increases social fragmentation, and undermines trust in institutions. Economic efficiency suffers as transaction costs rise and cooperation diminishes, while

⁶ Alexis de Tocqueville, *Democracy in America*, Vol. 10 (Regnery Publishing 2003).

⁷ Bo Rothstein, 'Social Capital, Economic Growth and Quality of Government: The Causal Mechanism', *New Political Economy* 8 (2003), 49-71.

⁸ Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000).

political engagement declines, leading to weaker democratic participation. Additionally, the erosion of social capital has significant effects on individual well-being, as human connection is vital for mental and physical health.

The decline of social capital in the 1970s coincided with another development: rising polarisation in American politics.⁹ The political realignment of the late 1960s, when Southern conservative Democrats joined the Republican Party and liberal Republicans in the Northeast gravitated toward the Democrats, created increasingly homogenous parties and constituencies. This shift reduced electoral incentives for bipartisan compromise and instead fuelled ideological extremity within both parties. Over time, moderate voices were marginalised or replaced by more radical candidates, deepening divisions within the electorate.

As polarisation intensified, it contributed to what Putnam described as a shift from bridging to bonding social capital. Social networks became more insular, reinforcing political and ideological divides. This ‘double sorting’ phenomenon resulted in social and political identities becoming increasingly intertwined, further entrenching partisan divisions and eroding opportunities for cross-party interaction.

One of the most visible effects of this polarisation is its impact on American families. Political differences have become a leading cause of familial estrangement, with divisions intensifying since the 2016 and 2020 elections.¹⁰ Surveys suggest that one in two adults is estranged from a close relative due to political disagreements. Younger generations, in particular, are more likely to sever ties over political differences, prioritising personal values over familial bonds.

Beyond families, political polarisation has transformed the broader social landscape. Political debates now permeate sports, entertainment, and lifestyle choices, making it increasingly difficult for individuals to escape the partisan divide. Political identity now shapes friendships, workplace relationships, and community interactions. This growing trend has led Americans to view political opponents with distrust and hostility, replacing traditional social divides based on race, religion, or socioeconomic status with ideological barriers.¹¹ As political discourse grows more contentious and adversarial,

⁹ Nolan McCarty, *Polarization: What Everyone Needs to Know* (Oxford University Press 2019).

¹⁰ <<https://time.com/7201531/family-estrangement-us-politics-epidemic-essay/>>, last access 19 February 2025.

¹¹ Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra and Sean J. Westwood, ‘The Origins and Consequences of Affective Polarization in the United States’, *Annual Review of Political Science*, 22 (2019), 129-146.

many Americans have withdrawn from civic life altogether, disillusioned by the toxic and divisive nature of modern politics.

II. The Disaffected Voter and the Decline of Political Accountability

The decline of social capital and the rise of polarisation have fundamentally altered the fabric of American democracy. The erosion of civic engagement, the growing dominance of political identities, and the fragmentation of social trust have all contributed to the rise of the disaffected voter. This disengaged and alienated electorate feels increasingly disconnected from traditional democratic processes and institutions, seeking radical change rather than incremental reform. As Americans retreat from civic life, they become more susceptible to negative partisanship and political cynicism, viewing politics through a lens of frustration and grievance rather than engagement and problem-solving. A 2023 PEW poll shows that 65 % of Americans say they always or often feel exhausted when thinking about politics, and 55 % percent even feel angry.¹² This marks a sharp increase from previous decades – only 12 % of Americans reported feeling angry about politics in 1997, a number that had risen to 24 % by 2020, highlighting a growing sense of frustration and alienation from the political system.¹³

In addition, the decline in social capital and the intensification of political polarisation have created a dysfunctional political process, eroding public trust in government institutions and their ability to address pressing societal challenges such as inequality and public health.¹⁴ Congressional sessions have been marked by partisan infighting, unproductive impeachment inquiries, and a failure to pass essential legislation on matters such as immigration, climate change, and fiscal responsibility. This stagnation is attributed to a lack of bipartisan deliberation and compromise, leading to a government that struggles to perform its fundamental duties.¹⁵ It is unsurprising then that only

¹² <<https://www.pewresearch.org/politics/2023/09/19/americans-dismal-views-of-the-nations-politics/>>, last access 19 February 2025.

¹³ <<https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/>>, last access 19 February 2025.

¹⁴ Jennifer McCoy, Tahmina Rahman, and Murat Somer, 'Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities', *American Behavioral Scientist* 62 (2018), 16-42.

¹⁵ <<https://global.upenn.edu/penn-washington/news/other-threat-democracy/>>, last access 19 February 2025.

16 % of Americans have trust in the federal government to do what is right, down from over 50 % just 20 years ago.¹⁶

As faith in democratic institutions wanes, voters have become increasingly sceptical of the government's capacity to serve their needs, leading many to disengage from the political process entirely or to embrace populist leaders who promise radical change.¹⁷ Authoritarian populism has exploited public frustration with the inefficiency and perceived corruption of the political system. The political scientists Marc Hetherington and Jonathan Weiler argue that polarisation is no longer simply about policy disagreements but reflects deep-seated psychological differences between authoritarian and non-authoritarian worldviews.¹⁸ Authoritarians prioritise order, security, and deference to authority, while non-authoritarians emphasise diversity, autonomy, and openness. According to a 2023 Public Religion Research Institute (PRRI) survey, roughly 38 % of Americans support authoritarianism in response to the direction of the country, favouring a 'leader who is willing to break some rules if that's what it takes to set things right'.¹⁹ This cultural divide has been exacerbated by political elites who exploit fears and insecurities, further pushing disaffected voters toward reactionary and disruptive political movements. In fact, roughly 23 % support political violence to solve problems according to another PRRI poll of 2023.²⁰

The disaffected voter is a product of the evolving estrangement between citizens and the democratic process. Rather than engaging with politics through policy evaluation or ideological alignment, these voters oscillate between disengagement and populist fervour. On one hand, they are cynical and withdrawn from civic participation; on the other, they are highly susceptible to appeals that promise to upend the political order. This tension is reflected in the widening gap between hyper-partisanship and political apathy – where a vocal, highly engaged minority dominates political discourse, while a frustrated and indifferent majority retreats from engagement.²¹ Social media and partisan media further distort public perception, amplifying the voices of

¹⁶ <<https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/>>, last access 19 February 2025.

¹⁷ <<https://www.americanprogress.org/article/drivers-authoritarian-populism-united-states/>>, last access 19 February 2025.

¹⁸ Marc J. Hetherington and Jonathan D. Weiler, *Authoritarianism and Polarization in American Politics*, (Cambridge University Press 2009).

¹⁹ <<https://www.prii.org/research/threats-to-american-democracy-ahead-of-an-unprecedented-presidential-election/>>, last access 19 February 2025.

²⁰ <<https://www.prii.org/research/threats-to-american-democracy-ahead-of-an-unprecedented-presidential-election/>>, last access 19 February 2025.

²¹ Yanna Krupnikov and John Barry Ryan, *The Other Divide: Polarization and Disengagement in American Politics* (Cambridge University Press 2022).

the hyper-engaged and shaping policy debates in ways that do not necessarily reflect broader societal concerns. Meanwhile, many Americans avoid politics not out of ideological extremism but from exhaustion with a system they see as dysfunctional and unresponsive.²²

However, the disaffected voter shares a sense of ideational detachment and de-identification with the principles, functionality, and purpose of American democracy. They increasingly support candidates who advocate radical disruption, regardless of feasibility or adherence to democratic norms.²³ This emboldens political leaders to pursue extreme policies without fear of significant backlash, prioritising symbolic appeals over substantive governance. Disaffected voters care less about upholding democratic principles and more about non-governing – ruling without regard for institutions, the rule of law, or those outside their immediate political tribe. As a shared sense of civic responsibility erodes, cynicism, rather than a vision for governance, guides political behaviour.

The rise of the disaffected voter weakens traditional mechanisms of democratic accountability. Politicians no longer need to appeal to a broad, diverse electorate; instead, they can secure power by catering to ideological extremes and relying on widespread disengagement to suppress opposition. The high rate of incumbency re-election despite pervasive public dissatisfaction reflects how voter apathy allows politicians to evade scrutiny and continue pushing divisive agendas. A striking example of this is the public's fading memory of the January 6, 2021, insurrection – an event with profound consequences for democratic governance and global perceptions of U.S. stability.²⁴ The rapid decline in its political salience highlights how disengagement enables leaders to escape accountability for actions that threaten democratic norms.

The consequences of this shift are far-reaching. Political discourse has become increasingly adversarial, with attacks on democratic institutions and the rule of law proving more politically effective than substantive policy discussions. Both major parties now face internal rifts between establishment figures and anti-establishment factions, further complicating governance. Moreover, as issue saliency becomes politicised through the lens of disaffection, pressing challenges such as climate change, economic inequality, and healthcare reform are increasingly framed not as problems to be solved but as

²² <<https://theconversation.com/after-super-tuesday-exhausted-americans-face-8-more-months-of-presidential-campaigning-225047>>, last access 19 February 2025.

²³ Heather C. Lench, Leslie Fernandez, Noah Reed, Emily Raibley, Linda J. Levine and Kiki Salsedo, 'Voter Emotional Responses and Voting Behaviour in the 2020 US Presidential Election', *Cognition and Emotion* 38 (8) (2024), 1196-1209, doi:10.1080/02699931.2024.2355572.

²⁴ <<https://www.washingtonpost.com/politics/2025/01/06/jan-6-american-attitudes-polling-trump/>>, last access 19 February 2025.

battlegrounds in a zero-sum political war – making consensus and effective policymaking ever more elusive.²⁵

III. Democratic Foreign Policy in the Age of the Disaffected Voter

As trust in democratic institutions and processes erodes, the traditional mechanisms of accountability that have historically constrained and guided U.S. foreign policy are increasingly undermined. With an electorate that is either disengaged or driven by frustration rather than strategic vision, political elites face fewer incentives to pursue consistent, long-term foreign policy goals, instead opting for approaches that prioritise short-term political gains and symbolic gestures over substantive international engagement.

International relations scholars have long argued that democracies possess distinct advantages over autocracies in global affairs, such as enhanced war-fighting capabilities, sovereign borrowing capacity, and the ability to cooperate constructively with like-minded regimes.²⁶ These advantages stem from institutional constraints – both vertical, through electoral accountability, and horizontal, through checks and balances imposed by legislatures, independent judiciaries, and media scrutiny.²⁷ Together, these constraints have historically ensured that democratic leaders prioritise the provision of public goods (i. e., national welfare) over private goods (special interests), adhere to established foreign policymaking norms, and make credible international commitments.²⁸ As a result, U.S. foreign policy has traditionally been marked by stability, reliability, and long-term strategic vision.²⁹

However, in the age of the disaffected voter, these constraints have weakened. With large segments of the electorate disengaged or deeply cynical about politics, political elites face less pressure to justify foreign policy decisions in terms of long-term national interests or global stability. Instead, foreign policy is increasingly leveraged for domestic political manoeuvring.

²⁵ <<https://www.nytimes.com/2022/10/18/us/politics/midterm-election-voters-democracy-poll.html>>, last access 19 February 2025.

²⁶ John Gerring, Carl Henrik Knutsen and Jonas Berge, ‘Does Democracy Matter?’, *Annual Review of Political Science* 25 (2022), 357-375.

²⁷ Yannis Papadopoulos, *Understanding Accountability in Democratic Governance, Elements in Public Policy* (Cambridge University Press 2023).

²⁸ Daniel W. Drezner, ‘The Death of the Democratic Advantage?’, *International Studies Review* 24 (2022), viac017.

²⁹ Brett Ashley Leeds and Michaela Mattes, *Domestic Interests, Democracy, and Foreign Policy Change* (Cambridge University Press 2022).

International institutions, once seen as pillars of U.S. global leadership, are now frequently framed as threats to national sovereignty – positions that resonate with disaffected voters who view institutions with scepticism rather than as safeguards of governance stability. This shift allows political elites to justify withdrawing from international agreements, undermining multilateral cooperation, and prioritising unilateral actions that project decisiveness while often delivering little substantive progress. It is thus unsurprising that one of Trump's first actions upon returning to office was to sign executive orders withdrawing the U.S. from the World Health Organization and the Paris Climate Accord.

Another consequence of this shift is the blurring of distinctions between allies and adversaries. The erosion of social capital has fostered a transactional view of foreign relations, where alliances are no longer valued for their stability and shared values but are instead assessed through an immediate cost-benefit lens. A 2024 Pew Research Center (PEW) poll reveals a notable decline among the American electorate's beneficial view of the North Atlantic Treaty Organization (NATO), particularly among Republicans and independents.³⁰ This fosters uncertainty among allies and emboldens adversaries, who see opportunities to exploit inconsistent U.S. commitments and policies. A striking example is NATO's muted response to Trump's assertion that the U.S. should assume control over Greenland, following Denmark's request that its allies refrain from engaging with such provocations.³¹

In this environment, foreign policy is increasingly reduced to performance politics, where symbolic gestures and headline-grabbing pronouncements take precedence over substantive diplomatic engagement. The incentive for political leaders is to appear decisive and bold, even if their actions are largely superficial or ineffective. Announcements of tariffs, threats to withdraw from international organisations, and high-profile but inconsequential summits become tools to signal strength to disaffected voters while avoiding the complexities of genuine diplomatic engagement. This performative approach to foreign policy enables leaders to cultivate an image of action while, in reality, achieving very little.

Furthermore, the disaffected voter's preference for disruption over pragmatism encourages political elites to pursue more extreme foreign policy measures. The need to project toughness takes precedence over sustainable diplomatic solutions, leading to impulsive tariffs, abrupt renegotiations of

³⁰ <<https://www.pewresearch.org/global/2024/05/08/americans-opinions-of-nato/>>, last access 19 February 2025.

³¹ <<https://www.ft.com/content/dbb70dc0-0038-4b40-9f5f-f56a867b5eaf>>, last access 19 February 2025.

longstanding agreements, and an embrace of isolationist rhetoric. These moves may provide short-term political benefits, but they come at the cost of long-term strategic coherence, further destabilising America's role in the international order.

IV. The Trump Administration and America's Future Role in the World

The consequences of this political shift are difficult to predict with certainty. However, it is evident that President Trump's second administration will enjoy significant latitude in shaping foreign policy with minimal constraints from an increasingly disaffected public. The erosion of accountability mechanisms has created an environment in which foreign policy decisions are driven less by strategic imperatives and more by immediate political calculations. The Trump administration's proposals to purchase Greenland or to incorporate Canada as the 51st American state exemplify how political elites, freed from meaningful scrutiny, are emboldened to pursue unconventional, and at times impractical, ideas without significant domestic pushback. Similarly, Trump's repeated claims that he could swiftly end the war in Ukraine and his assurances that tariffs would not raise consumer prices – positions that his administration has already begun to walk back – highlight the dominance of short-term political messaging over the complexities of international diplomacy and economic realities.

Another critical factor shaping U.S. foreign policy under the Trump administration will be the internal dynamics of his executive branch. The second Trump presidency is poised to be characterised by what can best be described as court politics – a form of governance in which policy formulation and execution are dictated not by rational deliberation or institutional norms but by the competition among factions vying for the favour of the president.³² In an environment where accountability is weak and political expediency reigns, court politics replaces strategic coherence with personal loyalty, ideological opportunism, and performative policymaking.³³

Court politics thrives when a leader, unconstrained by institutional guardrails, encourages rival factions to compete for influence, not by presenting well-reasoned policies grounded in expertise, but by appealing to the leader's

³² <<https://www.nytimes.com/2025/01/10/opinion/ezra-klein-podcast-erica-frantz.html>>, last access 19 February 2025.

³³ Erica Frantz, *Authoritarianism: What Everyone Needs to Know* (Oxford University Press 2018).

personal preferences and political instincts. Under Trump's leadership, this dynamic has intensified due to his preference for loyalty over competence and his inclination to reward those who mirror his rhetoric and reinforce his worldview. As a result, the composition of his cabinet and White House staff is expected to reflect the fault lines within the broader Republican Party, divided into competing factions that prioritise different, and often contradictory, foreign policy goals.

One faction, composed of staunch national protectionists and populist loyalists, is likely to advocate for an aggressive, isolationist foreign policy, promoting economic protectionism, a hardline stance against China, and a transactional approach to alliances. This group, which includes prominent figures who align with Trump's 'America First' rhetoric such as Pete Hegseth (Secretary of Defence), Tulsi Gabbard (nominee for Director of National Intelligence), Kristi Noem (Secretary of Homeland Security) or Elisa Stefanik (nominee for Ambassador to the United Nations), is expected to push for policies that further disengage the U.S. from international institutions, reinforcing the perception that multilateral organisations are obstacles rather than assets to national sovereignty.

In contrast, the libertarian-leaning faction within the administration is likely to resist interventionist policies and push back against protectionist economic measures that could harm global trade relationships. This faction, consisting of figures like Marco Rubio (Secretary of State), Doug Burgum (nominee for Secretary of the Interior), Lori Chavez-DeRemer (nominee for Secretary of Labour) or Robert F. Kennedy Jr. (nominee for Secretary of Health) sees international engagement primarily through an economic lens, emphasising deregulation and free-market competition over geopolitical concerns. However, their influence within the administration will be contingent on Trump's willingness to temper his populist impulses with pragmatic economic considerations – a balance that proved tenuous in his first term.

A third faction, composed of representatives from the business elite, including Scott Bessent (Secretary of Finance), Cantor Fitzgerald (nominee for Secretary of Commerce), Chris Wright (nominee for Secretary of Energy) or Elon Musk (nominee for potentially new Department of Government Efficiency) is expected to promote policies that prioritise economic interests over ideological battles. They may advocate for maintaining trade relationships with Europe and balancing economic decoupling from China with strategic engagement, recognising the costs of complete disengagement. However, their influence may be limited by the nationalist rhetoric dominating Trump's political base and the broader sentiment among disaffected voters who see globalisation as a threat rather than an opportunity.

The competition among these factions will shape foreign policy in unpredictable ways, with Trump acting as the ultimate arbitrator, often swayed by the faction that best aligns with his immediate political goals rather than long-term strategic interests. The influence of court politics in Trump's second term is further reinforced by the role of his closest advisors and White House staff, who are expected to act as gatekeepers, insulating the president from dissenting views and limiting congressional oversight. Consequently, congressional Republicans, particularly those in leadership positions or on key foreign policy committees, may find themselves sidelined, with their influence diminished in favour of Trump's inner circle of loyalists.

This dynamic is likely to exacerbate the trend of executive overreach, with key decisions increasingly made within the confines of the White House rather than through deliberative interagency processes. This, in turn, makes policy volatility and arbitrariness more likely. His return to office suggests a shift to lawfare, as executive orders flood the system, many already facing legal challenges that sideline legislative oversight and voter input. The administration's growing reliance on executive power over institutional deliberation reflects a broader trend toward authoritarian-style governance, where policy decisions are increasingly shielded from democratic accountability. This shift will extend to foreign policy, where decisions will be shaped by personalist leadership and political loyalty rather than by expert-driven assessments or bipartisan deliberation.

This internal chaos will have significant consequences for America's global role. Allies once reliant on U.S. stability must now navigate an increasingly erratic diplomatic landscape, as conflicting factions within the Trump administration send mixed signals on NATO, trade, and security alliances. The perception of the U.S. as an unreliable partner will only deepen as foreign policy becomes reactive and fragmented. Meanwhile, Trump's narrow 52-seat Senate majority falls short of the 60 votes needed to bypass the filibuster, ensuring that major legislative efforts will still require bipartisan support, adding further unpredictability to U.S. global engagement.

The broader consequence is the U.S.'s accelerated, yet selective retreat from the global order. Once a key architect of international institutions, the U.S. is increasingly acting as a transactional power, engaging only when immediate gains are clear. However, this retreat will not take the form of a wholesale exit from multilateral organisations but rather a strategic hollowing out of U.S. influence within them – scaling back participation, withholding funding, and undermining institutional commitments. This approach will allow the administration to reap the benefits of selective engagement while avoiding long-term obligations.

V. Concluding Reflections

The rise of the disaffected voter and the internal factionalism within the Trump administration have the potential to fundamentally reshape U.S. foreign policy. As democratic accountability mechanisms weaken and decision-making becomes increasingly driven by court politics, American foreign policy is likely to become more erratic, short-sighted, and unpredictable. As I have argued here, this erosion of institutional constraints foregrounds a more unilateralist and volatile foreign policy approach. This shift will likely manifest in diminished commitments to multilateralism, an intensified focus on great power competition, and a greater reliance on performative diplomacy rather than substantive engagement.

Similar patterns can be observed in comparative cases of democratic backsliding, where governments abandon long-standing diplomatic norms, renegotiate international agreements with minimal public legitimacy, and engage in abrupt foreign policy shifts that destabilise strategic partnerships.³⁴ Addressing these challenges will require renewed efforts to re-engage the electorate, rebuild trust in democratic institutions, and restore strategic coherence in policymaking. Without such efforts, the U.S. risks further erosion of its global leadership role, with lasting consequences for international order and stability.

The global response to Trump's re-election has been divided. While some states view his return as an opportunity to advance their own strategic interests, traditional U.S. allies – particularly in Europe and South Korea – have expressed notable pessimism, raising concerns about the weakening of the geopolitical 'West'. This divergence in perspectives suggests that Europe may struggle to maintain unity or exert global influence in leading an outright resistance to the new administration. Nevertheless, recent surveys indicate that many around the world view the European Union as a power on par with the U.S. and China – an asset European leaders should leverage as they navigate the uncertainties of the coming years.³⁵

In light of these developments, it is imperative for European policymakers to acknowledge and adapt to the realities of a more transactional world. Rather than attempting to lead a global liberal opposition to Trump's administration, Europe should focus on strengthening its strategic autonomy and cultivating partnerships that align with its long-term interests. This requires

³⁴ Benjamin J. Appel and Sarah E. Croco, 'Democratic Backsliding and Foreign Policy' (May 2024). IGCC Working Paper No. 2, available at: <<http://escholarship.org/uc/item/8s31h6c9>>, last access 20 February 2025.

³⁵ <<https://ecfr.eu/publication/alone-in-a-trumpian-world-the-eu-and-global-public-opinion-after-the-us-elections/>>, last access 19 February 2025.

pragmatic engagement with a diverse range of global actors, reinforcing the European Union's role as a stabilising force amid shifting geopolitical dynamics. By doing so, Europe can maintain its influence, uphold its values, and safeguard its strategic interests in an increasingly unpredictable international order.

Gordon M. Friedrichs

Re-Reading Historic Articles in the ZaöRV: Anniversary Series

Claiming Legality – German Lawyers under the Swastika and the Aggression against Poland

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Abstract

The article studies how German lawyers under the swastika justified the German aggression against Poland in 1939 and questioned the support of the United States for Poland and its Allies. It distinguishes three lines of argument: First, they claimed that the Kellogg-Briand Pact was devoid of normative content and thus could not bind the German Reich. This argument was coupled with a political critique of the League of Nations Covenant and the Kellogg-Briand Pact as instruments for maintaining the territorial status quo. Second, they put forward that the German Reich was acting in self-defence and that it was Poland, France, and Great Britain who had violated the Covenant and the Pact. Third, they rejected efforts to reconceptualise the existing rules of neutrality in light of the Covenant and the Pact. Reliance on a more traditional understanding of neutrality was intended to raise legal obstacles to siding with Poland, France, and Great Britain for third states such as the United States.

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I. Introduction

On September 1, 1939, Germany invaded Poland. Two days later, France and Great Britain declared a ‘state of war’ between themselves and the German Reich.¹ The British dominions of Canada, Australia, New Zealand, South Africa, semi-sovereign India, and the independent states of Iraq and Egypt soon followed. This marked the beginning of World War II in Europe. By 1945, more than 60 million people, most of them civilians, had died in the global conflict between the Allies (especially France, Great Britain, Poland, and later the Soviet Union and the United States) and the Axis powers (especially Germany, Italy, and Japan).² In the eyes of many, the outbreak of war meant the end of the League system and was the final nail in the coffin of the prospects of collective security.³ At first glance, it seems to make little sense to look for references to international peace and security law at this point in time.

But even in September 1939, the main protagonists relied on international law. The less sovereignty-oriented ‘new’ international law that had emerged as a response to World War I and found expression in the *Covenant of the League of Nations* and the *1928 Treaty for the Renunciation of War* (the Kellogg-Briand Pact)⁴ was used to justify the resort to war. In the wake of the German invasion, the French and British governments argued that the German military actions violated the Pact triggering the obligations under mutual assistance agreements with Poland.⁵

According to the French communication to the League of Nations, the ‘aggression committed on September 1st by the German Government against Poland [...] in violation of the undertakings contracted, in the most complete freedom, towards both Poland itself and all the States signatories of the Pact

¹ Communications relating to the Present State of War, League of Nations Official Journal 20 (1939), 387-394 (387 f.).

² See instead of many Anthony Beever, *The Second World War* (Weidenfeld & Nicolson 2012).

³ On the contemporary view on the end of collective security see for instance Marcel Hoden, ‘Europe without the League’, *Foreign Aff.* 18 (1939), 13-28 (13); Hans Wehberg, ‘Warum scheiterte der Völkerbund?’, *Friedens-Warte* 40 (1940), 141-145; for a historical assessment see Zara Steiner, *The Triumph of the Dark. European International History 1933-1939* (Oxford University Press 2013).

⁴ On the ‘new’ international law see James W. Garner, *Le développement et les tendances récentes du droit international*, *RdC* 35 (1931 I), 605-720 (609).

⁵ France and Britain had concluded assistance treaties with Poland in 1921/1925 and in 1939 respectively, *Franco-Polish Treaties of 1921 and 1925*, <<https://avalon.law.yale.edu/wwii/ylbka1.asp>>, last access 21 January 2025; *Agreement of Mutual Assistance between the United Kingdom and Poland*, 25 August 1939, <<https://avalon.law.yale.edu/wwii/blbk19.asp>>, last access 21 January 2025.

for the Renunciation of War of August 28th, 1928' established France's obligation to assist Poland.⁶ Similarly, the British government declared that the German government had committed an 'act of aggression against a Member of the League of Nations'. This action had been taken 'in disregard of the obligations which the German Government had assumed towards Poland and the other signatories of the Treaty for the Renunciation of War of August, 27th 1928'.⁷ Both states concluded that accordingly they were in a 'state of war' with the German Reich.⁸

The National Socialist government, in contrast, did not put forward an official legal argument for its military action in Poland. Instead, the National Socialists staged a plot to politically justify their actions as a defensive response to Polish aggression. The *Gleiwitz* incident and similar actions on the German-Polish border on the night of August 31, 1939 have become prime historical examples of false flag attacks. SS troops in Polish uniforms broadcasted an anti-German message in Polish from an allegedly captured German radio station.⁹ In a speech to the Reichstag on September 1, 1939, Hitler suggested that Germany was responding to Polish atrocities. 'After twenty-one border incidents were recorded the other night, tonight there were fourteen, including three very serious ones. I have therefore now decided to speak to the Poles in the same language that Poland has been using towards us for months. [...] For the first time tonight, Poland fired shots on our own territory also through regular soldiers. Since 5:45a.m., the fire is being returned. From now on bombs will be met by bombs.'¹⁰ Although this statement did not refer to the legal rules of peace and security, it could easily be linked to the legal doctrine of self-defence.

This opened the floor for legal debate among international lawyers. British and French lawyers did not put much effort into supporting their governments' case (perhaps because it was too obvious?).¹¹ In contrast, as the article

⁶ Communications relating to the Present State of War (n. 1), 387.

⁷ Communications relating to the Present State of War (n. 1).

⁸ Communications relating to the Present State of War (n. 1).

⁹ On this see Jürgen Runzheimer, 'Der Überfall auf den Sender Gleiwitz im Jahre 1939', *Vierteljh. Zeitgesch.* 10 (1962), 408-426.

¹⁰ 'Führer' und Reichskanzler Adolf Hitler in seiner Ansprache vor dem deutschen Reichstag, 1. September 1939, <<https://archive.org/details/1.-september-1939-fuhrer-und-reichskanzler-adolf-hitler-in-seiner-ansprache-vor->>, last access 21 January 2025.

¹¹ Most international lawyers assumed that Germany had been the aggressor without going into a deeper doctrinal analysis. For instance, Quincy Wright merely pointed to the German 'invasion' of Poland but did not go into detail, Quincy Wright, 'The Present Status of Neutrality', *AJIL* 34 (1940), 391-415 (409); implicit also in René Cassin, 'Présent et avenir de la neutralité', *Esprit International* 14 (1940), 48-69; James T. Shotwell, 'War as an Instrument of Politics', *International Conciliation* 20 (1940), 205-213.

will show, German international lawyers under the swastika¹² supported the National Socialist war effort by ‘claiming legality’ for the German Reich’s military actions in Poland and by criticising US support for France and Great Britain. This group consisted of Carl Bilfinger, Axel Freytagh von Loringhoven, Carl Schmitt, Wilhelm Grewe, and Ferdinand Schlüter, who were all but one members of the National Socialist German Workers’ Party (NSDAP). While not a party member, Freytagh von Loringhoven was guest of the NSDAP in the Reichstag since 1933 as a former member of parliament for the dissolved German National People’s Party (DNVP).¹³

The arguments about the aggression against Poland have not yet received much attention in scholarship. The ‘turn to history’¹⁴ has not led to a particularly deep engagement with National socialist conceptions of international law. Key works associated with the ‘turn’ – such as Martti Koskenniemi’s *The Gentle Civilizer of Nations: The Rise and Fall of International Law (1870-1960)* – do not touch upon the relationship between National Socialism and international law.¹⁵ The existing literature on the subject does not focus on the justifications for the German aggression.¹⁶ As an exception, Bernhard Roscher points to the attempts of some German lawyers to minimise the

¹² The terminology is borrowed from Michael Stolleis, Michael Stolleis, ‘Against Universalism – German International Law under the Swastika: Some Contributions to the History of Jurisprudence 1933-1945’, *GYIL* 50 (2007), 91-110.

¹³ These affiliations are mostly well-known, see Michael Stolleis, *A History of Public Law in Germany 1914-1945*, (Oxford University Press 2004), 149, 271, 283, 340, 462; for Ferdinand Schlüter see *Institutsfragebogen 1945*, 20.12.1945, Ordner ‘Bilanz 1945. Aufbau nach 1945’, Max-Planck-Institut für ausländisches öffentliches Recht, Heidelberg (received by Dr. Philipp Glahé).

¹⁴ On the ‘turn’ see George Rodrigo Bandeira Galindo, ‘Martti Koskenniemi and the Historiographical Turn in International Law’, *EJIL* 16 (2005), 539-559; Matthew Craven, ‘Introduction: International Law and Its Histories’ in: Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Brill 2007), 1-25 (3 ff.).

¹⁵ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

¹⁶ Dan Diner, ‘Rassistisches Völkerrecht. Elemente einer nationalsozialistischen Weltordnung’, *Viertelj. Zeitgesch.* 37 (1989), 23-56; Stolleis, *Against Universalism* (n. 12), 91 ff.; Detlev Vagts, ‘International Law in the Third Reich’, *AJIL* 84 (1990), 661-704; Manfred Messerschmitt, ‘Revision, Neue Ordnung, Krieg. Akzente der Völkerrechtswissenschaft in Deutschland 1933-1945’, *Militär-geschichtliche Mitteilungen* 9 (1971), 61-95; Rüdiger Wolfrum, ‘Nationalsozialismus und Völkerrechtswissenschaft’ in: Franz Jürgen Säcker (ed.), *Recht und Rechtslehre im Nationalsozialismus* (Nomos 1992), 89-102; Diemut Majer, ‘Die Perversion des Völkerrechts unter dem Nationalsozialismus’, *Jahrbuch des Instituts für Deutsche Geschichte Tel Aviv* 14 (1985), 311-332; Felix Lange, ‘The Dream of a Völkisch Colonial Empire: International Law and Colonial Law During the National Socialist Era’, *London Review of International Law* 5 (2017), 343-369.

normative content of the Kellogg-Briand Pact in the context of the outbreak of World War II.¹⁷

While Roscher's study is an important building block, this paper aims at a deeper and more systematic assessment. It distinguishes three lines of argument developed by German international lawyers under the swastika and situates them within the larger struggle over the limits of the right to wage war in the late 1930s and early 1940s. First, it was claimed that the Kellogg-Briand Pact was in any case devoid of normative content and thus could not bind the German Reich. This argument was coupled with a political critique of the League of Nations Covenant and the Kellogg-Briand Pact as instruments for maintaining the territorial *status quo* (II.). Second, it was argued that the German Reich was acting in self-defence and that it was Poland, France, and Great Britain who had violated the Covenant and the Pact (III.). Third, German lawyers under the swastika rejected efforts to reconceptualise the existing rules of neutrality in light of the Covenant and the Pact. Reliance on a more traditional understanding of neutrality was intended to raise legal obstacles to the support of the United States to France and Great Britain in World War II (IV.).

Taken together, the analysis sheds light on the current debate about the evolution of doctrines on the 'outlawry of war'. While Oona A. Hathaway's and Scott J. Shapiro's influential monograph *The Internationalists: How a Radical Plan to Outlaw War Remade the World* emphasises the normative and factual impact of the Kellogg-Briand Pact,¹⁸ some have criticised the work for overemphasising its relevance.¹⁹ This contribution shows that the normative framework for peace and security in general and the Pact in particular, have not generally been seen as 'scraps of paper',²⁰ nor as a 'radical

¹⁷ While this is the most comprehensive assessment of this issue so far, Roscher does not systematise the arguments and does not reference the highly relevant writings of Axel von Freytagh-Loringhoven, see Bernhard Roscher, *Der Briand-Kellogg-Pakt von 1928. Der "Verzicht auf den Krieg als Mittel nationaler Politik" im völkerrechtlichen Denken der Zwischenkriegszeit* (Nomos 2004), 262-267; also Daniel Marc Segesser mentions key writings on 'Kriegsschuld' by German authors in his assessment of the legal debate about the criminalisation of war crimes between 1872 and 1945, see Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht? Die Abmündung von Kriegsverbrechen in der internationalen fachwissenschaftlichen Debatte 1872-1945* (Brill Schöningh 2010), 301-306.

¹⁸ Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017).

¹⁹ For critical reviews see Anna Spain Bradley, 'The Internationalists: How A Radical Plan to Outlaw War Remade the World. By Oona A. Hathaway and Scott J. Shapiro', *AJIL* 112 (2018), 330-335; Charlotte Peevers, 'Liberal Internationalism, Radical Transformation and the Making of World Orders', *EJIL* 29 (2018), 303-322.

²⁰ See as an example the debate in the British parliament of the time, <https://hansard.parliament.uk/lords/1935-02-20/debates/55b8f0a2-14cc-4a5e-8b9f-51a4596b1bf0/Briand-Kellogg_Pact>, last access 21 January 2025.

plan[s] that remade the world'.²¹ Instead the discussions demonstrate that the Pact was part and parcel of a struggle over different visions of how to regulate war and peace in the 1930s, 1940s and beyond.

II. The Alleged Lack of Normative Force of the Pact

In the late 1930s, two treaties were particularly important for legal assessments of war and peace. The Covenant of the League of Nations aimed to achieve international peace and security and established organs such as the League Council and the League Assembly for that matter. The Covenant contained procedural obligations about what had to be done before a state could legally go to war. The elaborate procedural regime provided for prior arbitration or a Council report, as well as a mandatory waiting period before military action amounting to war could be taken (Arts 12 to 15). If a League member went to war without complying with the procedure, the Covenant provided for automatic economic sanctions and authorised military sanctions (Art. 16).²²

The Kellogg-Briand Pact of 1928 then placed a substantive limit on war-making. In its Art. I, the High Contracting Parties declared 'that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another'. However, unlike the Covenant, it was silent on the issue of sanctions. The Pact was ratified by 63 states, including all the major powers.

How did German international lawyers associated with the National Socialist regime interpret these treaties in the context of the German invasion of Poland? With regard to the Covenant, the argument was quite simple: The Covenant did not apply to the German Reich in view of Germany's withdrawal from the League. Art. 1 III provided for a two-year notification period before withdrawal from the League became effective.²³ Since Germany

²¹ Hathaway and Shapiro, *Internationalists* (n. 18).

²² Some highlighted that the Covenant also contained a prohibition of conquest by force in its Article 10, Titus Komarnicki, *La question de l'intégrité territoriale dans le Pacte de la Société des Nations (l'article X du Pacte)*, (Les Presses Universitaires de France 1923). On the Covenant from today's perspective Robert Kolb (ed.), *Commentaire sur le pacte de la société des nations* (Bruylant 2015).

²³ Art. 1 III of the Covenant stipulated: 'Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal'; on its interpretation Walther Schücking and Hans Wehberg, *Die Satzung des Völkerbundes* (Vahlen 1924), 254-255; Jean Ray, *Commentaire du pacte de la société des nations* (Recueil Sirey 1930), 110-113.

had given notice of its withdrawal in October 1933, after the National Socialist government had taken power, the German Reich was no longer bound by the Covenant in 1939.²⁴ Not only Germany, but also Japan, Paraguay, and Italy left the League in the 1930s in order to free themselves from their legal obligations.²⁵

A similar argument did not apply to the Kellogg–Briand Pact. The German Reich had subscribed to its Art. I renouncing war as one of its original members. The Pact thus was binding on the German Reich even in 1939. German lawyers under the swastika therefore had to develop a somewhat more sophisticated justificatory strategy.

One attempt stemmed from Carl Bilfinger (1879–1958). In 1940, Bilfinger justified the German aggression in Poland in his article ‘*Die Kriegserklärungen der Westmächte und der Kelloggpackt*’.²⁶ The article was published in the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) which was edited at the Berlin *Kaiser-Wilhelm-Institute for Foreign Public Law and Public International Law* (KWI).²⁷ At the time, Bilfinger was a Professor for Public Law and International Law at the University of Heidelberg with close ties to the KWI.²⁸ Bilfinger published regularly in its journal, probably because its director Viktor Bruns was his cousin. After Bruns’ death in 1943, Bilfinger succeeded him as the new director from 1944 to 1945.²⁹

²⁴ For this argument see Axel Freiherr von Freytagh-Loringhoven, *Kriegsausbruch und Kriegsschuld 1939* (Essener Verlagsanstalt 1940), 11.

²⁵ Some indicated that the case could be made against effective withdrawal by Japan since it was questionable whether it had fulfilled all its obligations as a precondition for League withdrawal, see Josephine Joan Burns, ‘Conditions of Withdrawal from the League of Nations’, *AJIL* 29 (1935), 40–50 (45–47).

²⁶ Carl Bilfinger, ‘Die Kriegserklärungen der Westmächte und der Kelloggpackt’, *HJIL* 10 (1940), 1–26.

²⁷ On the role of the Institute in German international legal scholarship see Felix Lange, ‘Between Systematization and Expertise for Foreign Policy: The Practice-Oriented Approach in Germany’s International Legal Scholarship (1920–1980)’, *EJIL* 28 (2017), 535–558; Ingo Hueck, ‘Die deutsche Völkerrechtswissenschaft im Nationalsozialismus. Das Berliner Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht, das Hamburger Institut für Auswärtige Politik und das Kieler Institut für Internationales Recht’ in: Doris Kaufmann (ed.), *Geschichte der Kaiser-Wilhelm-Gesellschaft im Nationalsozialismus. Bestandsaufnahme und Perspektiven der Forschung*, Vol. 1 (Wallstein 2000), 490–527; Rüdiger Hachtmann, ‘Das Kaiser-Wilhelm-Institut für ausländisches öffentliches Recht und Völkerrecht 1924 bis 1945’, *MPIL* 100, 15 December 2023, <<https://mpil100.de/2023/12/das-kaiser-wilhelm-institut-fuer-a-uslaendisches-oeffentliches-recht-und-voelkerrecht-1924-bis-1945/>>, last access 21 January 2025.

²⁸ From 1924 to 1935, Bilfinger had been Professor of Public Law and Public International Law at the University of Halle.

²⁹ Philipp Glahé, Reinhard Mehring and Rolf Rieß (eds), *Der Staats- und Völkerrechtler Carl Bilfinger (1879–1958): Dokumentation seiner politischen Biographie. Korrespondenz mit Carl Schmitt, Texte und Kontroversen* (Nomos 2024), 11–24.

Despite being a strong supporter of National Socialist revisionist foreign policy, Bilfinger continued his academic career after World War II. In 1949, Bilfinger became director of the renamed Heidelberg Max Planck Institute for Comparative Public Law and Public International Law – the same year he turned 70.³⁰

Given the international visibility of the *ZaöRV* as one of the leading German international law journals, Bilfinger's 1940 article was the most prominent piece on the outbreak of World War II that was also addressed to an international audience.³¹ The main focus of the article was a critique of the Kellogg-Briand Pact as the main 'legal title on which the Western powers wanted to base their justification for the attack against Germany'.³² Bilfinger thus took issue with the British and French statements of September 3, 1939, in which they accused Germany of violating the Pact by its aggression against Poland.³³

Against this background, Bilfinger put forward a general critique of the Pact. It would be wrong to rely on the Pact because the legal instrument 'does not reach the minimum level of certainty required for a legal norm'.³⁴ Thus, Germany could not have violated a legal obligation toward Poland even if it had initiated the hostilities.³⁵ For him, the Kellogg-Briand Pact had no legal force and therefore could not constrain German action in Poland.

Bilfinger supported his 'lack-of-normative-force' claim with two arguments. First, he argued that questions of war and peace could not be meaningfully addressed by (international) law. The Christian idea of a just war, or *bellum justum*, would not be plausible in the 20th century since the 'structure of modern international law' would be based on a premise of a 'coexistence of independent states'.³⁶ Bilfinger was referring to the *bellum justum* idea often associated with Augustine of Hippo. Augustine had introduced a distinction between unjust and just wars, the latter having a just cause (*causa iusta*) and aiming at restoring peace (*iustus finis*).³⁷ For Bilfinger such a

³⁰ Felix Lange, 'Carl Bilfingers Entnazifizierung und die Entscheidung für Heidelberg. Die Gründungsgeschichte des völkerrechtlichen Max-Planck-Instituts nach dem Zweiten Weltkrieg', *HJIL* 74 (2014), 697-731.

³¹ His colleagues advanced their claims about the legality of German action mostly in fora addressed primarily to a German audience, see below.

³² Bilfinger, 'Kriegserklärungen' (n. 26), 4 (all translations are my own).

³³ Communications relating to the Present State of War (n. 1), 387.

³⁴ Bilfinger, 'Kriegserklärungen' (n. 26), 7.

³⁵ Bilfinger, 'Kriegserklärungen' (n. 26), 7.

³⁶ Bilfinger, 'Kriegserklärungen' (n. 26), 7-8.

³⁷ Raimund Schulz, 'Augustinus und die Vorstellung vom „gerechten Krieg“' in: Hans-Joachim Heintze and Annette Fath-Lihic (eds), *Kriegsbegründungen. Wie Gewaltanwendung und Opfer gerechtfertigt werden sollten* (Berliner Wissenschaftsverlag 2008), 11-18.

distinction was necessarily linked to the Christian idea of a world state.³⁸ Bilfinger suggested that '[m]odern international law cannot fundamentally and universally organize the protection of the sovereignty of states through measures that are incompatible with this independence of the states themselves'.³⁹ Moreover, the 'existential struggle between sovereign states' cannot be solved 'by universal substantive legal principles (*Rechtssätze*)'.⁴⁰ In this 'existential struggle every opponent fights for his fundamental right of existence: therefore, the "jus ad bellum"'.⁴¹

For Bilfinger, the term 'jus ad bellum' had to be understood as a free right to wage war. Legal rules would have no constraining force in this respect. Efforts to regulate issues of peace and security were futile. Accordingly, Bilfinger suggested that the Western powers would reach the 'extra-legal sphere' when they invoked the Pact in connection with the outbreak of World War II.⁴²

Second, Bilfinger argued that the Covenant and the Pact would discriminate against Germany because they were intended to confirm the existing territorial *status quo*. As Bilfinger pointed out in his 1940 article, the 'reservations'⁴³ that would bring the Pact into line with the Covenant would mean a 'doubling of the [...] status quo safeguards' to the detriment of Germany.⁴⁴ During the negotiations on the Pact, a US note of June 1928 clarified that 'the Covenant can [...] be construed as authorising war in certain circumstances' but that there was 'no necessary inconsistency between the Covenant and the idea of an unqualified renunciation of war'.⁴⁵ For Bilfinger, this was evidence of the problematic link between the Covenant and the Pact.⁴⁶ The prohibition of war in the Pact and the prohibition of territorial changes under Art. 10 of the Covenant would be against the interests of the powers that had lost World War I. Linking the Pact to the Covenant would go against their interests and violate

³⁸ Bilfinger, 'Kriegserklärungen' (n. 26), 8.

³⁹ Bilfinger, 'Kriegserklärungen' (n. 26), 8.

⁴⁰ Bilfinger, 'Kriegserklärungen' (n. 26), 8.

⁴¹ Bilfinger, 'Kriegserklärungen' (n. 26), 8.

⁴² Bilfinger, 'Kriegserklärungen' (n. 26), 8.

⁴³ Not only Bilfinger, but also others treated the declarations made in the context of the Kellogg-Pact negotiations as 'reservations' in the legal sense, Hans Wehberg, *Die Ächtung des Krieges* (Vahlen 1930), 106-107. The character as legal 'reservations' is, however, not obvious, since the declarations were not formally made by each state upon ratification, on this see Robert Le Gall, *Le Pacte de Paris du 27 Août 1928* (Receuil Sirey 1930), 83-85.

⁴⁴ Bilfinger, 'Kriegserklärungen' (n. 26), 11.

⁴⁵ 'Note des amerikanischen Botschafters in Berlin an den Staatssekretär des Auswärtigen Amts vom 23. Juni 1928' in: *Materialien zum Kriegsächtungspakt*, (3rd edn, Verlag der Reichsdruckerei 1929), 70.

⁴⁶ Bilfinger, 'Kriegserklärungen' (n. 26), 11.

the principle of equality.⁴⁷ It would mean that the existing legal framework for peace and security would privilege one group and discriminate against another.⁴⁸ The Kellogg-Briand Pact could be activated ‘to the detriment of poor nations or nations dependent on the acquisition of territory for settlement and economic expansion because of overpopulation’.⁴⁹ It would work ‘automatically against the “have-nots” and for the saturated powers’.⁵⁰

Bilfinger’s use of language suggests that he was deeply troubled by the perceived ‘Schmach of Versailles’. The Treaty of Versailles was signed on June 28, 1919 between Germany and most of the Allied and Associated Powers to end World War I. France, Great Britain, and the United States played a key role in the negotiations. The treaty imposed onerous obligations on the German Empire: Germany had to disarm, give up significant portions of its territory, pay heavy reparations to the Allies, and accept responsibility for the war. As a result, the treaty became a primary target of attack by German international lawyers during the interwar period.⁵¹ Some abroad also criticised the heavy burden the peace treaty placed on Germany.⁵²

Bilfinger built on these arguments but took them one step further. For Bilfinger, Germany was a ‘have-not’ that needed to regain its lost territories. The rules of international law restricting revision, even if carried out by force, had to be set aside. Bilfinger did not mention that the German Reich had been one of the original signatories of the Pact. With Gustav Stresemann as Foreign Minister, the *Auswärtige Amt* had generally sought to bring France and Germany closer together and to enhance Germany’s international standing through participation in international fora. After the German Reich became a member of the League of Nations in 1926, it was quick to signal its support for the Kellogg-Briand Pact.⁵³

This foreign policy direction clearly did not find favour with Bilfinger, as can be seen from his early extensive writings on questions of war and peace.⁵⁴ Already in the first issue of the *ZaöRV* in 1929, shortly after the adoption of

⁴⁷ Bilfinger, ‘Kriegserklärungen’ (n. 26), 11.

⁴⁸ Bilfinger, ‘Kriegserklärungen’ (n. 26), 11-12.

⁴⁹ Bilfinger, ‘Kriegserklärungen’ (n. 26), 15.

⁵⁰ Bilfinger, ‘Kriegserklärungen’ (n. 26), 15.

⁵¹ On the reaction of German international legal scholarship to the Treaty of Versailles, see Stolleis, *A History of Public Law* (n. 13), 60-64; however some saw some potential for peaceful ‘revision’ under the Covenant, Hans Wehberg, ‘Die Revision internationaler Verträge’, *Friedens-Warte* 32 (1932), 196-202 (200-201).

⁵² John Maynard Keynes, *The Economic Consequences of the Peace* (Harcourt, Brace & Howe 1920).

⁵³ See Roscher (n. 17), 82.

⁵⁴ Carl Bilfinger, ‘Betrachtungen über politisches Recht’, *HJIL* 1 (1929), 57-76; Bilfinger, ‘Die russische Definition des Angreifers’, *HJIL* 7 (1937), 483-496; Bilfinger, *Völkerbundsrecht gegen Völkerrecht* (Duncker & Humblot 1938).

the Kellogg-Briand Pact, Bilfinger pointed out that the terms of the Pact were too vague to be recognised as legal obligations.⁵⁵ The many contradictory declarations made by states prior to its adoption were evidence that essential questions of war and peace could not be meaningfully addressed by international law. The Pact would be ‘a programmatic declaration that does not contain the minimum level of legal bindingness required for political legal norms’.⁵⁶ Moreover, since the mid-1930s, Bilfinger had attacked the League of Nations as an institution which would ‘guarantee [...] the status quo through hegemony and sanctions’.⁵⁷ In his lecture at the *Hague Academy of International Law* published in 1938 Bilfinger also expressed scepticism about regulating issues of war and peace through law.⁵⁸

Bilfinger thus put forward a particular ‘political’ understanding of international law, based on the premise that international law could not touch the vital interests of states. Through this lens, the major new universal treaties on peace and security – the Covenant and the Pact – were meaningless because the issue was not amenable to legal regulation and the treaties would discriminate against Germany. Bilfinger tried to revive the doctrine of the 19th century, when international law was rather indifferent to questions of war and peace.⁵⁹

Bilfinger was not a lone wolf. His prominent colleague Carl Schmitt – with whom Bilfinger had had a close collegial relationship at least until 1934 –⁶⁰ had developed similar arguments, albeit with a primary focus on the League of Nations Covenant rather than the Pact. In his 1924 article *Die Kernfrage des Völkerbundes*, Schmitt emphasised that the League contained a ‘guarantee of a status of possession’ and was based on the assumption that the territorial arrangements of the peace treaties were legitimate.⁶¹ Normative rules such as

⁵⁵ Bilfinger, ‘Politisches Recht’ (n. 54), 70.

⁵⁶ Bilfinger, ‘Politisches Recht’ (n. 54), 72.

⁵⁷ Bilfinger, *Völkerbundsrecht* (n. 54), 35.

⁵⁸ Carl Bilfinger, ‘Les bases fondamentales de la communauté des états’, RdC 63 (1938), 129-241 (135).

⁵⁹ For a recent critique of the ‘indifference’-account see Agatha Verdebout, *Rewriting the Histories of the Use of Force: The Narrative of ‘Indifference’* (Cambridge University Press 2021), 107; Hendrik Simon, ‘The Myth of *Liberum Ius ad Bellum*: Justifying War in 19th-Century Legal Theory and Political Practice’, EJIL 29 (2018), 113-136.

⁶⁰ Reinhard Mehring, ‘Vom Berliner Schloss zur Heidelberger „Zweigstelle“. Carl Bilfingers politische Biographie und seine strategischen Entscheidungen von 1944’, MPIL 100, 9 February 2024, <<https://mpil100.de/2024/02/vom-berliner-schloss-zur-heidelberger-zweigstelle-carl-bilfingers-politische-biographie-und-seine-strategischen-entscheidungen-von-1944/>>, last access 21 January 2025.

⁶¹ Carl Schmitt, ‘Die Kernfrage des Völkerbundes (1924)’ in: Carl Schmitt and Günter Maschke (ed.), *Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik 1924-1978* (2nd edn, Duncker & Humblot 2005), 1-25 (7).

Article 10 of the Covenant, which obligated League members to preserve the territorial integrity of all members against external aggression, would intend to secure this *status quo*. For Schmitt, therefore, the ‘rule of law is the dangerous thing’ because the more one would emphasise the law, the more one would ‘legitimize the existing situation’.⁶² Some years later, Schmitt emphasised that the League of Nations would be ‘a system of legalization’ aimed at ‘monopoliz[ing] the decision on just war with a certain authority and place[ing] the momentous decision on the right and wrong of war associated with the turn to the discriminatory concept of war in the hands of certain powers’.⁶³ As a lawyer dedicated to German revisionism, Schmitt devoted his efforts to discrediting the existing system of peace and security. In response to the Polish aggression against Germany, Carl Schmitt again criticised the Geneva system in general terms for blurring the distinction between war and peace by attempting to impose legal rules on the issue. Although he did not mention the German-Polish hostilities, he made it clear that the attempts in Geneva to regulate war were to blame for the outbreak of World War II.⁶⁴

Such ‘lack-of-normative-force’ arguments were not exclusively of German origin. Some other international lawyers, in particular Italian scholars, did not regard war and peace as amenable to regulation.⁶⁵ However, this claim was only a minority position in the discipline. Scholars from a variety of different national backgrounds treated the Pact as a proper instrument of legal interpretation. Among them were well-known lawyers such as Quincy Wright in the US, George Scelle in France and Hersch Lauterpacht situated in Great Britain.⁶⁶ But also lawyers from less powerful states, such as the Polish international lawyer Mirosław Gonsiorowski or the Chinese lawyer Yeun-li Liang, emphasised the legal relevance of the Pact.⁶⁷ Even German-speaking legal scholars of different political persuasions, such as Hans Weh-

⁶² Schmitt, ‘Kernfrage’ (n. 61), 11.

⁶³ Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (4th edn, Duncker & Humblot 2007), 8.

⁶⁴ Carl Schmitt, ‘Inter pacem et bellum nihil medium’, *Zeitschrift der Akademie für Deutsches Recht* 6 (1939), 594-595 (594).

⁶⁵ On Francesco Coppola and Umberto Campagnolo see Roscher (n. 17), 156-158, 165-167.

⁶⁶ Quincy Wright, ‘The Meaning of the Pact of Paris’, *AJIL* 27 (1933), 39-61; Georges Scelle, ‘Le Pacte Kellogg’, *La Paix par le Droit* 38 (1928), 432-439; Hersch Lauterpacht, ‘The Pact of Paris and the Budapest Articles of Interpretation’, *Transactions of the Grotius Society* 20 (1934), 178-204.

⁶⁷ Yuen-li Liang, ‘The Pact of Paris as Envisaged by Mr. Stimson: Its Significance in International Law’, *China Law Review* 5 (1932), 198-207; Mirosław Gonsiorowski, ‘The Legal Meaning of the Pact for the Renunciation of War’, *Am. Polit. Sei. Rev.* 30 (1936), 653-680.

berg, Viktor Bruns, and Alfred Verdross also wrote positively about the new legal instrument in the late 1920s and early 1930s.⁶⁸

In the early 1930s, Bilfinger's position thus was the exception rather than the rule. During the National Socialist era and in the context of Germany's aggression against Poland, Bilfinger's 'lack-of-normative-force' claim became increasingly popular among German international lawyers. Like Bilfinger, the young lawyer Wilhelm Grewe (1911-2000) argued in 1940 that the conduct of war was not constrained by legal rules. Grewe – who was to become an important legal expert in the *Auswärtige Amt* during the Adenauer government after World War II – was then a research assistant at the *Deutsches Institut für außenpolitische Forschung* (German Institute for Foreign Policy Research) at the time. In the Institute's monthly publication, he emphasised that questions of war guilt (*Kriegsschuld*) would be a moral but not a legal issue. The 'vague wording and numerous reservations [...] largely deprived the Briand-Kellogg Pact of its legally binding force'.⁶⁹ Neither the term aggression, nor the scope of self-defence would be clearly defined.⁷⁰ Grewe concluded: the question of war guilt would be 'no legal question in the narrow sense according to which a matter could be assessed against a fixed legal norm and a clear legal consequence could be derived from it'.⁷¹

In sum, the 'lack-of-normative-force' argument was popular with German international lawyers under the swastika because it implied that the German Reich had not violated any legal obligations with its aggression against Poland. Instead, Germany could rely on a free right to wage war. In the specific context of German aggression against Poland, this argument was used as a justificatory strategy to enable National Socialist Germany's territorial expansion without any legal constraints.

III. Embracing National Socialist Propaganda and Claiming Violations by Western Powers

Some German jurists offered a more doctrinal justification for the German aggression arguing with the existing rules of peace and security. Axel Freiherr von Freytagh-Loringhoven (1878-1942), a professor at the University of Bres-

⁶⁸ Wehberg, *Ächtung* (n. 43); Alfred Verdross, 'Die Ausnahmen vom Kriegsverbote des Kellogg-Pakts', *Friedens-Warte* 39 (1930), 65-66; Viktor Bruns, 'Völkerrecht als Rechtsordnung I', *HJIL* 1 (1929), 1-56 (25-27).

⁶⁹ Wilhelm G. Grewe, 'Die Kriegsschuldfrage als völkerrechtliches Problem', *MAP* 7 (1940), 99-102 (101).

⁷⁰ Grewe, 'Kriegsschuldfrage' (n. 69), 101.

⁷¹ Grewe, 'Kriegsschuldfrage' (n. 69), 102.

lau, provided the most detailed doctrinal analysis. A strong opponent of the 1918 Revolution and the Weimar Republic, he described himself as ‘a monarchist standing on *völkisch* ground’.⁷² As a member of parliament for the nationalist, anti-republican and anti-Semitic DNVP, Freytagh-Loringhoven focused his political energies on criticising Gustav Stresemann’s foreign policy of rapprochement with France and Germany’s entry into the League of Nations.⁷³ After the National Socialist takeover, Freytagh-Loringhoven was a key figure in the DNVP’s self-dissolution and remained in parliament as a guest of the NSDAP. As a member of the notorious *Akademie für Deutsches Recht* and chairman of the Colonial Law Committee he was a protagonist in the German legal efforts to recover the ‘stolen’ German colonies.⁷⁴

After the German aggression against Poland in 1939, Freytagh-Loringhoven was the first to develop the legal case for National Socialist aggression in the *Zeitschrift der Akademie für deutsches Recht*.⁷⁵ In 1940, he also published a 115-page book on ‘Kriegsausbruch und Kriegsschuld 1939’ which dealt with the question of the legal and political guilt for the outbreak of World War II.⁷⁶ The monograph was part of the *Veröffentlichungen des Deutschen Instituts für Außenpolitische Forschung*, edited by Friedrich Berber, another important German international lawyer and legal advisor to National Socialist foreign minister Joachim von Ribbentrop.⁷⁷ A colleague praised Freytagh-Loringhoven’s monograph for exemplifying that ‘German legal science’ would be ‘the master of the situation’ at this ‘historic moment’.⁷⁸

Freytagh-Loringhoven put forward two lines of argument. First, he justified German aggression as self-defence. For him, not the German Reich but Poland had violated the Pact.⁷⁹ Freytagh-Loringhoven explained that while the terms ‘war’ and ‘aggression’ were not defined in the Pact, Poland was bound by a definition of ‘aggression’ that had been enshrined in a treaty

⁷² Axel von Freytagh-Loringhoven, *Die Weimarer Verfassung in Lehre und Wirklichkeit* (J.F. Lehmann 1924), preface V; on this Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Weimarer Republik und Nationalsozialismus* (C. H. Beck 2002), 161-162.

⁷³ On this Thomas Ditt, „Stosstruppfakultät Breslau“: Rechtswissenschaft im „Grenzland Schlesien“ (Mohr Siebeck 2011), 19; Joachim Wintzer, *Deutschland und der Völkerbund 1918-1926* (Brill Schöningh 2006), 127.

⁷⁴ On this Lange, ‘Colonial Empire’ (n. 16), 350.

⁷⁵ Axel Freiherr von Freytagh-Loringhoven, ‘Das deutsche Weissbuch’, *Zeitschrift der Akademie für Deutsches Recht* 6 (1939), 591-594.

⁷⁶ Freytagh-Loringhoven, *Kriegsausbruch* (n. 24).

⁷⁷ On Berber Katharina Rietzler, ‘Counter-Imperial Orientalism: Friedrich Berber and the Politics of International Law in Germany and India, 1920s-1960s’, *Journal of Global History* 11 (2016), 113-134.

⁷⁸ Gustav A. Walz, ‘Besprechung Freytagh-Loringhoven: Kriegsausbruch und Kriegsschuld 1939’, *Zeitschrift für Völkerrecht* 25 (1941), 267 (269).

⁷⁹ Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 13-14.

between the Soviet Union, Poland and other Soviet neighbours.⁸⁰ According to Freytagh-Loringhoven, Poland committed a number of acts with ‘obviously warlike character’ in particular ‘the shelling of the German town Beuthen with artillery fire in the night from August 31 to September 1’.⁸¹ In addition, Freytagh-Loringhoven mentioned various alleged military actions by Poland since August 27, cumulating in ten attacks on August 31. These actions could not be regarded as mere border incidents but would amount to aggression.⁸²

According to Freytagh-Loringhoven, Polish aggression meant that Germany had the right under international law to use force to defend itself and to respond to these attacks.⁸³ For him, ‘it was unequivocally clear that Germany was legally defending herself, even if she went on the offensive militarily’.⁸⁴ He suggested that defence by military means was not only a right but an obligation, especially for a great power like Germany.⁸⁵ Without explicitly mentioning it, Freytagh-Loringhoven argued for self-defence under international law.

At the doctrinal level, the doctrine of self-defence was indeed recognised as a legal exception to the prohibition of war. Although not explicitly codified in the Kellogg-Briand Pact, it was recognised as an implicit exception. A US note dated June 23, 1928 clarified prior to the adoption of the Pact: ‘There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions, to defend its territory from attack or invasion [...]’.⁸⁶ The parties responding to the note agreed with this interpretation or argued for even more far-reaching exceptions.⁸⁷ Freytagh-Loringhoven thus based his claim on an existing legal concept.

On the factual level, however, Freytagh-Loringhoven built his case on National Socialist propaganda. The National Socialist media reported a series of incidents in which Polish troops had allegedly entered German territory and fired on German soldiers in late August 1939.⁸⁸ These incidents were all

80 Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 16.

81 Freytagh-Lovringhoven, ‘Weissbuch’ (n. 75), 593.

82 Freytagh-Lovringhoven, *Kriegsausbruch* (n. 24), 16.

83 Freytagh-Loringhoven, ‘Weissbuch’ (n. 75), 593.

84 Freytagh-Loringhoven, ‘Weissbuch’ (n. 75), 593.

85 Freytagh-Lovringhoven, *Kriegsausbruch* (n. 24), 6.

86 Note des amerikanischen Botschafters (n. 45), 70.

87 On this see Roscher (n. 17), 92-95.

88 Jürgen Runzheimer, ‘Die Grenzzwischenfälle am Abend vor dem Angriff auf Polen’ in: Wolfgang Benz and Hermann Graml (eds), *Sommer 1939. Die Großmächte und der europäische Krieg* (Deutsche Verlags-Anstalt 1979), 107-147.

staged. Reinhard Heydrich, head of the *Reichssicherheitshauptamt* and later responsible for organising the mass murder of the Jews, had led the planning. Heydrich reportedly told subordinates that Hitler needed a pretext for war.⁸⁹ At various locations, SS personnel used Polish uniforms to simulate an attack. However, because the activities apparently did not give the local population the impression of a serious attack, initial plans to bring in foreign journalists were not carried out.⁹⁰

Freytagh-Loringhoven did not question the press reports and did not attempt to investigate the factual basis for Germany's actions. Despite the fact that the German large-scale offensive against Poland began only hours after the faked incidents, German international lawyers happily accepted these claims. Carl Bilfinger even cited Hitler's Reichstag speech as the only evidence of Polish aggression.⁹¹

Second, Freytagh-Loringhoven argued that Britain and France had violated both the League of Nations Covenant and the Briand-Kellogg Pact by 'declaring war' on the German Reich.⁹² With respect to the Covenant, Freytagh-Loringhoven suggested that Britain and France had violated the Covenant's procedural obligations. For him, these procedural obligations applied even to a non-member State such as Germany. At the very least, Britain and France should have waited for a decision by the League Council before going to war.⁹³ Carl Bilfinger had made similar points. By not going through the League's mediation procedure before 'declaring war' on Germany, the Western powers violated the Covenant. This would amount 'from the point of view of the law of the League of Nations to a confession of war guilt on the part of the Western Powers'.⁹⁴

This argument was rather surprising. As explained, Germany was no member of the League Covenant by 1939 since its withdrawal had become effective in 1935. The procedural obligations of Arts 12 to 15 applied only to 'disputes between members of the League'. For Germany, only the provisions of the League Covenant dealing with non-members were applicable. Art. 17 provided for a procedure whereby non-member states 'shall be invited to accept the obligations of membership in the League for the purposes of [a] dispute'. If a state refused the invitation and went to war against a member of the League, the sanctions mechanism under Art. 16

⁸⁹ Runzheimer (n. 88), 111.

⁹⁰ Runzheimer (n. 88), 147.

⁹¹ Bilfinger, 'Kriegserklärungen' (n. 26), 3; with a reference to 'Polish hostilities', Friedrich Schlüter, 'Der Ausbruch des Krieges', *HJIL* 10 (1940), 244-269 (244); Walz (n. 78), 267.

⁹² Freytagh-Loringhoven, 'Weissbuch' (n. 75), 592.

⁹³ Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 11.

⁹⁴ Bilfinger, 'Kriegserklärungen' (n. 26), 2-3; see also Carl Bilfinger, *Der Völkerbund als Instrument britischer Machtpolitik* (Junker & Dünhaupt 1940), 16, 40.

would be triggered. The member states of the League thus had the power to extend the sanction system to non-League members through Art. 17. This did not mean, however, that members of the League were bound by the provisions of the Covenant *vis-a-vis* non-members.⁹⁵

Beyond the Covenant, Freytagh-Loringhoven also saw a violation of the Kellogg-Briand Pact by France and Great Britain. The Pact would not allow self-defence in the name of Poland.⁹⁶ Self-defence would be legal only if directed against an immediate attack, not to protect an ally.⁹⁷ He claimed: ‘This has always been the unanimous opinion of the entire literature on international law.’⁹⁸ Similarly, Carl Bilfinger suggested that a third state could not claim self-defence on behalf of another state that had allegedly been attacked.⁹⁹ The British reliance on the idea of defensive wars would amount to ‘a record of distortion, falsification and inversion’.¹⁰⁰

In this case, the German lawyers had a point. The law of the time did not recognise the concept of ‘collective self-defence’ as we know it today. In the context of the adoption of the Pact, a number of States had made it clear that self-defence was limited to a response to an armed attack on the territory of the state invoking it. As the US note of June 23, 1928 prior to the adoption of the Pact, made clear: ‘Every nation is free at all times and regardless of treaty provisions, to defend its territory from attack or invasion. [...]’.¹⁰¹ The French response of July 14, 1928 emphasised that each state may ‘defend its territory against an attack or invasion’.¹⁰² While some states argued for a broader understanding of self-defence when vital interests were at stake,¹⁰³ others signalled agreement. None suggested that self-defence could be invoked on behalf of other states even if the attacked state asked for help. Accordingly, the major textbooks of the time on war and peace did not mention collective self-defence.¹⁰⁴ It was not until Art. 51 of the United

⁹⁵ Standard accounts accordingly did not touch upon potential obligations of member states *vis-à-vis* non-member states, Schücking and Wehberg (n. 23), 637–644.

⁹⁶ Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 13.

⁹⁷ Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 13.

⁹⁸ Freytagh-Loringhoven, *Kriegsausbruch* (n. 24), 13.

⁹⁹ Carl Bilfinger, ‘Angriff und Verteidigung’, *Zeitschrift der Akademie für Deutsches Recht* 8 (1941), 253–255 (253).

¹⁰⁰ Bilfinger, ‘Angriff’ (n. 99), 253.

¹⁰¹ Note des amerikanischen Botschafters (n. 45), 70.

¹⁰² ‘Note des französischen Außenministers an den amerikanischen Botschafter in Paris vom 14. Juli 1928’ in: *Materialien zum Kriegsächtungspakt* (3rd edn, Verlag der Reichsdruckerei 1929), 84.

¹⁰³ On this see Roscher (n. 17), 84–88.

¹⁰⁴ See for instance Paul Barandon, *Das Kriegsverhütungsrecht des Völkerbundes* (Carl Heymanns 1933), 270–279; Lassa Oppenheim, *International Law: A Treatise. Disputes, War and Neutrality* (5th edn, Longmans, Green and Co 1935), 157–162; Le Gall (n. 43), 94–109.

Nations Charter that the doctrine of collective self-defence was enshrined in international law.¹⁰⁵

Did France and Great Britain thus have no legal basis for acting on behalf of Poland? Not at all. It was generally accepted in the international legal literature that the Pact did not restrict war against a state that had itself violated the Kellogg-Briand Pact. In the negotiations on the Pact, the US had proposed to amend the preamble to clarify this issue. The new version of the preamble stated that ‘any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty’. According to the US, it was clear that wars against the violator of the Pact were excluded from the scope of the Pact. ‘There can be no question as a matter of law that violation of a multilateral anti-war treaty through resort to war by one party thereto would automatically release the other parties from their obligations to the treaty-breaking state.’¹⁰⁶ Soon France and Germany explicitly adopted the US interpretation and Australia even suggested that ‘the preamble in this respect is to be taken as part of the substantive provisions of the treaty itself’.¹⁰⁷ Scholars from Germany, the US, and France accordingly emphasised that the Pact did not protect its breakers.¹⁰⁸ Thus, the Pact did not prohibit war against the aggressor Germany. Freytagh-Loringhoven’s criticism of France and Britain for their support of Poland thus came to nothing.

IV. Against the Shift in the Rules of Neutrality

The third line of argument put forward by German lawyers under the swastika does not concern the *ius ad bellum* in the strict sense. Rather, the rules of ‘neutrality’ are codified in two of the 1907 Hague Conventions dealing with *ius in bello*, one devoted to warfare on land and one to warfare at sea.¹⁰⁹ The Conventions set out the obligations of third states in war

¹⁰⁵ Josef L. Kunz, ‘Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations’, *AJIL* 41 (1947), 872-879; Hans Kelsen, ‘Collective Security and Collective Self-Defense Under the Charter of the United Nations’, *AJIL* 42 (1948), 783-796.

¹⁰⁶ Note des amerikanischen Botschafters (n. 45), 70.

¹⁰⁷ ‘Note des britischen Staatssekretärs für auswärtige Angelegenheiten an den amerikanischen Geschäftsträger in London vom 18. Juli 1928’ (Antwort der Australischen Regierung) in: *Materialien zum Kriegssächtingungspakt* (3rd edn, Verlag der Reichsdruckerei 1929), 104; on this Roscher (n. 17), 94-95.

¹⁰⁸ Scelle (n. 66), 436; Barandon (n. 104), 269; Wright, ‘Pact of Paris’ (n. 66), 56.

¹⁰⁹ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907; Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, 18 October 1907.

between belligerents. According to the Conventions, belligerents may not use the territory of a neutral state for their military operations, and neutral states are prohibited from permitting such use.¹¹⁰ Third states are also prohibited from transferring arms directly to belligerents.¹¹¹ While neutral states are not obliged to prevent the export of arms to belligerents by private actors, they are obliged to treat belligerents impartially in such cases.¹¹² Similarly, belligerents must be treated equally when it comes to access to ports or the use of territorial waters of the neutral state.¹¹³ The rationale behind the concept of neutrality is the localisation of war. By not taking sides, it was hoped to limit the spread of war by preventing third states from being drawn into the conflict.¹¹⁴

As early as World War I, the question of trade in arms with belligerents had been a focal point for the development of various legal perspectives on the matter.¹¹⁵ After the adoption of the Covenant of the League of Nations and the Kellogg-Briand Pact, the rules of the Hague Conventions came even under more pressure. As scholars have shown, the Covenant and the Pact sparked a debate between a ‘traditional’ and a ‘reformist’ understanding of neutrality.¹¹⁶ In 1920, the Council of the League of Nations pointed out that a strict reading of the idea of neutrality ‘is incompatible with the principle that all members will be obliged to cooperate in enforcing respect for their engagements’.¹¹⁷ In the 1930s, many scholars argued that the two treaties had implications for the existing rules of neutrality. Since the rules distinguished between lawful and unlawful war, there could be no obligation to remain impartial. At the 1933 meeting of the American Society of International Law international lawyers such as James W. Garner and Charles G. Fenwick argued that sanctions against an aggressor did not violate international law, particularly obligations of neutrality.¹¹⁸ In Europe, the Greek international lawyer Nicolas Politis dismissed the traditional concept of neutrality as ‘a product of international anarchy’ and ‘a true anachronism’. For him, neutral-

¹¹⁰ Arts 2-5 of the Hague Convention (V).

¹¹¹ Art. 6 of the Hague Convention (XIII).

¹¹² Arts 7 and 9 of the Hague Convention (V).

¹¹³ Art. 9 of the Hague Convention (XIII).

¹¹⁴ On this rationale Edwin Borchard and William Potter Lage, *Neutrality for the United States* (Yale University Press 1937), Preface VI.

¹¹⁵ Hatsue Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (Cambridge University Press 2012), 123.

¹¹⁶ With a focus on the US debate Shinohara (n. 115); Stephen Neff, ‘A Three-Fold Struggle Over Neutrality: The American Experience in the 1930s’ in: Pascal Lottaz & Herbert R. Reginbogin (eds), *Notions of Neutralities* (Lexington Books 2019).

¹¹⁷ Communications relating to the Present State of War (n. 1), 57.

¹¹⁸ On this Shinohara (n. 115), 125-126.

ity as an institution was ‘irrevocably doomed’ and ‘destined to disappear’.¹¹⁹ In the influential textbook *Oppenheim’s International Law*, Hersch Lauterpacht suggested in 1935 that the ‘outbreak of war is no longer an event concerning the belligerent alone’. On this basis, he argued that neutral nations such as the United States, which was not a member of the League but a signatory to the Pact, had a *carte blanche* to apply economic or military sanctions against so-called ‘guilty belligerents’.¹²⁰ In 1940, the French lawyers René Cassin put forward that since localising war through neutrality was a mere illusion, one needed to reject attempts to resurrect ‘traditional neutrality’.¹²¹ A ‘new school’ had emerged.

The shift in the concept of neutrality found expression in two documents. First, the International Law Association, founded as a private institution in 1873, adopted the Budapest Articles of Interpretation in 1934. Art. 4 emphasises the change in the concept of neutrality:

‘In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of International Law, do all or any of the following things: [...] (b) Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent; (c) Supply the State attacked with financial or material assistance, including munitions of war; (d) Assist with armed forces the State attacked.’¹²²

This was nothing less than an explicit repudiation of the Hague Conventions rules.

Second, in 1939 US scholars adopted the influential *Harvard Draft Convention on the Duty and Rights of States in Case of Aggression*. Philip Jessup, a professor at Columbia Law School, was the rapporteur. Although Jessup himself had long supported the traditional notion of neutrality,¹²³ the draft maintained that in the case of aggression third states were not bound by the rules of neutrality towards the aggressor.¹²⁴ It explained various options for third states in the face of aggression. They could either declare to become ‘co-defending’ states and assist the defending country militarily – which was

¹¹⁹ Nicolas Politis, *La Neutralité et La Paix* (Hachette 1935), 7-8; on this Shinohara (n. 115), 131-132.

¹²⁰ Oppenheim (n. 104), 231.

¹²¹ Cassin (n. 11), 48-69.

¹²² Manley O. Hudson, ‘The Budapest Resolutions of 1934 on the Briand-Kellogg Pact of Paris’, *AJIL* 29 (1935), 92-94 (93).

¹²³ Philip C. Jessup, ‘The Birth, Death and Reincarnation of Neutrality’, *AJIL* 26 (1932), 789-793.

¹²⁴ Draft Convention on Rights and Duties of States in Case of Aggression, *AJIL* 33 (1939), 827-830.

the traditional concept. Or they could become ‘supporting states’ and assist an attacked state without using armed force. The draft emphasised that ‘supporting states’ could discriminate against the aggressor.¹²⁵ Impartiality therefore did not apply.

German international lawyers strongly rejected such ideas in the context of German aggression against Poland. Carl Bilfinger argued that France and Great Britain could not claim that the Kellogg-Briand Pact authorised them to intervene in a dispute between third parties, in this case Poland and Germany.¹²⁶ He suggested that the idea of a ‘carte blanche for interventions’ would affect almost all ‘fundamental questions of political international law’.¹²⁷ The principle of state sovereignty and the doctrines of neutrality would be at stake: ‘The notion of just war and justifiable attack is extended to a legal doctrine of illicit neutrality towards the aggressor state.’¹²⁸ This ‘new international law’ had to be rejected.¹²⁹

Ferdinand Schlüter, a *Referent* at the KWI, took a similar view in his 1942 *ZaöRV* article ‘Kelloggpackt und Neutralitätsrecht’.¹³⁰ He argued that an explicit convention was needed to override existing neutrality doctrines.¹³¹ In particular, Schlüter attempted to deconstruct the normative weight of the Budapest Articles as a ‘scholarly opinion on international law’.¹³² The articles would only reflect the position of a ‘private association of lawyers’¹³³ since no state representatives had attended the meeting. In addition, British international lawyers such as Arnold McNair, John Fischer Williams, and J. L. Brierly would have dominated the International Law Association committee in Budapest. He concluded: ‘The Budapest Articles, which have been compiled by British international lawyers contrary to the clear will of the signatory states of the Kellogg-Briand Pact, form a link in the chain of British efforts to free itself from all obligations under international law with a view to a future war.’¹³⁴ Wilhelm Grewe also rejected the ‘well-known American arguments for the abolishment of the term neutrality’.¹³⁵ It would be obvious

¹²⁵ Draft Convention on Rights and Duties (n. 125); on this Stephen Neff, *War and the Law of Nations. A General History* (Cambridge University Press 2005), 310-311.

¹²⁶ Bilfinger, ‘Kriegserklärungen’ (n. 26), 6.

¹²⁷ Bilfinger, ‘Kriegserklärungen’ (n. 26), 6.

¹²⁸ Bilfinger, ‘Kriegserklärungen’ (n. 26), 6.

¹²⁹ Bilfinger, ‘Kriegserklärungen’ (n. 26), 6.

¹³⁰ Ferdinand Schlüter, ‘Kelloggpackt und Neutralitätsrecht’, *HJIL* 11 (1942), 24-32.

¹³¹ Schlüter, ‘Kelloggpackt’ (n. 130), 29.

¹³² Schlüter, ‘Kelloggpackt’ (n. 130), 31.

¹³³ Schlüter, ‘Kelloggpackt’ (n. 130), 32.

¹³⁴ Schlüter, ‘Kelloggpackt’ (n. 130), 32.

¹³⁵ Wilhelm G. Grewe, ‘Die Bestimmung des Kriegszustandes’, *Zeitschrift der Akademie des Deutschen Rechts* 7 (1940), 355-356 (356).

that the Hague Conventions cannot be amended by ‘legislative acts’ in the United States.¹³⁶ The Harvard draft would be a draft without a firm legal basis.¹³⁷ ‘[N]o one will be able to claim that the Harvard draft has any legal significance outside the United States.’¹³⁸ German scholars thus attempted to discredit the scholarly projects that reinterpreted the neutrality concept in light of the Covenant and the Pact.

Again, there was a German scholarly tradition to this argument which had gained popularity since the mid-1930s. In May 1936, at a high-profile conference on collective security in Paris, Friedrich Berber asserted that all the attempts to reshape the rules of neutrality would expose the ‘utopian character [...] of the new international legal ideology’.¹³⁹ In particular attempts to allow for a ‘benevolent’ or ‘partisan’ neutrality would be ‘irreconcilably at odds with reality’.¹⁴⁰ As evidence he pointed to neutrality legislation in the United States, which provided for arms embargoes against both belligerents and thus did not distinguish between the aggressor and the attacked state.¹⁴¹

Support for the traditional understanding of neutrality did not come only from German lawyers. In the United States, the issue of neutrality divided the so-called ‘traditionalists’ and the ‘reformists’.¹⁴² A key figure among the traditionalists was Edwin Borchard, a professor at Yale Law School, who argued for maintaining the rules of the Hague Convention. He put forward that the debate over the impact of the League of Nations and the Kellogg-Briand Pact on international law should be understood in terms of the binary of realism and evangelism.¹⁴³ While the latter school would ‘placed its faith in the “enforcement” of peace by collective sanctions’, the former would show practical judgment by relying on negotiation, mediation, and arbitration.¹⁴⁴ For Borchard, novel concepts such as ‘non-belligerency’ were nothing more than ‘a name used as a modern excuse for violating the laws of neutrality’.¹⁴⁵ In Europe, the Scandinavian states emphasised the principle of neutrality in the hope of staying out of the continent’s wars as European tensions rose in

¹³⁶ Wilhelm G. Grewe, ‘Das Englandhilfsgesetz der Vereinigten Staaten’, MAP 8 (1941), 214-217 (216).

¹³⁷ Grewe, ‘Kriegsschuldfrage’ (n. 69), 102.

¹³⁸ Grewe, ‘Englandhilfsgesetz’ (n. 136), 217.

¹³⁹ Fritz Berber, ‘Neutralität und kollektive Sicherheit’, Zeitschrift für Politik 26 (1936), 357-369 (360).

¹⁴⁰ Berber (n. 139), 361.

¹⁴¹ Berber (n. 139), 362-363.

¹⁴² Shinohara (n. 115), 123-148.

¹⁴³ Edwin M. Borchard, ‘Realism v. Evangelism’, AJIL 28 (1934), 108-117.

¹⁴⁴ Borchard, ‘Realism’ (n. 143), 108-109.

¹⁴⁵ Edwin Borchard, ‘War, Neutrality and Non-Belligerency’, AJIL 35 (1941), 618-625 (624).

the late 1930s. Based on a joint effort by international legal experts, Finland, Denmark, Sweden, Norway, and Iceland adopted declarations of neutrality in 1938. The Norwegian international lawyer Edvard Hambro (1911-1977) referred to these declarations as proof of the maintenance of the rules of neutrality: The legislation would ‘prove that the old law of neutrality still applies despite all the violations during the war and despite the ideology of the League of Nations Covenant and the Kellogg-Briand Pact’.¹⁴⁶ Thus, there was a deep division between different schools on the question of neutrality.

It was not surprising that German international lawyers during the National Socialist period (and before) embraced the traditional view. The project of revision on the European continent could potentially be hampered by US support for Poland, France, and Great Britain. In World War I, the United States had demonstrated its military and economic power. Keeping the US involvement in the conflict to a minimum by emphasising rules of neutrality was a common cause of German lawyers under the swastika.

V. The Question of Audience

This analysis has shown that German legal scholars developed various arguments to justify Hitler’s aggression against Poland and to accuse the Western powers of violating international law. Not surprisingly, these arguments had little force (with the exception of the issue of neutrality, where the new rules of collective security were in tension with traditional understandings under the two Hague Conventions).

Who were the German lawyers under the swastika speaking to? Were the publications aimed at international lawyers abroad or the National Socialist government? Given the international reputation of the *ZaöRV*, at least Bilfinger’s article was likely to receive attention abroad. However, in light of the broad consensus on the legal validity of the Pact, it was rather unlikely that Bilfinger could convince his international colleagues by treating the Pact as a ‘scrap of paper’. Also, the harsh tone of the article makes it unlikely that it was supposed to persuade scholars abroad. Accordingly, the efforts to reach an international audience were much more limited when compared to earlier cases. Until 1938, German international lawyers had at times translated their arguments into different languages. For instance, when German lawyers under the swastika claimed that Germany had a legal title to regain the colonies lost under the Treaty of Versailles, they translated parts of their

¹⁴⁶ Edvard Hambro, ‘Das Neutralitätsrecht der nordischen Staaten’, *HJIL* 8 (1938), 445-469 (468).

publications into English, French, and Italian.¹⁴⁷ Such attempts seemed fruitless in the context of the aggression against Poland. German lawyers under the swastika were isolated with their claims of legality.

Bilfinger was thus primarily addressing an internal audience. His colleagues who published in German journals with less international standing were also looking inward. But at whom? Were the arguments directed at the National Socialist government? Did the lawyers diligently offer their justificatory services for Hitler's expansionist foreign policy?

It is important to note that Hitler and Ribbentrop had not asked for such services. The National socialist leaders did not care about possible legal constraints on German expansion by military force. The fact that the *Auswärtige Amt* did not provide any official legal justification for the aggression in Poland speaks volumes. Nonetheless, the lawyers wanted to signal to the government that they were clearly on its side in this matter. While one would have to dig deeper into each case, it is not unlikely that career ambitions had some role to play. Moreover, German lawyers under the swastika had a common starting point: they all considered the territorial arrangements of the Treaty of Versailles to be grossly unjust. They all were members or closely associated with the NSDAP. When the Hitler government took military action to change the territorial *status quo*, the lawyers did not hesitate. Since they shared the expansionist goals, they were willing to provide legal cover for the aggression against Poland – although peaceful revision of Versailles was no longer on the agenda.

Last but not least, German lawyers under the swastika wanted to present an image of legality for self-assurance. The lawyers confirmed to themselves and the interested public that the German Reich could claim legality for its aggressive actions. This may explain the self-confident tone despite the weak legal position: As Freytagh-Loringhoven postulated 'only rarely at the outbreak of war it was so clear which side the law was on.'¹⁴⁸ The lawyers mutually confirmed to each other that Germany was not to blame for World War II.

Claiming legality against all odds is not a thing of the past. Fast forward to 2022: Despite the obvious violation of the prohibition of the use of force and aggression by the Russian Federation with its invasion of Ukraine, the Presidium of the Russian Branch of the International Law Association claimed legality. For them, the 'special military operation' was carried out 'on

¹⁴⁷ See Axel Freiherr von Freytagh-Loringhoven, *Das Mandatsrecht in den deutschen Kolonien. Quellen und Materialien* (Duncker & Humblot 1938); on this in general Lange, 'Colonial Empire' (n. 16), 343-369.

¹⁴⁸ Freytagh-Loringhoven, 'Weissbuch' (n. 75), 594.

the basis of the provisions of the United Nations Charter on self-defences, on the protection of human rights, in accordance with the international treaties of the Russian Federation with the Donetsk and Lugansk republics, at the request of these states and taking into account the appeals of Russian citizens living on the territory of these republics'.¹⁴⁹ The Russian international lawyers thus supported the official claim of President Putin.

While this is by no means limited to autocratic regimes, it seems that – international lawyers in such regimes tend to act as channels of justification for their governments' foreign policy, no matter what. One lesson from the late 1930s, however, may be that their arguments are paper tigers. If they lack persuasive force, they will have no impact on international legal discourse – at the time and in the long run.

¹⁴⁹ Statement of the Presidium of the Russian Branch of the International Law Association (no date provided), <<http://www.ilarb.ru/html/news/2022/7032022.pdf>>, last access 21 January 2025.

Abhandlungen

Common Interests and Common Spaces: Visions of the Past and Future of International Justice

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Abstract

From climate change to genocide, front page news is increasingly becoming the business of international courts. These cases are typically brought before the International Court of Justice on the basis of common

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interests in compliance with obligations owed to the international community or collective/shared responsibility associated with global challenges. Taking stock of recent developments, the present contribution considers how common-interest and common-space litigation has impacted the architecture of international justice in terms of legal interests, legal standing, third states' interventions, and reparations, prompting the emergence of new institutional approaches to tackling these issues. In the attempt to sketch a narrative about the past and future of common-interest and common-space litigation (and the role of international judicial institutions therein), this article intends to provide a history-sensitive account of the 'juridification' process of common interests, and show the centrality of international courts and tribunals to the juridical life of common interests and common spaces. At the same time, it aims to illuminate how international justice has adapted to the challenges of international adjudication. Ultimately, it prompts reflections as to the evolving institutional dimensions of international justice in regard to common interests and common spaces.

Keywords

common interests – community interests – *erga omnes* obligations – common spaces – global commons – public interest – public nature

I. Introduction

Arguments regarding common interests and common spaces are increasingly being raised and developed in the halls of international justice. 'Common spaces' is framed here as a deliberately wide expression that encompasses shared resources and areas such as global commons that pertain to the community (or where resources are governed in the interest of the common heritage of mankind), and which are, as such, generally *public* in character. In this regard, they provide a tangible – and increasingly vulnerable – setting in which notions of the common interest are often applied and arguably tested. Instead, by 'common interests', reference is made to interests that are common to the international community as a whole and, as such, shared in character, not pertaining to one or few states but engaging the compliance of virtually all states vis-à-vis all states. It is not uncommon for 'community

interests'¹ or 'general interests'² to be used in lieu of 'common interests',³ with community interests being understood as moral and objective values and interests⁴ that are shared across the international community and that deserve the protection of all states through collective/coordinated action.⁵

From a legal viewpoint, common interests are correlative of obligations that are owed to the international community as a whole⁶ (i. e. *erga omnes* obligations), or to all parties to a multilateral convention of universal or quasi-universal character (i. e. *erga omnes partes* obligations), and which offer

¹ Bruno Simma, 'From Bilateralism to Community Interest in International Law', RdC 250 (1994), 217-384; Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law', EJIL 21 (2010), 387-419; Yoshifumi Tanaka, 'Protection of Community Interests in International Law: The Case of the Law of the Sea', Max Planck UNYB 15 (2019), 329-375; Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011); Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018); Jutta Brunnée, 'International Environmental Law and Community Interests: Procedural Aspects' in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018); Gentian Zyberi, *The Protection of Community Interests in International Law: Some Reflections on Potential Research Agendas* (Intersentia 2021); Rüdiger Wolfrum, *Solidarity and Community Interests* (Brill 2021).

² Separate Opinion of Judge Jessup to ICJ, *South West Africa* (Liberia v. South Africa), judgment of 21 December 1962, ICJ Reports 1962, 387 (432), referring to Article 7 of the South West Africa Mandate as 'intended to recognize and to protect the *general interests* of the Members of the international community in the Mandates System'; Giorgio Gaja, 'The Protection of General Interests in the International Community General Course on Public International Law', RdC 364 (2013), 19-185; James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', AJIL 96 (2002), 874-890 (884, 888); Massimo Iovane et al., *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry* (Oxford University Press 2021).

³ René Lefeber, 'The Exercise of Jurisdiction in the Antarctic Region and the Changing Structure of International Law: The International Community and Common Interests', NYIL 21 (1990), 81-137.

⁴ See e.g. Samantha Besson, 'Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?' in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 36-49 (38).

⁵ On the point, see also Letizia Lo Giacco, 'When a Dispute Exists: the Emerging Evidentiary Practice of the ICJ in Common Interests Proceedings', *The Law & Practice of International Courts and Tribunals* 23 (2024), 353-384 (354 f.).

⁶ Yoshifumi Tanaka, 'Reflections on *Locus Standi* in Response to a Breach of Obligations *Erga Omnes Partes*: A Comparative Analysis of the *Whaling in the Antarctic* and *South China Sea* Cases', *The Law & Practice of International Courts and Tribunals* 13 (2018), 527-554. Notably, *erga omnes* obligations are owed to the international community as a whole, while *erga omnes partes* obligations are owed to all parties to a multilateral convention of universal or quasi-universal character, such as the 1948 Genocide Convention and the 1984 Convention against Torture. See ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), judgment, of 20 July 2012, ICJ Reports 2012, 422 (para. 68).

a basis for the decentralised enforcement of those obligations.⁷ The latter has been central to a lineage of cases⁸ culminating in the judgment on the merits in *Belgium v. Senegal* (2012),⁹ and more recently in the judgment on preliminary objections in *The Gambia v. Myanmar* (2022),¹⁰ which confirmed resort to the doctrine weaving together common interests and *erga omnes partes* obligations in international adjudication. Multiple proceedings instituted on the basis of common interests are yet pending before the Court, such as *Canada and the Netherlands v. Syria*¹¹ – regarding the Convention against Torture – and *The Gambia v. Myanmar*,¹² *South Africa v. Israel*¹³ and *Nicaragua v. Germany*¹⁴ – instead concerning the Genocide Convention.

But it is not only in the context of contentious cases that common interests and common spaces are springing into view. Rather, common interests and common spaces are litigated, argued, and presented in different institutional forms, across disciplinary boundaries, and engaging different functions and jurisdictions. For example, several international courts and tribunals are currently hearing cases relating to climate change.

Requests for advisory opinions concerning common interests and common spaces have been increasingly pursued as an alternative avenue to the contentious jurisdiction of the Court. For instance, advisory opinions in the case *Obligations of State in respect of Climate Change and Legal Consequences arising from Policies and Practices of Israel in the Occupied Palestinian*

⁷ Christian Tams, ‘Individual States as Guardians of Community Interests’ in: Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 379–405, (381 f.).

⁸ ICJ, *East Timor* (Portugal v. Australia), judgment of 30 June 1995, ICJ Reports 1995, 90 (para. 29); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, ICJ Reports 2004, 136 (paras 88, 155–157); ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), jurisdiction and admissibility, judgment of 3 February 2006, ICJ Reports 2006, 6 (paras 64 and 125); ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 26 February 2007, ICJ Reports 2007, 43 (paras 147 and 162).

⁹ ICJ, *Belgium v. Senegal* (n. 6).

¹⁰ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), preliminary objections, judgment of 22 July 2022, ICJ Reports 2022, 477 (in particular paras 107–108).

¹¹ ICJ, *Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Canada and The Netherlands v. Syrian Arab Republic), provisional measures, order of 16 November 2023, ICJ Reports 2023, 587.

¹² ICJ, *The Gambia v. Myanmar* (n. 10).

¹³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), provisional measures, order of 26 January 2024.

¹⁴ See ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory* (Nicaragua v. Germany), provisional measures, order of 30 April 2024.

Territory, including East Jerusalem, respectively, were requested by the United Nations (UN) General Assembly, giving new impulse to a formerly neglected avenue of international justice.¹⁵ In the same vein, advisory proceedings concerning common spaces such as the environment and the ensuing scope of state obligations to respond to climate change have also involved the International Tribunal on the Law of the Sea (ITLOS), particularly with regard to small islands threatened by the marine environmental impacts of climate change, as well as the Inter-American Court of Human Rights in the framework of international human rights law.

Arguments on states' obligations vis-à-vis environmental degradation have also been advanced before the UN Committee on the Convention of the Rights of the Child (see e. g. *Sacchi et al. v. Argentina et al.*) resulting in the adoption of General Comment 26 in August 2023, as well as before the European Court of Human Rights in no less than three cases since 2021 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *Carême v. France* and *Duarte Agostinho and Others v. Portugal and 32 Others*). In relation to common spaces, an interesting line of reasoning about victimhood and reparations has emerged in the *Prosecutor v. Al Mahdi* case before the International Criminal Court (ICC), i. e. the first case dealing with the destruction of a world cultural heritage site as a war crime in the jurisprudence of the ICC. In this context, questions may be raised as to the potentially varied treatment of what are nevertheless common interests.

As such, common interests and common spaces have catalysed a wave of judicial activity that traverses legal regimes and appears qualitatively novel, suggesting that it may be too reductive to frame international courts and tribunals as mere dispute settlement mechanisms, for their action goes beyond mere adjudication. Against this evolving background, the present contribution explores how international justice mechanisms are adapting to proceedings concerning common interests and common spaces, potentially breaking new frontiers in the broader architecture of international justice.

In our attempt to sketch a narrative about the past and future of common-interest and common-space litigation (and the role of international courts and tribunals therein), we will next provide a history-sensitive account of the 'juridification' process of the common interests doctrine in international law (section II.). Thereafter, we will illustrate how evolving approaches to litigation concerning common interests and common spaces are poised to impact the broader architecture of international law, with regard to legal interests,

¹⁵ See further *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*, Request for Advisory Opinion (23 December 2024).

legal standing, third-State intervention, and reparations among others (section III.). In light of the normative limits of this institutional centralisation of the international community, we will draw final conclusions on the trajectory of international justice toward common interests and common spaces (section IV.).

This introduction thus broadly defines the thematic scope of the present Focus Section of the *ZaöRV/HJIL* as the changing shape of justice in the global commons. Subsequent articles build upon this theme by considering innovations in institution-building and strategic litigation in respect of the marine environment and the atmosphere, reimagining the foundations and functions of international dispute settlement bodies, and reflecting new perspectives on the doctrines and practices that may ‘remodel’ the architecture of international justice in the coming years.

II. The Juridification of Common Interests in the Jurisprudence of the ICJ: A Look Backward

In an often overlooked scholarly achievement, Wilfred Jenks in 1969 registered fundamental changes in the sociological foundations of international law,¹⁶ which prompted him to query the place of international law in the world community:

‘The world has become one. This may be the most controversial but it is also the fundamental point, and most of the controversy arises from a misunderstanding of what is meant when it is said that the world has become one. This one world no longer accepts the supremacy of any of its parts over the whole or any other part. In this one world, any war or threat of war has become an immediate danger of overwhelming catastrophe for the whole world. In this one world, respect for the dignity and worth of the human person has come to the widely accepted as the foundation of fundamental and inalienable human rights. This one world recognises a common responsibility for the common welfare, among as within nations. [...] This oneness of the world does not presuppose or imply any unity of purpose, ideology or interest, or any proved capacity for common action among the conflicting forces which are struggling for mastery or self-assertion. [...] In brief, the world has become a unit by reason of the growing intensity of the struggles which divide it no less than the growing intimacy of the bonds which unite it.’¹⁷

¹⁶ Wilfred Jenks, *A New World of Law? A Study of the Creative Imagination in International Law* (Longmans 1969).

¹⁷ Jenks (n. 16), 5 f., 20.

One of the aspects Jenks interrogated concerned 'the capacity of the law to grow and change with the growth and needs of the community'.¹⁸ This question still remains relevant to date. For instance, how have conceptions of legal standing changed in relation to common interests and common spaces litigation? To what extent can the concept of reparation adapt to findings of responsibility for violation of community interests, e.g. in the context of climate change? What institutional changes are ongoing to effectively tackle the common concerns of the international community? Our claim is that international courts have so far been central pivots in this aspiration for development and adaptation, not necessarily because they perceived their own role as central in addressing these perennial matters,¹⁹ but more simply because applicants saw in judicial proceedings an effective way to bring their claims forward and achieve something actually or strategically.

Nominally, the existence of common interests is an uncontroversial issue among most international lawyers. An important dimension to bear in mind pertains to the way in which the concept of common interest entered the practice of international law. Its pedigree is theoretical/doctrinal rather than strictly legal,²⁰ in the sense that it came about through a judicial pronouncement rather than being based on a source of international law. In fact, the *Reservations to the Genocide Convention* Advisory Opinion (1951) is commonly seen as the first international judicial reference to the concept of 'common interest'. What is more, multilateral conventions such as the 1984 Convention Against Torture – adopted with a view to safeguard common 'values and interests' – do not specifically or expressly refer to the concept of 'common interest'.²¹

¹⁸ Jenks (n. 16), 13. Notably, these shifts were of interest for a number of international scholars at the time. See, e.g. Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964); Georg Schwarzenberger, *The Frontiers of International Law* (Stevens & Sons 1962).

¹⁹ Hernández, for instance, is dismissive of positions that would assign a central role to the ICJ for, in his view, the Court has continuously relied on the centrality of states in defining the international community and has evidenced a certain reticence in arrogating to itself the role of determining the bounds of this concept. See Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014), 237.

²⁰ In this vein, some scholars have observed that the idea of a 'common good' is rooted in the philosophical works of XVI and XVII centuries. On the point, see Rüdiger Wolfrum, 'Identifying Community Interests in International Law: Common Spaces and Beyond' in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 19-35 (19).

²¹ In ICJ, *Belgium v. Senegal*, the ICJ constructs the concept of common interest by reference to the Preamble to the Torture Convention, in the recital: 'Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'. ICJ, *Belgium v. Senegal* (n. 6), para. 68. See *infra* II.1.

As such, common interests are elements of a conceptual or epistemic framework, capable to influence and direct the interpretation of legal norms, not as a matter of law but as a matter of theory and knowledge.²² Being vested with a unique authority to pronounce on what the law is, in exerting this function courts often produce new concepts which mould the architecture of the law by affecting how the legal operators understand, argue and act upon the law. It is not by coincidence that several international law sources adopted since the International Court of Justice (ICJ) Advisory Opinion on the *Reservations to the Genocide Convention* (1951) have expressly utilised a ‘common interest’ register. These include the *Preamble* to the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (referring to the ‘common interest of all mankind’), as well as the *Preamble* to the 1994 UN Convention to Combat Desertification, which refers to ‘the concern of the international community’.²³

Treating common interests as doctrinal limbs rather than legal concepts shall of course not diminish their significance. On the contrary, they are integral to the conceptual foundation which has enabled current litigation before the ICJ and beyond, impacting the very understanding of the structure of international law. To borrow the terms from Bruno Simma’s seminal work, the resort to concepts such as ‘common interests’ marks the shift ‘from bilateralism to community interest in international law’.²⁴ Moving from this, the following sub-section explores the genealogy of common interests as a concept constructed through the jurisprudence of the ICJ, not in isolation, but by reference to the concept of *erga omnes (partes)* obligations. The Court has in fact been central in articulating the very doctrine that interweaves common interests and *erga omnes (partes)* obligations.

1. The Genealogy of Common Interests in the Jurisprudence of the ICJ: Foundational Developments

Many scholars identify the first reference to common interest in the jurisprudence of the Court dating back to 1951. Indeed, in the context of its Advisory Opinion on the *Reservations to the Genocide Convention*, the Court considered ‘[i]n such a convention the contracting States do not have

²² On the point, see also Letizia Lo Giacco, *Judicial Decisions in International Law Argumentation – Between Entrapment and Creativity* (Hart 2022), 174-176, 181-183.

²³ Preamble, para. 2, signed 14 October 1994, entered into force 13 October 1995.

²⁴ Simma (n. 1); Tams (n. 7).

any interests of their own; they merely have, one and all, a *common interest*, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.²⁵

On closer scrutiny, however, it is possible to trace the origins of the concept even further back, by reference to Judge McNair's separate opinion to the Advisory Opinion on the *International Status of South West Africa*,²⁶ discussing the creation of an international regime by a multilateral treaty when a 'public interest' is involved:

'From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international régime or status, which soon acquires a *degree of acceptance and durability extending beyond the limits of the actual contracting parties*, and *giving it an objective existence*. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of a great war.'²⁷

Similarly, a reference to common interests can be distilled from the dissenting opinion of Judge Jessup in the 1966 *South West Africa* cases,²⁸ referring to 'a *general interest* [of States] in the maintenance of an international régime adopted for the *common benefit* of the international society'.²⁹ In aggregation, these clues suggest that common interest as a concept was already in the making in the early days of activity of the ICJ, as part of the fabric of the newly established international legal order.

²⁵ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion of 28 May 1951, ICJ Reports 1951, 15 (23).

²⁶ ICJ, *International Status of South West Africa*, advisory opinion of 11 July 1950, ICJ Reports 1950, 128.

²⁷ ICJ, *International Status* (n. 26), 153. (emphasis added). For an excellent recollection on the matter, see Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press 2000), 35-37. Ragazzi importantly notes that McNair's position shares some conceptual similarities with the Report of the International Committee of Jurists entrusted by the Council of the League of Nations to provide an advisory opinion on some legal aspects of the Aaland Islands question, in particular its demilitarisation. See Ragazzi (n. 27), 28-37.

²⁸ Oscar Schachter, 'Philip Jessup's Life and Ideas', *AJIL* 80 (1986), 878-895 (892). On the point, see also Ragazzi (n. 27), 8.

²⁹ ICJ, *South West Africa* cases (Ethiopia v. South Africa and Liberia v. South Africa), dissenting opinion of Judge Jessup, judgement of 18 July 1966, ICJ Reports 1966, 325 (373). As explained by Maurizio Ragazzi, this excerpt of Judge Jessup's dissent shall be read in the context of the arguments raised by Spain during the pleadings which laid out the premises to the Court's dictum. In particular, counsel for Spain Roberto Ago argued that 'denial of justice committed against a particular person is not a kind of crime towards the international community as a whole or towards each one of its members; it is an international delict committed by a State towards a State to which the person in question belongs'. See Ragazzi (n. 27), 10-11.

However, common-interest proceedings are a recent win in international law. By this, reference is made to the actual application of the concept in contentious proceedings before the Court. Indeed, it took several failures – the most notorious being the *South West Africa* cases – until the Court finally recognised in *Belgium v. Senegal* (2012) that a state may have legal standing to invoke the responsibility of another state based on common interests in the compliance with *erga omnes partes* obligations.³⁰

Common interests and *erga omnes (partes)* obligations are intertwined concepts in international law in that one is often used as a corollary of the other, or to explain the rationale for distinguishing them from individual interests and reciprocal obligations, respectively.³¹ In this vein, the ICJ defined *erga omnes* obligations as those that '[b]y their very nature [...] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.'³²

The *Barcelona Traction* case is widely considered the first juridical articulation of the concept of *erga omnes* obligations. Given the somewhat cloudy meaning of the concept, the Court found apposite to provide a few effective illustrations thereof, such as obligations derived from 'outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination',³³ which find their legal basis in general international law or in 'instruments of a universal or quasi-universal character'.³⁴ In doing so, the Court has charted the frame that ties together the concept of 'legal interests of all states' and that of *erga omnes* obligations.

As it may be appreciated, the concept of common interests interwoven with that of *erga omnes* obligations has primarily recurred in the context of cases concerned with norms set at protection of fundamental values for the international community (e.g. the prohibition of aggression or of genocide, as mentioned in the *Barcelona Traction* case, in the Advisory Opinion on *Reservations to the Genocide Convention* just cited and, to some extent, in the *South West Africa* cases concerned with the performance of South Africa's obligations as a mandatory power on a territory ruled by apartheid), thus

³⁰ ICJ, *Belgium v. Senegal* (n. 6), 422. It is worth noting that legal standing based on the common interest with the compliance with *erga omnes* obligations – distinguished from those codified in multilateral treaties (i.e. *erga omnes partes*) – has not yet found application in the Court's jurisprudence.

³¹ See Lo Giacco, 'When a Dispute Exists' (n. 5), 354.

³² ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), second phase, judgment of 5 February 1970, ICJ Reports 1970, 3 (para. 33) (emphasis added).

³³ ICJ, *Barcelona Traction* (n. 32), para. 34.

³⁴ ICJ, *Barcelona Traction* (n. 32), para. 34.

highlighting two main inherent traits: on the one hand, universality, in that *erga omnes* obligations are binding on all states with no exception; on the other, solidarity since every state is considered to have a common (legal) interest in their protection.³⁵ These two hallmarks continue to inform the articulation of common interests and *erga omnes* obligations in judicial practices before the Court.

In particular, only in 2012 did the Court explicitly expound the conceptualisation of common interests in relation to *erga omnes partes* obligations, in the context of *Belgium v. Senegal*.³⁶ The case concerned a dispute on the application and interpretation of Senegal's obligations under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Torture Convention'), with respect to former President of Chad Hissène Habré, resident in Senegal since the 1990s. In particular, Belgium submitted that, among other things, by failing to either prosecute Habré for alleged acts of torture or extradite him to Belgium, Senegal had violated the obligation *aut dedere aut judicare* set out in Article 7 of the Torture Convention. The Court noted that

‘68. As stated in its Preamble, the object and purpose of the Convention is “to make more effective the struggle against torture [...] throughout the world”. The States parties to the Convention have a *common interest* to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a *common interest* in compliance with these obligations by the State in whose territory the alleged offender is present. *That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.* All the States parties “have a *legal interest*” in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I. C. J. Reports 1970, p. 32, para. 33*). These obligations may be defined as “*obligations erga omnes partes*” in the sense that each State party has an interest in compliance with them in any given case. In this respect, the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide, with regard to which the Court observed that

³⁵ Ragazzi (n. 27), 17.

³⁶ ICJ, *Belgium v. Senegal* (n. 6).

“In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the Convention.” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I. C. J. Reports 1951, p. 23*).³⁷

69. The *common interest* in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. *It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.³⁸

As such, in *Belgium v. Senegal*, the Court recognised for the very first time the legal standing of the applicant to invoke the responsibility of Senegal with its obligations *erga omnes partes* under the Torture Convention based on its common interest in the compliance of all other States parties with their conventional obligations.

The granting of legal standing based on common interests has been upheld in the *The Gambia v. Myanmar* case (2022)³⁹ and in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*,⁴⁰ in relation to *erga omnes partes* obligations enshrined in the Genocide Convention, as well as in *Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and The Netherlands v. Syrian Arab Republic)*,⁴¹ in relation to the Torture Convention. This reaffirmation of common interests as a legal basis for the applicant’s legal standing in disputes concerned with *erga omnes (partes)* obligations has clearly advanced the juridification of these two concepts in the Court’s caselaw.

³⁷ ICJ, *Belgium v. Senegal* (n. 6), para. 68 (emphasis added).

³⁸ ICJ, *Belgium v. Senegal* (n. 6), para. 69 (emphasis added).

³⁹ ICJ, *The Gambia v. Myanmar* (n. 10), paras 107-108. See also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, provisional measures, order of 23 January 2020, ICJ Reports 2020, 3 (para. 41).

⁴⁰ ICJ, *South Africa v. Israel* (n. 13).

⁴¹ ICJ, *Canada and The Netherlands v. Syrian Arab Republic* (n. 11), para. 50.

2. Subsequent Refinement of the Scope of Common Interests in Codification and Judicial Practice

The ICJ's jurisprudence on common interests informed, and has since drawn upon, the identification and codification of customary requirements for legal standing in inter-State proceedings, as reflected in the International Law Commission's (ILC) 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).⁴² Among these reflections of modern customary international law, Article 42 can in large part be seen as a reflection of the traditional requirement of direct interest, such as arises from a unique injury. Yet whereas Articles 42(a) and 42(b)(i) respectively refer to injuries which 'individually' or 'specially' affect a particular State, Article 42 (b)(ii) refers to the breach of an obligation which radically changes the position of 'all other States' to which it is owed.

The lack of requirement of 'specially affected' status to invoke breaches of international obligations under Article 42(b)(ii) appears to find closer kin in Article 48 of the ARSIWA, which concerns obligations whose 'principal purpose will be to foster a common interest, over and above any interests of States concerned individually', such as for the protection of a group of people.⁴³ In this light, Articles 42(b)(ii) and 48 are distinguishable by the characterisation of members of 'the international community' as 'injured' in the former, and non-injured – yet still entitled to invoke responsibility – in the latter.

Article 42(b)(ii) especially recalls the aforementioned development in ICJ case law of *erga omnes partes* doctrine, given the origins of this provision in the law of treaties.⁴⁴ Notably, while the ILC's Commentary frames Article 42 as encompassing non-treaty obligations in theory, the only examples of Article 42(b)(ii) provided therein derive from treaty systems – 'a disarmament treaty, a nuclear-free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of

⁴² ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries', (2001) ILCYB, Vol. II, Part. Two.

⁴³ See James Crawford, *Chance, Order, Change: The Course of International Law* (Brill 2014), 278. For a typology of such interests in this context, see generally Benvenisti and Nolte (n. 1), 3. On the role of the PCIJ in this area, see Antonios Tzanakopoulos, 'The Permanent Court of International Justice and the 'International Community' in: Christian Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Brill 2013), 339-359 (referring to PCIJ, *Greco-Bulgarian "Communities"*, advisory opinion of 31 July 1930, PCIJ Ser. B, No. 17 (1930), 4).

⁴⁴ See ILC, ARSIWA (n. 42), 117-119 (detailing the influence of Article 60 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)).

each of the others'.⁴⁵ The Commentary makes particular reference to the Antarctic Treaty in this light as well.⁴⁶ In each of these instances, the obligation is 'integral', or interdependent, meaning that its performance by the responsible State is a necessary condition of its performance by all the other States.⁴⁷

The question of which treaty instruments actually contain obligations *erga omnes* or *erga omnes partes* has been discussed in the aftermath of several cases concerning global commons, such as the legal regimes of Antarctica, the deep seabed, and the atmosphere. In the *Whaling in the Antarctic* case, in which Australia alleged Japan's breaches of the International Convention for the Regulation of Whaling (ICRW). The Court was reluctant to take up Australia's argument that the primary object and purpose of the ICRW concerned conservation.⁴⁸ For his part, however, Judge Cançado Trindade considered that the legal nature of the ICRW had been transformed into that of an 'environmental treaty' over time.⁴⁹

In Crawford's view, by instituting proceedings under the ICRW, 'Australia invoke[d] Japan's obligations *erga omnes partes* under the [ICRW]'.⁵⁰ Tanaka has similarly observed that 'the *Whaling* judgment appears to demonstrate that the *erga omnes partes* character of treaty obligations can be indirectly recognized through the establishment of the [...] admissibility of the Applicant State's claims'.⁵¹

It is thus all the more notable that, after being asked by Judge Bhandari '[w]hat injury, if any, has Australia suffered as a result of Japan's alleged

⁴⁵ ILC, ARSIWA (n. 42), 119.

⁴⁶ ILC, ARSIWA (n. 42), 119.

⁴⁷ ILC, ARSIWA (n. 42), 117-118. While the ARSIWA Commentary credits the notion of 'integral' obligations to Sir Gerald Fitzmaurice's work as ILC Special Rapporteur on the Law of Treaties, that earlier work had more clearly distinguished integral from interdependent obligations. For Sir Gerald, the force of 'integral' obligations are 'self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others'. Third Report on the Law of Treaties, by Mr. Gerald Fitzmaurice, Special Rapporteur, A/CN.4/115 (1958), 27-28.

⁴⁸ ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), merits, judgment of 31 March 2014, ICJ Reports 2014, 226 (paras 57-58).

⁴⁹ ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), separate opinion of Judge Cançado Trindade, judgment of 31 March 2014, ICJ Reports 2014, 348 (para. 71).

⁵⁰ See James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in: Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 224-240 (235). See also James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013), 373.

⁵¹ Tanaka, 'Reflections' (n. 6), 533, 537-538.

breach of the ICRW',⁵² Burmester (arguing for Australia) referred in passing to 'the fact that some of the JARPA II take is from waters over which Australia claims sovereign rights and jurisdiction', while much more emphatically stressing that it 'is seeking to uphold its collective interest, an interest it shares with all other parties [to the ICRW]'.⁵³ Boisson de Chazournes (arguing for the same) similarly focused her response on Australia's '*intérêt commun*' in maintaining the integrity of the regime deriving from the ICRW.⁵⁴

In the broader context of the law of the sea, we might consider the prospect of a State raising interests in judicial proceedings concerning environmental obligations under the UN Convention on the Law of the Sea (UNCLOS).⁵⁵ In the light of public interest litigation, it may be particularly salient to determine whether the environmental damage or risk at issue concerns a coastal State's claimed exclusive economic zone or continental shelf, as opposed to the shared resources of the high seas or the International Seabed Area. As the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea observed in *Activities in the Area*, obligations to preserve the environment of those common spaces may be owed to the international community as a whole, or owed 'to a group of States [providing] that the obligation is established for the protection of a collective interest of the group'.⁵⁶

Despite reference to general interests by the applicant States in *Nuclear Tests*,⁵⁷ the Court has not specifically resolved the question of *locus standi* in disputes concerning atmospheric pollution through nuclear testing. Nevertheless, in regard to nuclear disarmament, the issue of standing was pre-emptively raised by the Marshall Islands as Applicant in the *Nuclear Disarmament* cases, with relatively innovative reference to Article 42(b)(ii) of the ARSIWA.⁵⁸ The United Kingdom (UK), as one of the nuclear-armed

⁵² ICJ, Verbatim Record, CR 2013/13, 3 July 2013, 73.

⁵³ ICJ, Verbatim Record, CR 2013/18, 9 July 2013, 28 (Burmester).

⁵⁴ ICJ, Verbatim Record, CR 2013/18, 9 July 2013, 33 (Boisson de Chazournes).

⁵⁵ See UN Convention on the Law of the Sea (Montego Bay, 10 December 1982), Part XII.

⁵⁶ ITLOS, *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, advisory opinion of 1 February 2011, ITLOS Reports 2011, para. 180.

⁵⁷ See *Nuclear Tests* (Australia v. France), Application Instituting Proceedings, 9 May 1973, para. 49; *Nuclear Tests* (New Zealand v. France), Application Instituting Proceedings, 9 May 1973, para. 28.

⁵⁸ On the disuse of this provision in inter-State dispute settlement during the years following the ARSIWA's adoption, see Simon Olleson, *The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Preliminary Draft* (British Institute of International and Comparative Law 2007), 249. On the characterisation of nuclear weapons under international law, see further ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226.

Respondents, did not object to the Applicant's arguments in regards to Articles 42(b)(ii) and 48(3) of the ARSIWA. Instead, it persuasively refocused the Court's attention on the continued requirement of a bilateralised dispute, even in cases arising from collective interests.⁵⁹ Yet this question may arise in future proceedings before the ICJ and other inter-State bodies.

III. Institutional Approaches to Common Interests and Common Spaces: A Look Forward

Across international legal fields, arguments about common interests and common spaces have been invoked in multiple judicial proceedings. These actions present an unprecedented terrain to go beyond the mere invocation of commonality, and more importantly explore *how* they were – successfully or unsuccessfully – brought under judicial purview. Many procedural hurdles that may prevent jurisdiction and admissibility, e. g. legal standing in contentious proceedings before the ICJ, or the requirement of exhaustion of local remedies in international human rights proceedings stemming from individual applications.⁶⁰ These procedural impasses may well give a sense of the limits that international legal proceedings would set to the very notion of international community.

Innovative tactics to overcome these procedural hurdles are explored in other contributions to this Focus Section, such as the 'proxy-state model' for advancing common interests in *The Gambia v. Myanmar*.⁶¹ This was the first case in which the applicant was 'specifically and explicitly nominated by an international organization [the Organization of Islamic Cooperation] to bring a case on its behalf'.⁶² In a similar vein, alternative institutional solutions are taking shape at the International Criminal Court, whose Statute contemplates international organisations to represent the international community at the reparations stage.⁶³ The *Al Mahdi* case

⁵⁹ ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom), preliminary objections of the United Kingdom, ICJ Pleadings 2015, para. 51 ('[T]he prior notification requirement applies equally to States other than injured States as it does to injured States.').

⁶⁰ See e. g. Art. 34(1) ECHR; Art. 41(1)c) ICCPR; Art. (7)(e) of the Optional Protocol to the Convention on the Rights of the Child. See *Sacchi et al. v. Argentina et al.*, CRC/C/88/D/108/2019, Decision of 22 September 2021.

⁶¹ See Sarah Thin, "'Proxy States" as Champions of the Common Interest? Implications and Opportunities', HJIL 85 (2025), 69-96.

⁶² Thin (n. 61).

⁶³ See Elisa Ruozi, 'Repairing Harm to Common Interests and Common Spaces: Recent Institutional Developments Across Public International Law', HJIL 85 (2025), 127-150.

offered a concrete opportunity for the United Nations Educational, Scientific and Cultural Organization (UNESCO) to represent the interests of the international community in protecting common heritage of humankind from war crimes.⁶⁴

The growing apparition of common interests in international justice is visible from a range of other angles. 'Trust funds' are booming in the practice of reparations for common interests and common spaces, raising the question of the extent to which findings of responsibility are still necessary to secure reparations. Further, the value of advisory proceedings as an alternative to contentious proceedings is being potentially redefined in multiple proceedings concerning climate change, but also in regard to arguably common interests in, for example, labour and human rights.⁶⁵ Although not legally binding per se, the normative impact of advisory proceedings should not be underestimated, due to the actual effects they may have on state conduct and the procedural flexibility they may offer in terms of public participation.⁶⁶ This latter point is springing into view if one considers compliance-mechanisms established by multilateral agreements, in particular in the environmental sector. For example, the Implementation and Compliance Committee under the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (ABBNJ) oversees compliance with the principle of common heritage of mankind.⁶⁷ Such mechanisms shift focus towards stakeholders and cooperation among states to protect marine-genetic resources, manage marine areas, and assess environmental impacts effectively.

As such, the present Focus Section engages with different areas of public international law relevant for the protection of common interests and common areas, such as climate change, environmental protection, the common heritage of humankind, and the common interest of preventing and punishing genocide. Exploring these proceedings comparatively as well as in the aggregate prompts reflections as to how the concepts of common interests and common spaces impact upon the architecture of international justice and the role of courts therein.

⁶⁴ Ruozzi (n. 63).

⁶⁵ See ICJ, *Right to Strike under ILO Convention No. 87*, Request for Advisory Opinion, 10 November 2023.

⁶⁶ See Vladyslav Lanovoy and Miriam Cohen, 'Climate Change Before International Courts and Tribunals: Reflections on the Role of Public Interest in Advisory Proceedings', *HJIL* 85 (2025), 97-125.

⁶⁷ See Carlos Antonio Cruz Carrillo, 'The Implementation and Compliance Committee of the ABBNJ: Facilitating Cooperation and Public Participation in the High Seas', *HJIL* 85 (2025), 151-181.

1. Adaptations in the Managerial Architecture of Global Commons

In this light, we may observe that one of the central aspects of interests shared by the international community is that they reflect legal obligations owed to the international community as a whole. Samantha Besson for instance contends that ‘community interests are best understood as interests (i) that are common (ii) and/or belong to a community (iii)’.⁶⁸ The definition of the international community has thus far generated extensive controversy and can certainly be considered not yet settled. On the contrary, who exactly are the holders and the bearers of common interests – whether states, individuals or the international community as a collective entity – warrants further reflection. In particular, a point is worth of notice. As observed by Besson ‘the identity of the community holding the interests may not correspond to that of those acting upon or enforcing those interests procedurally in practice. The international community, in particular, is not (yet) institutionalised.’⁶⁹

The problem of the lack of institutionalisation of the international community is evidenced in the decentralisation of the enforcement of *erga omnes partes*. It is in other words for individual states – as in the case of contentious proceedings before the ICJ – or for collective entities such as Non-Governmental Organisations (NGOs) – as in the case of proceedings before the European Court of Human Rights (ECtHR) – to act on behalf of the international community to redress community interests as right-holders. This prompts questions as to how one can imagine the institutional centralisation of the international community – for instance, in the context of the enforcement of common interests beyond single states – and what are the normative limits of this reconfiguration.

The institutionalisation of the international community encompasses both general managerial functions and dispute settlement functions in relation to common spaces. Among the most developed examples of such a regime is found in Part XI of the UN Convention on the Law of the Sea (UNCLOS), which establishes the legal architecture of the International Seabed Area (‘the Area’). Under UNCLOS, the seabed beyond the limits of national jurisdiction and its mineral resources comprise ‘the common heritage of mankind’.⁷⁰ The Area is primarily managed by the International Seabed Authority (ISA),

⁶⁸ Besson (n. 4), 38.

⁶⁹ Besson (n. 4), 41.

⁷⁰ United Nations Convention on the Law of the Sea, Article 136, 21 ILM 1261 (1982) (UNCLOS).

which is mandated to 'organize, regulate and control' all mineral resource activities in the Area for the benefit of humankind as a whole.⁷¹ This mandate reflects three core objectives: the establishment of rules, regulations, and procedures for deep seabed mining; the protection of the marine environment from harm caused by activities carried out in the deep seabed; and the representation of humankind.⁷²

On this last point, however – representing the common interests of humankind – public participation at the ISA is generally limited and increasingly difficult.⁷³ It is doubtful whether individuals or directly concerned communities are sufficiently heard and represented. In this light, participation at the ISA may be understood within the broader context of the limited consideration of human rights compliance (and more broadly, common interests of a non-spatial character) within the ISA's mandate.⁷⁴

These limitations on participation in ISA affairs are exacerbated by the decision-making processes of the ISA's respective organs in practice.⁷⁵ For example, while the Council is a political organ that adopts resolutions regarding mineral explorations and awards contracts for mining in the Area, the Legal and Technical Commission – a body composed of state-nominated experts – advises the Council on critical decisions,⁷⁶ raising questions of effective oversight of managerial decision-making.⁷⁷ This perceived lack of transparency in the institutional governance of the common heritage of mankind has attracted questions by various stakeholders regarding potential human rights abuses and destruction of culture and livelihood through mineral resource extraction.⁷⁸

Common interests such as these, which exist independently of the *lex specialis* regimes of common spaces, do not frequently arise at the ISA's

⁷¹ 'About ISA' (International Seabed Authority) <<https://www.isa.org/jm/about-isa/>>, last access 14 February 2025.

⁷² UNCLOS, Article 137, 140, 145.

⁷³ Elisa Morgera, 'Participation of Indigenous Peoples in Decision Making Over Deep-Seabed Mining', *AJIL Unbound* 118 (2024), 93-97.

⁷⁴ Morgera (n. 73) (arguing that ISA member states do not raise compliance issues regarding international human rights obligations towards indigenous peoples in decisions regarding deep seabed mining).

⁷⁵ Elisa Morgera and Hannah Lily, 'Public Participation at the International Seabed Authority: An International Human Rights Law Analysis', *RECIEL* 31 (2022), 374-388 (385).

⁷⁶ Morgera (n. 73), 94.

⁷⁷ Morgera and Lily (n. 75), 384-385.

⁷⁸ 'Deep sea mining: mineral exploration in the pacific' (Business & Human Rights Resource Centre, 2021) <https://media.business-humanrights.org/media/documents/2021_TMT_deep_sea_mining.pdf>, last access 14 February 2025.

formal meetings of States Parties and recognised observer institutions.⁷⁹ It is not entirely surprising that such interests may be sidelined in the deliberative and managerial frameworks established in common-space regimes. Yet the dispute settlement mandate established in such regimes – or, perhaps more cynically, the interpretation of this mandate by the relevant judicial or quasi-judicial body – may be constrained by legal requirements such as *audi alteram partem*. In this manner, they may be empowered (or required) to air and assess common interests more effectively than the political and technical institutions of common-space regimes, such as those established in Part XI of UNCLOS.

Indeed, as noted above, the Seabed Disputes Chamber of ITLOS observed in its first and only opinion that obligations in the Area may arise from ‘a collective interest’ of a group of States.⁸⁰ In its plenary form, ITLOS has moreover framed other obligations under this ‘Constitution for the Ocean’⁸¹ in terms of common interests (or ‘elementary considerations of humanity’),⁸² which ‘must apply in the law of the sea, as they do in other areas of international law’.⁸³ Bearing in mind the Tribunal’s unique power to prescribe provisional measures *proprio motu* in order ‘to prevent serious harm to the marine environment’,⁸⁴ it is apparent that the judicial architecture of the deep seabed can accommodate the simultaneous protection of common interests and common spaces. Given the criticism which the ISA has attracted – as taking into account as well the specialised nature of individual common-space regimes – the question arises as to whether Part XI of UNCLOS may yet serve as an institutional model for emergent common interests or spaces.

⁷⁹ ISA, ‘Observers’ <<https://www.isa.org.jm/observers>>, last access 14 February 2025. In terms of alternative channels, see the ISA’s March 2023 Informal Working Group on the Protection and Preservation of the Marine Environment at the ISA, where five Pacific Indigenous Islanders were invited by Greenpeace’s delegation to share their ancestral and cultural ties to the deep sea. ‘Your TOF Debrief on the March International Seabed Authority Meetings’ (The Ocean Foundation) <<https://oceanfdn.org/tof-debrief-on-the-march-isa-meetings/>>, last access 14 February 2025.

⁸⁰ ITLOS, *Responsibilities and Obligations* (n. 56), para. 180.

⁸¹ See Remarks by Tommy T. B. Koh, President of the Third United Nations Conference on the Law of the Sea <https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>, last access 14 February 2025.

⁸² ITLOS, *Juno Trader* (Saint Vincent and the Grenadines v. Guinea-Bissau) (prompt release), judgment of 18 December 2004, ITLOS Reports 2004, 17 (para. 77).

⁸³ ITLOS, *M/V “SAIGA” (No. 2)* (Saint Vincent and the Grenadines v. Guinea), judgment of 1 July 1999, ITLOS Reports 1999, 10 (62); ITLOS, *M/V “Virginia G”* (Panama v. Guinea-Bissau), judgment of 14 April 2014, ITLOS Reports 2014, 101 (para. 359); ITLOS, “*Enrica Lexie*” (Italy v. India) (provisional measures), order of 24 August 2015, ITLOS Reports 2015, 182 (para. 133).

⁸⁴ UNCLOS, Article 290(1).

2. The Prospect of Multilateral Arbitration Regarding Common Interests and Common Spaces

Perhaps the clearest expression of the tension between the traditional bilateralism of international dispute settlement and the advancement of common interests through multilateral participation is third-party intervention. Much has been written on the relation between intervention and common interests in recent ICJ practice under Articles 62 and 63 of its Statute.⁸⁵ Less attention has been paid to the institutional dimension of intervention in the light of differences in the treatment of third-State interests (or potentially non-State interests) in different dispute settlement frameworks.

As such, it is worth querying arbitration as an appropriate forum for common-interest and common-space dispute settlement, and the prospect of multilateral participation in such proceedings. This prospect recalls the arbitral origins of Article 63 of the ICJ Statute,⁸⁶ and concepts of party autonomy discussed in judicial proceedings. In some respects, the heightened autonomy of arbitration increases the likelihood of affecting the rights and interests of third States, particularly when such proceedings are conducted confidentially.⁸⁷

To date, there has been no instance of an intervention by a third State in an inter-State arbitration.⁸⁸ Yet several developments and circumstances have

⁸⁵ See, e.g., Craig Eggett and Sarah Thin, 'Third-Party Intervention Before the International Court of Justice: A Tool for Litigation in the Public Interest?' in: Justine Bendel and Yusra Suedi, *Public Interest Litigation in International Law* (Routledge 2023); Benjamin Salas Kantor and Massimo Lando, 'Intervention and Obligations *erga omnes* at the International Court of Justice', CIL Dialogues, 20 April 2023, <<https://cil.nus.edu.sg/blogs/intervention-an-d-obligations-erga-omnes-at-the-international-court-of-justice>>, last access 12 April 2024. See *contra*, Brian McGarry, 'Decoding Nicaragua's Historica Request to Intervene in *South Africa v. Israel*', EJIL:Talk!, 21 February 2024, <<https://www.ejiltalk.org/decoding-nicaraguas-historic-request-to-intervene-in-south-africa-v-israel>>, last access 12 April 2024.

⁸⁶ Article 63 finds clear antecedents in an 1875 Resolution of the *Institut de Droit international* ('Draft regulations for international arbitral procedure'), the 1899 and 1907 conventions establishing the Permanent Court of Arbitration, and the 1907 draft convention and 1910 draft protocol of the International Prize Court.

⁸⁷ See William Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale University Press 1971), 330 (referring to the 'relatively secret context' of many arbitrations). This could be true as concerns awards or important procedural decisions which are not made public, as well as allegations in pleadings which are not made public.

⁸⁸ See Rosenne's (still accurate) assertion in Shabtai Rosenne, *Law and Practice of the International Court, 1920-2005* (Martinus Nijhoff 2006), 1441 ('[s]o far as is known, there has been no instance of an attempt at intervention in an arbitral proceeding in which the construction of a multilateral convention was in question'). See further John L. Simpson and Hazel Fox, *International Arbitration* (Stevens 1959), 184.

recently aligned in practice, raising this possibility on the basis of both formative and modern arbitration treaties – in particular, annex VII to UNCLOS,⁸⁹ a treaty concerned with both common spaces and common interests, as noted above.

In the ICJ's first hearings on an application filed under Article 62 of its Statute, *Tunisia v. Libya*, Sir Elihu Lauterpacht argued for Malta's intervention by distinguishing ICJ proceedings from arbitration: 'It is in the nature of an arbitration that it is limited to the States that have signed the *compromis* unless in their *compromis* they have accorded to third States the facility or faculty of intervening.'⁹⁰ This reflects a contractual view of the arbitral tribunal as the custodian of a bilateral treaty,⁹¹ free from the ICJ's concerns regarding third States' legal interests.⁹² States may opt for arbitration rather than judicial proceedings precisely because of this strong tradition of autonomy.

As with international adjudication, however, this autonomy may be limited by the powers and duties conferred through the tribunal's constitutive treaty, particularly in compulsory arbitration treaties such as UNCLOS. They may also be conferred by default provisions in the architectural treaties of arbitral institutions, such as the 1907 Hague Convention.⁹³

Arbitration is in principle a highly autonomous process, governed by paramount concern for party consent in the choice of procedures. In such cases, the parties – removed from the confines of a judicial institution with an established Statute and Rules – are generally considered free to shape the proceedings according to whatever norms they (or their designated arbitral institution) may choose. In practice, an inter-State arbitration tribunal will resolve procedural questions by first referring to the terms of the jurisdictional instrument agreed by the parties, as well as the rules of procedure

⁸⁹ See generally Shabtai Rosenne, 'Arbitrations Under Annex VII of the United Nations Convention on the Law of the Sea' in: Tafsir Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (Brill 2007), 989.

⁹⁰ ICJ, *Continental Shelf* (Tunisia v. Libya), Oral Proceedings, 19-23 March and 14 April 1981, 448. For comparative assessments of adjudication and arbitration in this context, see Robert Y. Jennings, 'The Role of the International Court of Justice', *BYIL* 68 (1998), 7-9; William Michael Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication', *RdC* 258 (1996), 49-55.

⁹¹ See generally Omar M. Dajani, 'Contractualism in the Law of Treaties', *Mich. J. Int'l L.* 34 (2012), 1-85.

⁹² See Freya Baetens, 'Procedural Issues Relating to Shared Responsibility in Arbitral Proceedings', *Journal of International Dispute Settlement* 4 (2013), 319, 337; Christine Chinkin, *Third Parties in International Law* (Oxford University Press 1993), 250-251.

⁹³ Convention on the Pacific Settlement of International Disputes (The Hague, 18 October 1907), 205 CTS 233.

adopted by the tribunal in consultation with the parties. The tribunal will thus resort to uncodified principles and powers only when needed to fill gaps in these instruments. Such treaties regularly include 'catch-all' provisions which govern the adoption of procedural rules, in the same manner as provided in Article 48 of the ICJ Statute.⁹⁴

In UNCLOS dispute settlement, where the vast majority of cases submitted under Part XV of the Convention have resulted in PCA-administered arbitrations, Part IV(III) of the PCA's constitutive 1907 Hague Convention appears to constitute a set of rules that fill procedural gaps in any agreement to arbitrate between States which are parties thereto. This is true unless such gap-filling is expressly excluded by the parties; the parties have agreed to provisions addressing (and displacing) the specific subject-matter of the relevant provisions of the 1907 Convention; or the parties have agreed to provisions which provide their own gap-filling mechanism.

In arbitrations instituted under Part XV of UNCLOS, the parties may fall into this last category, having agreed to the gap-filing mechanism in Article 5 of annex VII to UNCLOS ('[U]nless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case'). This view accords with the proposal and omission of reference to the 1907 Convention during the drafting of annex VII.

A PCA-administered UNCLOS tribunal might thus draw its power to admit intervention from Article 5 of annex VII, without taking the 1907 Convention into account. In this context, the principal characteristic distinguishing contemporary inter-State arbitration and judicial settlement is not a broad prohibition against intervention in the former, but rather its emphasis on tribunal discretion in the absence of clear and binding statutory rules ratified by the parties.⁹⁵

While the UNCLOS tribunal in the *South China Sea* arbitration admitted third States to participate merely as observers (without rights or recognition akin to intervention under Article 62 and 63 of the ICJ Statute), the admission of non-parties to receive unpublished case documents and attend closed

⁹⁴ 'The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.'

⁹⁵ On the ICJ's limited discretion in this context, see ICJ, *Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya), Application to Intervene, Judgment, ICJ Reports 1981, 3 (para. 12). See also ICJ, *Continental Shelf* (n. 95), para. 22 (citing Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920*, 593).

hearings⁹⁶ is a notable innovation in the management of procedural questions arising from common interests. This may prove particularly interesting when connected to the same tribunal's implication that environmental protection obligations under Part XII of UNCLOS are *erga omnes* irrespective of whether they clearly pertain to common spaces or, as in *South China Sea*, the environmental damage occurs in waters adjacent to rock features that are subject to sovereignty claims.⁹⁷

In this light, current practices and hurdles to the peaceful settlement of common interests and common spaces disputes prompt us to reflect and – to some extent also imagine – how the changing structure of international law (and international justice) may look like in the years to come. As aptly observed by Anne Peters in the context of the increasing importance of public-law principles in global governance, a broader overarching transformation is already taking place as the manifestation of ‘a paradigm shift, namely international law’s shift from a “private” to a “public” character’.⁹⁸

IV. Conclusions

Common interests and common spaces are becoming central pivots in international justice. States are increasingly resorting to them not only to achieve judicial pronouncements with respect to longstanding matters such as climate change or the prevention of genocide, but also to exhibit political commitment and alignment. Community interests are thus argued and litigated in a way that gives expression to the international community, understood not as a uniform, likeminded conglomerate of units, but as a concept that presupposes the existence of common interests to be tackled through cooperation, and thus also through public international law.

Along these lines, the progressive mobilisation of arguments based on common interests or common spaces prompts a threefold reflection. Firstly, international courts appear to enjoy enduring centrality to the life of the very concept of common interest since its first articulation in the jurisprudence of

⁹⁶ See Permanent Court of Arbitration, *South China Sea Arbitration*, Award on Jurisdiction and Admissibility, 29 October 2015, paras. 80, 84. The Philippines raised no objection to these requests ‘[i]n light of its oft-stated interest in transparency’. Permanent Court of Arbitration, *South China Sea Arbitration* (n. 96), para. 82.

⁹⁷ This inference derives from, e.g., conclusions found in paras 992-993 of the tribunal’s 2016 award.

⁹⁸ Anne Peters, ‘Towards Transparency as a Global Norm’ in: Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013), 534-607 (600).

the ICJ in 1951, including the culmination of the process of 'juridification' with its first concrete application in 2012. After a decade of relative dormancy, the concept is now being unearthed in a sequence of cases which directly bear on the operation of common interests.

Secondly, this lineage of cases – taken in the aggregate – tells something more about the nature of public international law as a 'public' field of law. For as long as international dispute settlement was confined to bilateral disputes raising little or no interest among third parties, the public character of international law was probably hard to detect. Today, instead, the sought decentralisation of enforcement and the types of issues that have reached the docket of international courts tend to emphasise this public dimension in an unprecedented manner. Remarkably, however, the public dimension has become visible first and foremost in the courtroom, not only through the legal action of non-injured parties, but also via third-party interventions that have multiplied in cases dealing with community interests and common spaces. Since Holland's famous statement in 1898 that 'the law of nations is but private law "writ large"',⁹⁹ the *public* character of public international law is certainly more within sight.

Looking beyond the courtroom, the activity of quasi-judicial bodies designed to pronounce authoritatively on common interests and common spaces similarly contributes to the public dimension of those interests and spaces, for instance by enabling broader participation of various 'stakeholders'.¹⁰⁰ Of course, it still remains to be seen whether the materialising 'publicness' of public international law in and out of the courtroom is, normatively speaking, a positive development in international affairs, and what challenges and opportunities may arise in this regard from the continued centralisation and multilateralisation of forums for international justice.

Thirdly, while international courts are becoming the vehicle of expression of the public dimension of international law, their respective institutional approaches to adjudication also warrant adaptation. This plays out in respect of what is required to perform their function effectively – in particular when common interests and common spaces are involved – as well as with respect to the possibilities of judicial process within their respective legal frameworks. The development of innovative concepts such as the 'proxy state'

⁹⁹ Thomas Erskine Holland, *Studies in International Law*, 152, cited in: Jenks (n. 16), 13, correcting the erroneous attribution of the sentence to Hersch Lauterpacht. Holland's privatised conception of international law, international law is concerned with the 'Persons' for whose sake rights are recognised; with the 'Rights' thus recognised; and with the 'Protection' by which those rights are made effective.

¹⁰⁰ See Malgosia Fitzmaurice, 'Bringing in Community Interests under International Environmental Law: Substantive and Procedural Paths', *HJIL* 85 (2025), 183–198.

model,¹⁰¹ and the characterisation of international organisations as representatives of common interests,¹⁰² indicate that courts are where the architecture of international law – including questions of representation and responsibility – will continue to be stress-tested in years to come. In this regard, international courts seized with questions relating to common interests and common spaces have demonstrated a pragmatic willingness to adapt from the traditional bounds of dispute settlement.¹⁰³ This adaptation, which appears so incremental when viewed across the historical arc of international justice, is nevertheless driven by the sudden breakthroughs of individual cases, and the creativity of judges and counsels.¹⁰⁴ These are the architects drafting new blueprints for justice in the global commons.

¹⁰¹ See *The Gambia v. Myanmar* (n. 10).

¹⁰² ICC, *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Public Reparation Order (17 August 2017), para. 107, in which the Trial Chamber awarded ‘one symbolic euro [...] to the international community, which is best represented by UNESCO’.

¹⁰³ See e.g. Alexander Wentker and Robert Stendel, ‘Taking the Road Less Travelled: The ICJ’s Pragmatic Approach to Provisional Measures in Nicaragua v. Germany’, *EJIL: Talk!*, 3 May 2024, available at <<https://www.ejiltalk.org/taking-the-road-less-travelled-the-icjs-pragmatic-approach-to-provisional-measures-in-nicaragua-v-germany/>>, last access 17 February 2025.

¹⁰⁴ Indeed courts’ pronouncements often take highly significant cues from arguments put forward by the parties. In *Barcelona Traction*, for instance, counsel Roberto Ago for Spain had submitted the argument distinguishing between bilateral obligations and obligations owed to the whole international community, which the ICJ later accepted in its famous obiter dictum. See n. 32.

‘Proxy States’ as Champions of the Common Interest?

Implications and Opportunities

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Abstract

During the 2022 preliminary objections proceedings in the case of *Gambia v. Myanmar* before the International Court of Justice (ICJ), Myanmar argued that the state initiating proceedings – the Gambia – was merely a ‘proxy state’, and that the ‘real’ applicant was the Organisation of Islamic Cooperation (OIC).¹ The OIC had appointed the Gambia, had ‘tasked’ it to bring the case, and had provided all the necessary resources to do so. As a result, Myanmar contended, the case was inadmissible.² This argument was summa-

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¹ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), preliminary objections, judgment of 22 July 2022, ICJ Reports 2022, 477 (34).

² ICJ, *Gambia v. Myanmar* (n. 1), 34.

rily dismissed by the ICJ,³ yet the question of proxy statehood deserves further inquiry. The ICJ's permissive approach has potentially important implications, including for the promotion of common interests through international adjudication.⁴

This article critically examines the phenomenon of 'proxy states' through the lens of the integration and furtherance of common interests in and through ICJ proceedings. First, it outlines and analyses Myanmar's 'proxy state' argument and the ICJ's response. This allows a picture to be painted of the 'proxy-state model' and the legal landscape in this regard, at least insofar as it has been interpreted by the ICJ. Section II. then delves into the potential of the proxy-state model to provide new routes for bringing issues of common interest before the ICJ. It critically examines the role of international organisations in furthering such interests, and highlights some key potential advantages that they can provide within this dynamic. Finally, section III. assesses three key concerns that have been raised in relation to cases being brought to by states acting as a proxy for an international organisation or other entity. Section IV. offers some conclusions on the implications and opportunities presented by the proxy-state phenomenon.

Keywords

Jurisdiction – International Court of Justice – Myanmar – international organisations – abuse of process – admissibility

I. *Gambia v. Myanmar* and the 'Proxy State' Argument

The *Gambia v. Myanmar* case is not the first and will certainly not be the last brought before the ICJ as a result of campaigning by non-state, third-party actors.⁵ The *Nuclear Weapons* Advisory Opinion of 1996 and the more recent advisory proceedings on climate change were both the outcome of considerable campaigning by Non-Governmental Organisations (NGOs) and other civil society actors.⁶ Similarly, such actors have played key roles in

³ ICJ, *Gambia v. Myanmar* (n. 1), 44-46.

⁴ Common interests will be discussed in more detail in section II. In short, these concepts are understood as interests which are shared by a group of actors and which transcend the individual interests of those actors.

⁵ See Michael A. Becker, 'Pay No Attention to that Man behind the Curtain: the Role of Civil Society and Other Actors in Decisions to Litigate at the International Court of Justice', *Max Planck UNYB* 26 (2023), 90-107 (92-103) for an overview.

⁶ Becker 'Pay No Attention' (n. 5), 92-95.

the instigation of proceedings by Belgium and Australia in the *Questions relating to the Obligation to Prosecute or Extradite* and *Whaling in the Antarctic* cases.⁷

Unlike in those cases, however, *Gambia v. Myanmar* concerned the role played by an international organisation, a type of non-state actor with very different powers and position in international law than civil society actors. Also unlike in those cases, the respondent state, Myanmar, specifically raised the role played by the OIC as an objection to the ICJ's jurisdiction and the admissibility of the case.⁸ The Gambia had brought proceedings before the Court alleging that the treatment of the Rohingya (an ethnic and religious minority in Myanmar) by the Myanmar authorities amounted to a violation of a number of different obligations in the Genocide Convention, requesting a number of forms of relief.⁹ In initiating these proceedings, Myanmar argued that in reality, the Gambia was merely acting as a 'proxy' for the OIC, and that therefore the Court should refuse to exercise jurisdiction. The following sections analyse in turn the role of the OIC in the bringing of the case, Myanmar's argument that the Gambia could not bring such proceedings as it was only a 'proxy' of the OIC, and the Court's findings in that regard.

1. The Role of the OIC

The OIC is an international organisation made up of 57 states across four continents.¹⁰ It styles itself as the 'collective voice of the Muslim world'¹¹ and its diverse objectives as identified in its Charter include: 'to safeguard and protect the common interests and support the legitimate causes of the Member States' and 'to protect and promote human rights and fundamental freedoms'.¹² For over a decade, the Organisation has regularly expressed grave concern over the treatment of Rohingya Muslims in Myanmar and has mobilised a number of diplomatic, legal, and other efforts (including the

⁷ See Becker 'Pay No Attention' (n. 5), 98 f.

⁸ ICJ, *Gambia v. Myanmar* (n. 1), 34.

⁹ ICJ, *Preliminary Objections of the Union of Myanmar in the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), 20 January 2021, 112.

¹⁰ OIC, 'History' <https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en>, last access 31 January 2025.

¹¹ OIC, 'History' (n. 10).

¹² Charter of the Islamic Conference (OIC Charter) (UNTS 1972) Article 1 (2) and (14). There is a list of 20 separate and overlapping objectives in this article.

provision of aid to refugees) to support them and to bring attention to their cause.¹³

More recently, the OIC has taken a leading role in bringing this matter before the ICJ. To summarise what is a relatively complex series of resolutions,¹⁴ meetings, and statements, by and within the auspices of the OIC, the chain of most relevant events was as follows. In 2018, the OIC passed Resolution 59/45-POL which established an Ad Hoc Committee on Accountability for Human Rights Violations Against the Rohingyas.¹⁵ This Committee was chaired by The Gambia and its inaugural session was held in Banjul, The Gambia, on 10 February 2019.¹⁶ The Ad Hoc Committee decided upon a plan of action to utilise legal avenues for the protection of the Rohingya which was approved by the OIC, and which, it later became clear, included the bringing of proceedings before the ICJ.¹⁷ These proceedings were to be initiated by The Gambia as the chair of the Ad Hoc Committee, on behalf of the OIC.¹⁸ In the words of Myanmar, The Gambia was ‘appointed’ by the OIC for this role.¹⁹ The cost of the proceedings were funded by contributions from OIC Member States, and the funds themselves were managed by the Chair of the OIC Ad Hoc Committee and the OIC Secretary-General.²⁰

¹³ See e.g. Organization of Islamic Cooperation, ‘The OIC expresses grave concern over the situation of Myanmar Rohingya Muslims’, <https://www.oic-oci.org/topic/?t_id=7023&ref=2894&lan=en>, last access 31 January 2025; Organization of Islamic Cooperation, ‘OIC continues efforts to provide humanitarian aid to Rohingya refugees’, <https://www.oic-oci.org/topic/?t_id=10322&ref=4077&lan=en>, last access 31 January 2025. See also OIC, Resolution 4/46-MM on the Situation of the Muslim Community in Myanmar (46th session of the Council of Foreign Ministers, 1-2 March 2019), <<https://oic-oci.org/docdown/?docID=4447&refID=1250>>, last access 31 January 2025.

¹⁴ See *Preliminary Objections of Myanmar* (Gambia v. Myanmar) (n. 9) for a detailed overview.

¹⁵ OIC, Resolution 59/45-POL on the Establishment of an OIC Ad hoc Ministerial Committee on Accountability for Human Rights Violations Against the Rohingyas (45th Session of The Council Of Foreign Ministers, 5-6 May 2018), <<https://www.oic-oci.org/docdown/?docID=1868&refID=1078>>, last access 31 January 2025.

¹⁶ See OIC, ‘OIC Convenes Coordination Meeting for Ministerial Committee on Accountability for Human Rights Violations against the Rohingya’ (22 January 2019), <https://oic-oci.org/topic/?t_id=20506&ref=11671&lan=en>, last access 31 January 2025.

¹⁷ See ICJ, *Preliminary Objections of Myanmar* (n. 9), 76-84.

¹⁸ ICJ, *Preliminary Objections of Myanmar* (n. 9). As chair of the Ad Hoc committee, it may be assumed that the Gambia had considerable agency with regard to this decision by the Committee.

¹⁹ ICJ, *Preliminary Objections of Myanmar* (n. 9).

²⁰ ICJ, *Preliminary Objections of Myanmar* (n. 9), 100; OIC, ‘Report of the Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya’ (25 September 2019), <<https://www.oic-oci.org/docdown/?docID=4519&refID=1255>>, last access 31 January 2025.

2. The 'Proxy State' Argument

During the preliminary objections stage, Myanmar argued that 'the actual seisin of the Court in this case was performed by The Gambia [...] in [its] capacity as an organ of the OIC, or alternatively as "proxy" (or agent) of the OIC, and not in its capacity as a Contracting Party to the Genocide Convention'.²¹ Myanmar relied on the Court's definition of a dispute as 'a matter of substance',²² and 'a matter for objective determination by the Court'²³ to argue that it is up to the Court itself to determine 'who *in substance* is the real applicant in the case'.²⁴

Following this line of argumentation, 'the mere assertion by a State formally named as applicant in the application that it is the real applicant in the case will not suffice to establish that this is indeed the case'.²⁵ The Gambia, Myanmar argued, 'is merely acting on [the OIC's] behalf' as its proxy, 'having been expressly tasked by the OIC' to bring proceedings.²⁶ This characterisation of the 'real applicant' was based on a number of factual considerations, including the funding of proceedings,²⁷ the prior endorsement and approval by the OIC of The Gambia's application,²⁸ and the fact that The Gambia allegedly did not bring proceedings on its own initiative, but rather was 'tasked' to do so by the OIC, 'not only on behalf of, but at [its] behest'.²⁹ Much was made by Myanmar of the language used in press releases and other documentation that emphasises the role of the OIC and which presents The Gambia as an agent or appointee of the OIC.

In concluding that the OIC was the 'real applicant', Myanmar argued that the Court did not have jurisdiction over the case for two reasons: first, because the OIC was not a state, as required by Article 34(1) of the ICJ Statute;³⁰ and second, because the OIC was not a party to the Genocide

²¹ ICJ, *Preliminary Objections of Myanmar* (n. 9), 34.

²² See e.g. ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom), preliminary objection, judgment of 5 October 2025, ICJ Reports 2016, 833 (38); ICJ, *Preliminary Objections of Myanmar* (n. 9), 40.

²³ ICJ, *Preliminary Objections of Myanmar* (n. 9), 40, referring to inter alia ICJ *Marshall Islands* (n. 22), 38.

²⁴ ICJ, *Preliminary Objections of Myanmar* (n. 9); ICJ *Marshall Islands* (n. 22), 38, 42 (emphasis in original).

²⁵ ICJ, *Preliminary Objections of Myanmar* (n. 9), 43.

²⁶ ICJ, *Preliminary Objections of Myanmar* (n. 9), 43 and 45.

²⁷ ICJ, *Preliminary Objections of Myanmar* (n. 9), 100; OIC, 'Report of Ad Hoc Ministerial Committee' (n. 20).

²⁸ ICJ, *Preliminary Objections of Myanmar* (n. 9), 87.

²⁹ ICJ, *Preliminary Objections of Myanmar* (n. 9), 94, 96.

³⁰ Article 34(1) Statute of the International Court of Justice (UNTS 1945).

Convention and thus could not make use of the compromissory clause in Article IX as a jurisdictional basis.³¹ The Gambia, by contrast, argued that it was the ‘real applicant’, and not the OIC, the decision to bring proceedings having been made individually and independently by the Gambian government.³² It also emphasised that it was The Gambia who initially raised and spearheaded the matter within the framework of the OIC, rather than being a mere agent of that organisation.³³

3. The Court’s Response

The Court gave ‘short shrift’ to these arguments by Myanmar.³⁴ After summarising the arguments of the parties, each of Myanmar’s arguments on this point are rejected rather summarily.³⁵ Noting that the proceedings were instituted in The Gambia’s name, as a party to both the ICJ Statute and the Genocide Convention, the Court observed that

‘the fact that a State may have accepted the proposal of an intergovernmental organization of which it is a member to bring a case before the Court, or that it may have sought and obtained financial and political support from such an organization or its members in instituting these proceedings, does not detract from its status as the applicant before the Court’.³⁶

It emphasised that, in line with previous jurisprudence, whatever motivation a state may have in bringing a case ‘is not relevant for establishing the jurisdiction of the Court’.³⁷ It thus takes what might be described as a strongly formalist position with regard to the Gambia’s right of *locus standi*. The focus here appears to be very much of the letter of the law and Gambia’s right to bring proceedings, rather than the motivation behind or spirit in which such proceedings are brought.

³¹ ICJ, Preliminary Objections of Myanmar (n. 9), 185.

³² ICJ, *Gambia v. Myanmar* (n. 1), 39 f.

³³ ICJ, *Gambia v. Myanmar* (n. 1), 41.

³⁴ Becker ‘Pay No Attention’ (n. 5), 102. See ICJ, *Gambia v. Myanmar* (n. 1), Dissenting Opinion of Judge Xue, 3 et seq. who seems to agree with Myanmar on this point. Some of Judge Xue’s objections to the exercise of jurisdiction in this case are discussed below in section 4.3.

³⁵ ICJ, *Gambia v. Myanmar* (n. 1), 42-46.

³⁶ ICJ, *Gambia v. Myanmar* (n. 1), 44.

³⁷ ICJ, *Gambia v. Myanmar* (n. 1), 44. On this point, the Court refers to its previous pronouncement in ICJ, *Border and Transborder Armed Actions* (Nicaragua v. Honduras), judgment of 20 December 1988, ICJ Reports 1988, 69 (52).

It is rather notable that the Court did not engage with the factual extent of the OIC's influence at all, or on the question more generally as to whether in fact The Gambia was acting as a proxy. The Gambia and Myanmar both presented opposing arguments on this point, as noted above, but the Court appeared to deem this irrelevant: it did not matter if The Gambia had acted as a proxy for the OIC or not; regardless, it was exercising its right to bring proceedings before the ICJ.

The Court was thus crystal clear in its formalism: as a matter of law, a state may indeed bring proceedings on behalf of an international organisation or indeed another body or group of actors. Whether it is accurate to describe The Gambia as an appointee or proxy is beside the point; The Gambia is free to exercise its sovereign right to bring a case as it chooses. This *'laissez faire'* approach³⁸ could therefore open up international adjudication to a new pattern and dynamic when it comes to the institution of proceedings. The implications of this dynamic for common interests in international law are explored in the next section.

II. Proxy-States: A New Route for Promoting Common Interests?

This situation whereby an individual state acts as an agent or proxy to institute proceedings on behalf of an international organisation could provide interesting opportunities for the protection and promotion of common interests in international law. In contrast with individual state interests, common interests in international law transcend individual concerns, uniting a group with a shared purpose.³⁹ They are more than just the sum of individual interests within a group and instead reflect a shared quality that surpasses the coincidental alignment of individual interests.⁴⁰

³⁸ Michael A Becker, 'The Plight of the Rohingya: Genocide Allegations and Provisional Measures in the Gambia v Myanmar at the International Court of Justice', *Melbourne Journal of International Law* 21 (2020), 428-450 (440).

³⁹ See Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law', in: Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 79-89 (81). See also Sarah Thin, 'In Search of Community: Towards a Definition of Community Interest', in: Gentian Zyberi (ed.), *Protecting Community Interests Through International Law* (Intersentia 2021), 11-30 (12 f., 16 f.).

⁴⁰ Stephen M. King, Bradley S. Chilton and Gary E. Roberts, 'Reflections on Defining the Public Interest', *Administration and Society* 41 (2010), 954-978 (957); see also ICJ, *Reservations to the Convention on Genocide*, advisory opinion of 28 March 1951, ICJ Rep 1951, 15, 23. See also Sarah Thin, 'Community Interest and the International Public Legal Order', *NILR* 68 (2021), 35-59 (40).

International organisations similarly appear to operate on the basis of common purposes. By acting as an agent of an international organisation, the proxy state creates a new route through which the interests of international organisations rather than individual states *per se* can be brought before an international court or tribunal. A key question is therefore the extent to which international organisations can and do represent common interests. This is addressed in the first subsection. Although it is possible that a state may act as an agent or proxy for an informal group of states, or even another individual state, the proceeding analysis will focus on the pattern established in *Gambia v. Myanmar*; i. e. an individual state instituting proceedings at the behest of an international organisation. The second subsection analyses three key ways in which international organisations could contribute to the furtherance of common interest through the use of proxy states.

1. On Behalf of the Community? International Organisations and the Common Interest

International organisations are the product of interstate cooperation and the recognition of shared goals; as such, there are clear connections between them and common interests.⁴¹ Such arrangements can provide more detail, more focus, ‘a more comprehensive response’ to global problems such as climate change and environmental problems.⁴² They bring issues out of the state-vs-state paradigm. That said, international organisations are still essentially made up of states, each of which has its own individual interests.⁴³

Is it possible for such state-based creations to transcend the individual interests of their creators and act instead in the *common* interest? It seems difficult to answer this question in anything but the affirmative. Indeed, Virally has famously defined an international organisation specifically in reference to the common interest as ‘an association of States [...] whose

⁴¹ Jan Klabbers, ‘What Role for International Organizations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism’, in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 86-100 (93); Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009), 16-20.

⁴² See Michael Bowman, ‘Righting the World Through Treaties: The Changing Nature and Role of International Agreements in the Global Order’, *Legal Information Management* 7 (2007), 124-132 (126).

⁴³ Klabbers, ‘Promotion of Community Interests?’ (n. 41), 87.

task it is to pursue objectives of common interest'.⁴⁴ It might be argued to the contrary that states are inherently self-interested and therefore do not or cannot establish organisations that may act contrary to their own individual interest. However, this overlooks the fact that states themselves act in furtherance of common interests, sometimes at the expense of certain of their individual interests.⁴⁵ States are essentially socio-legal constructs made up of a plethora of differing and often conflicting interests and ideas and so the idea that their only interests would be purely individualist is a strange one.⁴⁶ They can and do also act in the common interest as well as in their individual interest.⁴⁷ Gambia's application to the Court in this case is a good example of that, alongside many other recent applications by non-injured states.⁴⁸ It is therefore illogical to claim that states could not themselves act in furtherance of a common interest that might contradict their individual interests.

The relationship between the organisation itself and its member states is also key here. It is traditional to speak of the possession of a 'distinct will' or '*volonté distincte*' as a defining characteristic of an international organisation.⁴⁹ Such a distinct will establishes the organisation or its organs as an

⁴⁴ Michel Virally, 'Definition and Classification of International Organizations: A Legal Approach', in: Georges Abi-Saab (ed.), *The Concept of International Organization* (1981), 50-66 (51). See also Angelo Golia Jr and Anne Peters, 'The Concept of International Organization', in: Jan Klabbbers (ed.), *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022), 25-49 (29).

⁴⁵ Huber wrote as early as 1910 that states conclude(d) treaties for essentially two reasons: interest and common interest: Max Huber, 'Die Soziologischen Grundlagen des Völkerrechts', *Archiv für Rechts- und Wirtschaftsphilosophie* 4 (1910), 21-35, as cited in Klabbbers, 'Promotion of Community Interests?' (n. 41), 16.

⁴⁶ Samantha Besson, 'Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?', in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 36-49 (46); Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' *LJIL* 29 (2016), 289-316 (295 f.).

⁴⁷ See Besson, 'Whose Interests?' (n. 46), 46; Besson, 'Dissolving the Paradox' (n. 46), 295 f.

⁴⁸ ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), judgment of 31 March 2014, ICJ Reports 2014, 226; ICJ, *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), judgment of 20 July 2012, ICJ Reports 2012, 422; ICJ, *Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Canada and the Netherlands v. Syrian Arab Republic), provisional measures, order of 16 November 2023, ICJ Reports 2023, 587 (1); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), Application Instituting Proceedings of 29 December 2023, ICJ Reports 2024, 1; ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory* (Nicaragua v. Germany), Application Instituting Proceedings of 1 March 2024, ICJ Reports 2024, 1.

⁴⁹ Golia and Peters (n. 44), 34; Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007), 19.

independent actor, separate, ‘more than the sum of its members’.⁵⁰ It has, nonetheless, been criticised in more recent literature as ‘outdated, obscure’⁵¹ and ‘metaphysical’⁵² – a difficult concept to pin down in practice. An arguably more practicable concept is that of (institutional) autonomy.⁵³ Rather than referring to the elusive notion of ‘will’, this approach focuses on the factual and legal capacity of an organisation to act independently of its members.⁵⁴ The international legal personality of an international organisation can be considered an important contributing factor in establishing the legal side of this autonomy, being a prerequisite for the organisation to possess legal rights and obligations under international law.⁵⁵ The extent and degree of autonomy of a particular organisation will depend on numerous factors related both to the constitutive set-up of the organisation and to the particular context.⁵⁶ It is nonetheless clear that the autonomy of international organisations is essential in their ability to further and represent common interests that extend beyond the individual interests of their member states.

In sum, international organisations are by definition legally and institutionally independent of their members, at least to a certain degree. This means that there is no inherent barrier to an international organisation adopting and furthering common interests which transcend and are distinct from the individual interests of its constituent states. The extent to which a particular international organisation actually does represent common interests will depend on the nature and set-up of that organisation and the particular circumstances at hand. It will normally be necessary to assess this on a case-by-case basis, not only on an organisation-by-organisation basis, as the same organisation may act to reflect a range of goals and purposes. There may always be a certain degree of tension between the individual interests of member states and these organisation-level common interests.⁵⁷

Key elements that can signal a greater degree of commonality include the intensity and types of cooperation, including the method of decision-making.

⁵⁰ Henry G. Schermers and Niels Blokker, *International Institutional Law* (6th edn, Brill 2018), 48; Golia and Peters (n 44), 34.

⁵¹ Golia and Peters (n. 44), 34.

⁵² Brölmann (n. 49) 21.

⁵³ Brölmann (n. 49) 19, Golia and Peters (n. 44) 34.

⁵⁴ Golia and Peters (n. 44) 38.

⁵⁵ On international legal personality as a defining characteristic of an international organisation, see notably ILC, ‘Articles on the Responsibility of International Organisations’ (ARIO) (2011) ILCYB, Vol. II, Part Two, 2, Article 2(a); Golia and Peters (n. 44), 34-37; Brölmann (n. 49), 19. On the relationship between legal personality and autonomy, see Golia and Peters (n. 44), 39.

⁵⁶ Golia and Peters (n. 44), 41.

⁵⁷ Klabbers, *International Institutional Law* (n. 41), 4 f.

If decisions are made by majority decision rather than requiring all states to agree, this is evidence of an interest greater than that of those individual states that do not concur.⁵⁸ Some commentators also point to the nature of the organ itself or the other organs that are present in the same wider organisation. Certain types of organs, particularly parliamentary and judicial bodies 'are supposed to be genuinely devoted to the organisation's overall interest and are supposed to operate as a complement, and corrective, to those organs chiefly entrusted with balancing the competing national interests'.⁵⁹ Organisations that contain such organs are generally thought to be more aligned with a communitarian perspective than an individual statist one. Finally, the functions or purposes of an institution or organisation as set out in law can also be relevant.⁶⁰ Many international institutions lack clearly defined functions and purposes, but many others are explicit (for example, in their constitutive treaty) with regard to the core common purposes for which they were created.⁶¹

The OIC itself certainly exhibits some of these characteristics. Decisions are regularly made by majority,⁶² and organs such as the OIC Independent Permanent Human Rights Commission would certainly appear to reflect a common-interest-based perspective.⁶³ Perhaps even more clearly, many of the objectives and principles listed in the OIC Charter are communitarian in nature, e. g. 'To promote and to protect human rights and fundamental freedoms' and 'To cooperate and coordinate in humanitarian emergencies such as

⁵⁸ E. g. some MEAs operate on the basis of qualified majority voting (QMV). See Ellen Hey, 'Common Interests and the (Re)constitution of Public Space', *Env. Policy & Law* 39 (2009), 152-159 (155).

⁵⁹ Werner Schroeder and Andreas Th. Müller, 'Elements of Supranationality in the Law of International Organisations' in: Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 358-378 (361).

⁶⁰ Mario Prost and Paul Kingsley Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?', *Chinese Journal of International Law* 5 (2006), 341-370 (355): 'IOs are not innate legal beings which spontaneously come to life. They are entities created by States which stem from the desire of governments to organize collectively their co-operation in particular elements of their international relations. Accordingly, IOs are entirely defined by the function, or purpose, for which they have been created [...] these functions can, within the same organization, vary in time according to the organization's changing needs, or those of its members.'

⁶¹ Klabbers, *International Institutional Law* (n. 41), 34.

⁶² See e. g. Rules of Procedure of the OIC Council of Foreign Ministers, Rule 19(1), <<https://bdrive.oic-oci.org/index.php/s/LomDpRWwdkpoed7>>, last access 31 January 2025; Rules of Procedure the OIC Executive Committee, Rule 11(1), <<https://bdrive.oic-oci.org/index.php/s/Y7eDCSwgTq3q5WS>>, last access 31 January 2025.

⁶³ See <<https://www.oic-iphrc.org/>>, last access 31 January 2025.

natural disasters'.⁶⁴ It is thus reasonable to conclude that the OIC is at least capable of representing common interests.

In this particular case, and as already noted above, The Gambia's application is clearly in furtherance of common interests. As a non-injured state, The Gambia does not have a direct legal interest in the outcome of the case beyond its status as a party to the Genocide Convention and the *erga omnes partes* status of the prohibition on genocide therein.⁶⁵ The Genocide Convention has previously been recognised as reflecting such an interest.⁶⁶ In this circumstance, therefore, the OIC's role may indeed be seen as promoting common interests – by way of a 'proxy state'.

2. Common Interest and the Proxy State Model

The previous section established that international organisations can and do act in furtherance of common interests. This section refocuses on the proxy-state dynamic, outlining the ways in which this model can serve the promotion of such interests. It highlights the positive contribution that international organisations can bring to international litigation instigated at their request or behest.

a) Forum for Deliberation and Identification of Common Interest

The first contribution that international organisations can provide is to act as a forum for deliberation and for the identification of issues of common interest. Referred to as 'the *agorae* of the global community',⁶⁷ international organisations provide fora in which participants can transcend the purely domestic and see from a global perspective.

There are numerous ways in which international organisations may be said to be well-positioned to 'facilitate and structure co-operation and deliberation in time and space'.⁶⁸ First, institutionalising discussion within a permanent or regular forum has an important impact on the nature of such communication.⁶⁹ Without such an infrastructure, negotiation and deliberation generally occur between fewer actors, making it less representative and harder to

⁶⁴ OIC Charter (n. 12), Article 1.

⁶⁵ ICJ, *Reservations to the Convention on Genocide* (n. 40), 23.

⁶⁶ ICJ, *Reservations to the Convention on Genocide* (n. 40), 23.

⁶⁷ Klabbers, 'Promotion of Community Interests?' (n. 41), 93.

⁶⁸ Prost and Clark (n. 60), 348.

⁶⁹ Prost and Clark (n. 60), 349.

make the link between any decisions made and broader common interests.⁷⁰ Even if more widespread negotiation occurs, it is commonly sporadic and less predictable.⁷¹ This permanency can ensure that the issue in question remains 'on the radar' and there can be a system in place for re-assessment and development of how the regime operates.

Next, the existence of an international forum creates a certain distance or level of detachment from national administrations.⁷² This, combined with the collective international nature of that forum, allows the discussion (in theory) to transcend the domestic and the self-interest of states to discuss matters from a global perspective. States are engaged in a common endeavour; they 'are now part of an integrated regime, through which precarious *inter partes* equilibria are replaced by a sort of "co-tenancy" of each member with all the others'.⁷³

Third, these deliberative fora facilitate the development of a shared, common agenda.⁷⁴ They provide a platform for discussion and action.⁷⁵ This helps to both 'facilitate the articulation and aggregation of national interests'⁷⁶ while looking at the same time to the common interest. International institutions 'are essential fora for the socialization of international relations'.⁷⁷ They allow for the elaboration of shared values and social understandings that are the basis, firstly, of any negotiation, but also of any understanding of common interests in international law.⁷⁸

International organisations also commonly introduce a level of structure and professionalism to the conduct of negotiations and deliberation. They lead to 'a large and continuous mobilization of human resources'.⁷⁹ Prost and Clark argue that 'Permanent mobilization of international agents encourages

⁷⁰ Prost and Clark (n. 60), 349.

⁷¹ Prost and Clark (n. 60), 349.

⁷² Prost and Clark (n. 60), 350.

⁷³ Prost and Clark (n. 60), 350.

⁷⁴ Prost and Clark (n. 60), 351.

⁷⁵ Klabbers, 'Promotion of Community Interests?' (n. 41), 94.

⁷⁶ Prost and Clark (n. 60), 351.

⁷⁷ Prost and Clark (n. 60), 353.

⁷⁸ See Prost and Clark (n. 60), 350. See also Georg Nolte, 'The International Law Commission and Community Interests', in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 101-118 (103): 'A community interest is not something which exists objectively, but needs to be socially established (constructed, recognized). The establishment of a community interest in international law usually begins with a claim by a certain actor which then becomes politically more widely accepted, by persuasion or by different forms of pressure. The process by which a community interest is established is usually fed by many informal (political or other) impulses whose legal relevance is determined by secondary rules of international law.'

⁷⁹ Prost and Clark (n. 60), 352.

the development of a coherent body of technical expertise, necessary for the handling of contemporary challenges, the nature of which is often complex and multidimensional'.⁸⁰ They highlight too that 'international agents are agents of the organization, not of their national State' and are, thus, 'in principle, devoted to the collective interests of the organization over narrow national interests'.⁸¹

International organisations therefore provide a great number of benefits in relation to the identification of common interests themselves, and strategies for their promotion and protection. These benefits stem from the ability of an international organisation to act as a forum for deliberation on such topics.

b) Practical Support

The second key contribution that an internal organisation can provide in this context is practical and political support. It has often been remarked that there is a relative paucity of cases before the ICJ, the primary objective of which is the promotion or protection of common interests (as opposed to individual state interests).⁸² While detailed consideration of the reason for this is beyond the scope of this article, it may be presumed that to take on such proceedings also is deemed to carry significant risk and potential costs – political, financial, legal. We do not yet have an international legal culture of individual states acting as 'guardians' of the common interest.⁸³ Acting on behalf of another, or on behalf of a collective, changes this dynamic.

The proxy state model allows for the risk to be shared. One element of this risk-sharing is resource-based. Bringing proceedings before the ICJ is an expensive business. The ICJ Trust Fund has provided financial support for some litigants, but there is always a limit to the amount of support that such funds can provide.⁸⁴ As noted above, the cost of the proceedings to The Gambia in *Gambia v. Myanmar* were funded by contributions from OIC Member States, and the funds themselves were managed by the Chair of the

⁸⁰ Prost and Clark (n. 60), 352.

⁸¹ Prost and Clark (n. 60), 352.

⁸² See André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure', *EJIL* 23 (2012), 769-791 (790 f.); Christian Tams, 'Individual States as Guardians of Community Interests' in: Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 397-405 (387 f.).

⁸³ Tams (n. 82).

⁸⁴ See Gbenga Oduntan, 'Access to Justice in International Courts for Indigent States, Persons and Peoples' *I. J. I. L.* 58 (2019), 265-325 (274 f.).

OIC Ad Hoc Committee and the OIC Secretary-General.⁸⁵ This pooling of resources might also be seen to extend beyond finances to expertise and experience in the formulating of positions and arguments before the ICJ. It also creates a (comparatively) transparent and predictable financial support structure for common interest cases to be brought and funded.

c) Transparency

Closely related to the above point is the role that international organisations (can) play in increasing transparency, particularly in relation to the funding of proceedings. If we compare the *Gambia v. Myanmar* proceedings with other ICJ cases, it would be naive to presume that all states that have initiated proceedings before the ICJ without help of the trust fund have covered the costs entirely by themselves.⁸⁶ The lack of transparency on this point is notable. In the proxy-state model, there is arguably a much greater prospect for the accessibility and (public) availability of information regarding the reasons for bringing the case, the interests that lie behind the application, and the practical arrangements for financial and legal support. Of course, this is not a *necessary* consequence of the proxy-state model, as much will depend on the particular facts surrounding an application and the value that the particular international organisation puts in transparency. Yet, international organisations are arguably far more likely to provide and document such information publicly than individual states acting alone and in their individual interest.

The value of transparency in and of itself may be the subject of some debate,⁸⁷ but it is clear that transparency has an important 'accessory, secondary role'⁸⁸ to play in the protection and promotion of other aims and interests. Transparency has an important contribution to make to good governance and the rule of law, to accountability of public actors and democracy,⁸⁹ to the legitimacy of international legal processes, and to the empower-

⁸⁵ ICJ, Preliminary Objections of Myanmar (n. 9), 100; OIC, Report of the Ad Hoc Ministerial Committee on Human Rights Violations Against the Rohingya, OIC/ACM/AD-HOC ACCOUNTABILITY/REPORT-2019/FINAL, 25 September 2019, <<https://www.oic-oci.org/docdown/?docID=4519&refID=1255>>, last access 31 January 2025.

⁸⁶ See further discussion on this point below, section III. 2.

⁸⁷ See Anne Peters, 'The Transparency Turn of International Law', *Chinese Journal of Global Governance* 1 (2015), 3-15 (9 f.).

⁸⁸ Andrea Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in: Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013), 1-10 (5).

⁸⁹ Bianchi (n. 88.)

ment and engagement of the public and civil society. Many of these factors intersect with common interests in international law. Transparency may thus be seen as an important potential contribution of the proxy-state model, as compared with more traditional dynamics that lie behind applications to the Court.

III. Concerns and Hurdles

During the proceedings in the *Gambia v. Myanmar* case, Myanmar argued that, even if the Court were to find that it did have jurisdiction, it should decline to exercise that jurisdiction (i. e. declare the case inadmissible). The reasons given for this predominantly related to the judicial function of the ICJ, and particularly procedural fairness and the avoidance of abuse of process.⁹⁰ Although these arguments were not successful in that particular case, they do raise some potential hurdles or concerns with regard to the proxy-state model. Myanmar raised a number of such matters, some of which related more generally to the initiation of proceedings by a non-injured state (what they term an *actio popularis*).⁹¹ This section focuses in particular on those concerns which relate to the proxy state model, and not to broader issues related to the standing of non-injured states.

1. Circumvention of Jurisdictional Limitations

Myanmar argued in *Gambia v. Myanmar* that even if the Court did have jurisdiction, it should have declined to exercise that jurisdiction (i. e. declare the case inadmissible) ‘if the effect of [exercising jurisdiction] would in substance lead to a circumvention of the limitations on the Court’s jurisdiction’.⁹² They argue in their submissions:

‘The function of the Court is to decide legal disputes between States entitled to appear before it. If, in substance, an exercise of jurisdiction would lead the Court to decide a dispute brought by a State or entity not entitled to appear before it, then a refusal by the Court to exercise that jurisdiction would be necessary to safeguard the Court’s judicial function.’⁹³

⁹⁰ ICJ, Preliminary Objections of Myanmar (n. 9), 50, 53.

⁹¹ ICJ, *Preliminary Objections of Myanmar* (n. 9), Preliminary Objection II(C).

⁹² ICJ, *Preliminary Objections of Myanmar* (n. 9), 50.

⁹³ ICJ, *Preliminary Objections of Myanmar* (n. 9), 50.

The contention or concern here appears to be that to allow a state to act as a proxy for an international organisation undermines the *locus standi* requirements of the Court. Despite the wording of this objection in terms of admissibility, it is difficult to see it as anything other than a repackaged version of Myanmar's objection to the Gambia's standing.⁹⁴ In no previous case has the Court found any such limitation to admissibility. In order to apply such a rule of admissibility, the ICJ would need to resort to analysis of the applicant state's motivation in bringing a case – something which it is clear the Court is reluctant to do.⁹⁵ It would also, arguably, place an undue restriction on the faculty of states to bring proceedings before the ICJ, and their discretion in deciding which cases to bring.

Myanmar's objection here may be understood as highlighting the problem of the creation of *artificial* disputes. In other words, if a state acts merely as a proxy, then the 'formal' dispute between applicant and respondent could be distinct from the 'real' dispute between respondent and the actor who engaged the proxy state to bring the application. One could potentially draw an analogy between this artificiality and the ICJ's jurisprudence in relation to the extinction of a dispute where it has become 'without object'.⁹⁶ The Court has previously found that a dispute has ceased to exist either in part or in its entirety for this reason. In these cases the Court can be seen to have looked at the motivation of parties in bringing proceedings.⁹⁷ However, that jurisprudence relates more to the outcome of the case and whether it would be 'devoid of purpose',⁹⁸ rather than the nature of the dispute between the parties as such. It thus seems unlikely that this notion of the artificiality of a dispute would have any legal effect when raised before the ICJ.

The Court has also previously dealt with claims that the application at hand is distinct from the 'real dispute' in situations where a broader conflict

⁹⁴ Indeed, Gambia's submissions frame it as such: ICJ, 'Written Observations of The Gambia on The Preliminary Objections Raised By Myanmar', written observations of 20 April 2021, 2.27.

⁹⁵ See e.g. ICJ, *Gambia v. Myanmar* (n. 1), 44; ICJ, *Border and Transborder Armed Actions* (n. 37), 52.

⁹⁶ ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), judgment of 14 February 2002, ICJ Reports 2002, 3 (18, 44); ICJ, *Nuclear Tests* (New Zealand v. France), judgment of 20 December 1974, ICJ Reports 1974, 457 (59); ICJ, *Nuclear Tests* (Australia v. France), judgment of 20 December 1974, ICJ Reports 1974, 253 (51-55); ICJ, *Dispute over the Status and Use of the Waters of the Silala* (Chile v. Bolivia), judgment of 1 December 2022, ICJ Reports 2022, 614, (163).

⁹⁷ See e.g. ICJ, *Nuclear Tests* (New Zealand v. France) (n. 96), 31; ICJ, *Nuclear Tests* (Australia v. France) (n. 96), 30.

⁹⁸ ICJ, *Silala* (n. 96), 42; ICJ, *Case concerning the Northern Cameroons* (Cameroon v. United Kingdom), judgment of 2 December 1963, ICJ Reports 1963, 15 (38).

situation has been recharacterised so as to fit within the scope of material jurisdiction of the Court. Examples include several of the cases brought on the basis of compromissory clauses in the Convention on the Elimination of Racial Discrimination and in the Genocide Convention.⁹⁹ In such cases, there is no doubt that a dispute of sorts exist between the parties, but rather whether the subject matter brought before the ICJ is a mischaracterisation of the true substance of the dispute. Although concerned with material jurisdiction rather than personal jurisdiction, so-called ‘recharacterised disputes’ cases are comparable in the sense that they may also be argued to circumvent jurisdictional limitations. The Court has thus far refrained from engaging with this notion of the ‘real dispute’, and has instead focused on whether the specific claims made by the applicant actually fall within the terms of the compromissory clause in question.¹⁰⁰ It seems therefore that there exists no additional criterion in the practice of the Court that the claims brought before it must reflect the ‘real dispute’ at hand, provided that the application fulfils formal criteria related to jurisdiction and admissibility.

It is worth considering the logical endpoint of Myanmar’s reasoning here in relation to the judicial function. If proxy statism were to become a regular feature of the Court’s jurisprudence and docket, would this be inherently in opposition to the Court’s judicial function? This question arguably touches upon the heart of the matter. Myanmar contends that the essential function of the Court is to resolve disputes between states.¹⁰¹ Seen from this perspective, it is at least possible to perceive a tension between this function and the situation in which cases are regularly brought on behalf of international organisations. Although formally an interstate case, in reality the Court could be seen as resolving a dispute which went beyond or fell outside this interstate dynamic. This could denote the existence of an additional, implicit criterion that only disputes which are *truly* interstate in nature, based on this conception of the judicial function.

However, this argument is premised upon a highly limited view of the international judicial function. One would certainly not be alone in understanding the judicial function of the ICJ in broader and more communitarian

⁹⁹ See e.g. ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections of the Russian Federation (1 December 2009), available at <<https://www.icj-cij.org/sites/default/files/cas-e-related/140/16099.pdf>>, last access 11 February 2025, paras 1.4, 1.10, where Russia argues that the ‘real dispute’ concerned the broader conflict and was not truly a dispute over the CERD, but rather one over international humanitarian law and the international law on the use of force, and therefore that the case should be declared inadmissible.

¹⁰⁰ See Lawrence Hill-Cawthorne, ‘International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study’ ICLQ 68 (2019), 779-815 (794), for discussion.

¹⁰¹ *Preliminary Objections of Myanmar* (n. 9), 50.

terms.¹⁰² The notion of dispute settlement as the exclusive function of international courts and tribunals is based on the traditional idea that international law serves individual state interests; that international law's core purpose is to facilitate and regulate interstate relations: a law *between* states, not above them.¹⁰³ International law, however, does much more than just this. There are countless international legal obligations binding on states which, if breached, would not generate an injured state. From environmental law to human rights and beyond, international law is no longer purely about protecting individual state rights or interests.¹⁰⁴ The international legal order recognises the legal effect of concepts like common interest, as expressed most clearly through obligations *erga omnes* (*partes*) and peremptory norms.¹⁰⁵ Returning to the role of the Court, the international judicial function may thus be seen as not only resolving disputes between states, but ensuring state compliance with their international legal obligations more generally.¹⁰⁶ As observed by Judge Lachs in his separate opinion to the *Lockerbie* case, 'the Court is the guardian of legality for the international community as a whole' and the 'general guardian of legality within the system'.¹⁰⁷

This wider view of the international judicial function – one that incorporates principles and concerns like the international rule of law, legality, and common interests in compliance with international law – is far more compatible with the proxy-state dynamic. From this perspective, provided the procedural rules are complied with, the Court is primarily concerned with whether a rule has been broken or not. It is not limited to disputes of a purely interstate nature beyond formal admissibility criteria. In determining that the

¹⁰² See e.g. Joan E. Donoghue, 'The Role of the World Court Today', *Ga. L. Rev.* 47 (2012), 181-201; Geert De Baere, Anna-Louise Chane and Jan Wouters, 'International Courts as Keepers of the Rule of Law: Achievements, Challenges, and Opportunities', *N. Y. U. J. Int'l L. & Pol.* 48 (2016), 715-793; Dinah Shelton, 'Form, Function, and the Powers of International Courts', *Chi. J. Int'l L.* 9 (2009), 537-571 (564).

¹⁰³ See Lassa Oppenheim, *International Law: A Treatise*, Vol. 1 (2nd edn, Longmans, Green, and Company 1905), 209 et seq., as quoted in Amos J. Peaslee, 'The Sanction of International Law', *AJIL* 10 (1916), 328-336 (333).

¹⁰⁴ Sarah Thin, *Beyond Bilateralism: A Theory of State Responsibility for Breaches of Non-Bilateral Obligations* (Edward Elgar 2024), 28 et seq.

¹⁰⁵ See ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), judgment of 5 February 1970, ICJ Reports 1970, 3 (33-34); ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), Articles 40-41; Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, Article 53; Bruno Simma, 'From Bilateralism to Community Interest in International Law', *RdC* 250 (1994), 217, 322.

¹⁰⁶ See Sarah Thin, 'Guardians of Legality? The International Judicial Function in an Era of Community Interest', *Nord. J. Int'l L.* 92 (2023), 499-527, particularly 11 et seq.

¹⁰⁷ ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), provisional measures, order of 14 April 1992, ICJ Reports 1992, 3, 26.

Gambia does indeed have standing in this case and no rule of law or procedure would prevent the Court from exercising jurisdiction, the Court may be seen to have (at least partially) accepted this broader conception of its judicial function.

2. Potential for Abuse

In its submissions, Myanmar highlighted the ‘wide range of potential abuses’ that could stem from the precedent that would be set by accepting to hear a case brought by a proxy state.¹⁰⁸ These scenarios included corporations paying a willing state to bring a case, or a state agreeing to be the ‘nominal applicant’ in proceedings on behalf of another state as a diplomatic favour or bargaining piece.¹⁰⁹ This, they argue, would run contrary to the ICJ’s judicial function and to the consent of state parties to the ICJ Statute.¹¹⁰

Despite the concerns that such scenarios might give rise to, there was never any real prospect of arguing that the Gambia’s application represented a comparable abuse of process.¹¹¹ In and of itself, therefore, this objection by Myanmar was always likely to fail. The question remains, however, whether such scenarios are a real concern. In other words, what would or could the Court’s approach be in relation to scenarios such as those raised by Myanmar, i. e. states agreeing to initiate proceedings on behalf of other actors, including potential corporations, as a diplomatic favour or for economic return?

Taking a closer look at the types of supposedly nightmare scenarios highlighted by Myanmar, the question arises as to how likely (or unlikely) these scenarios really are. Let us first draw a distinction between these scenarios which involve a proxy state bringing a case of their own free will, potentially in exchange for financial or diplomatic benefit, on the one hand, and a situation of coercion on the other. If it could be proven that a state had been compelled against their will to make an application to the Court, it is submitted that this would be an obvious case of abuse of process. It could alternatively be treated, analogous with the consent to be bound by a treaty, as being devoid of legal effect.¹¹² Indeed, exercising jurisdiction over an application brought through coercion would arguably ‘risk circumventing

¹⁰⁸ *Preliminary Objections of Myanmar* (n. 9), 53.

¹⁰⁹ ICJ, *Preliminary Objections of Myanmar* (n. 9), 53.

¹¹⁰ ICJ, *Preliminary Objections of Myanmar* (n. 9), 53.

¹¹¹ *Written Observations of The Gambia* (n. 94), 15 et seq; ICJ, *Gambia v. Myanmar* (n. 1), 49.

¹¹² See Vienna Convention on the Law of Treaties, Article 51: The expression of a State’s consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

the consent requirement'.¹¹³ Such clear-cut cases are, however, highly unlikely to arise in practice. The threshold of coercion itself is famously difficult to define, and even more difficult to establish.¹¹⁴

By contrast, that a state might bring a case in exchange for a financial or other benefit seems a comparatively realistic prospect. Such situations are also more complex as a matter of law as *prima facie* the decision to bring a case, if made freely, is a sovereign act.¹¹⁵ It is difficult to identify any positive law that would limit the state's right to take such an act as they saw fit, whether influenced by extraneous concerns or interests or otherwise.

Let us take the scenario of a state acting as proxy for a corporation or corporations. It is certainly not unheard for industry to take an interest in interstate adjudication. Following the introduction of plain packaging for cigarettes, tobacco companies were at the forefront of formulating arguments that these measures were contrary to international trade law,¹¹⁶ shortly before proceedings were brought before the World Trade Organization (WTO).¹¹⁷ Industrial actors have been less vocal in relation to cases before the ICJ, but that is not to say that important private interests are not in play. The pending dispute of *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)* is essentially a territorial dispute over the Essequibo region,¹¹⁸ a region in and around which ExxonMobil has been actively exploiting oil reserves worth billions of dollars since 2015.¹¹⁹ Venezuela has denounced Guyana's decision to license these activities,¹²⁰ and has ordered ExxonMobil and other industrial

¹¹³ Becker 'Pay No Attention' (n. 5), 104.

¹¹⁴ See Marko Milanovic, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law', *AJIL* 117 (2023), 601-650, especially at 612 et seq.

¹¹⁵ Becker 'Pay No Attention' (n. 5), 104.

¹¹⁶ Andrew D. Mitchell, 'Australia's Move to the Plain Packaging of Cigarettes and Its WTO Compatibility', *Asian Journal of WTO & International Health Law and Policy* 5 (2010), 405-426, e.g. at 407, 414, 421. See also Tobacco Tactics, 'Industry Arguments Against Plain Packaging', <<https://tobaccotactics.org/article/industry-arguments-against-plain-packaging/>>, last access 30 January 2024.

¹¹⁷ See e.g. WTO, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for Consultations by Indonesia of 25 September 2013, WT/DS467/1.

¹¹⁸ See ICJ, *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, ICJ Reports 2023, 262 (22).

¹¹⁹ See ExxonMobil, 'Guyana Project Overview', <<https://corporate.exxonmobil.com/locations/guyana/guyana-project-overview#DiscoveriesintheStabroekBlock>>, last access 11 February 2025; ExxonMobil, '2022 Annual Report', <<https://corporate.exxonmobil.com/-/media/global/files/locations/guyana-operations/em-guyana-annual-report-2022.pdf>>, last access 11 February 2025.

¹²⁰ See 'Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Cooperative Republic of Guyana on March 29th, 2018' of 28 November 2019, <<https://www.icj-cij.org/sites/default/files/case-related/171/171-20191128-WRI-01-00-EN.pdf>>, last access 11 February 2025, 40.

actors to leave the region.¹²¹ In Venezuela's submissions to the Court, they even refer to the role of ExxonMobil and other multinational companies as being 'behind Guyana's belligerent approaches'.¹²² This is by no means the first territorial dispute before the ICJ which affects potential oil profits, nor will it be the last.¹²³ Is it possible, or even probable, that at least one of these proceedings were brought using funding from and following pressure or encouragement by the oil and gas industry? The present author would suggest that the likelihood appears rather high. It seems reasonable to assume, therefore, that this nightmare scenario put forward by Myanmar already exists, and indeed could even be rather commonplace.

In addressing Myanmar's arguments, the Court did acknowledge its power to refuse to exercise jurisdiction on grounds of abuse of process. The Court has so far been reluctant to use this power, holding repeatedly that an application will only be found inadmissible on such grounds 'in exceptional circumstances',¹²⁴ and where there is 'clear evidence' of abusive conduct.¹²⁵ The threshold is therefore high. The question remains as to whether and under what conditions the proxy state model would or could amount to such abusive conduct.

In a recent case involving alleged abuse of process, *Equatorial Guinea v. France*, France argued that the case should be declared inadmissible on grounds of abuse of process on the basis that Equatorial Guinea's objective in bringing proceedings was solely to shield its Vice President (who was also the son of the President) from pending criminal proceedings in France.¹²⁶ Although the Court found that neither the 'exceptional circumstances' nor the 'clear evidence' thresholds were met and therefore that this was not a bar to

¹²¹ Argus Media, 'Venezuela Gives 90-Day Warning to Guyana Producers', 6 December 2023, <<https://www.argusmedia.com/en/news-and-insights/latest-market-news/2516564-venezuela-gives-90-day-warning-to-guyana-producers>>, last access 11 February 2025.

¹²² Venezuelan Memorandum (n. 120), 44.

¹²³ See e.g. ICJ, *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), judgment of 3 February 2009, ICJ Reports 2009, 61; Dana Spinant, 'Romania Wins Black Sea Border Dispute', Politico, 3 February 2009; ICJ, *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya), judgment of 12 October 2021, ICJ Reports 2021, 206; Peter Muiruri, 'Kenya Rejects UN Court Judgment Giving Somalia Control of Resource-Rich Waters', Guardian, 14 October 2021.

¹²⁴ ICJ, *Gambia v. Myanmar* (n. 1), 49; ICJ, *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), Preliminary Objections, judgment of 13 February 2019, ICJ Reports 2019, 7 (107 et seq.). See also in ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Preliminary Objections, judgment of 6 June 2018, ICJ Reports 2018, 292 (150); ICJ, *Jadhav* (India v. Pakistan), judgment of 17 July 2019, ICJ Reports 2019, 418 (49).

¹²⁵ ICJ, *Immunities and Criminal Proceedings* (n. 124), 150.

¹²⁶ ICJ, *Immunities and Criminal Proceedings* (n. 124), 140.

admissibility,¹²⁷ Judge Donoghue appended a Separate Opinion in which she strongly disagreed on this point. She determined that “The President of Equatorial Guinea made clear that the purpose of these actions is a personal one, to address difficulties faced by his son.”¹²⁸ This purpose, she found ‘is entirely at odds’ with the law of diplomatic privileges and immunities relied upon by Equatorial Guinea.¹²⁹ As such, she reasoned, the dismissal of the case ‘would pose no threat to diplomatic functions’; it would, however, allow Equatorial Guinea to continue to benefit from the shield provided by earlier provisional measures awaiting the Court’s judgment on the merits.¹³⁰

Judge Donoghue’s conclusion appears to stem from an understanding that certain primary rules of international law (in *Equatorial Guinea v. France*, rules on diplomatic privileges and immunities) have a particular purpose, and if they are put to a use ‘entirely at odds’ with the purpose for which they were designed, then this could amount to abuse of process. This would certainly not appear to be the case in *Gambia v. Myanmar*, as there is no clear evidence that The Gambia or the OIC brought or supported the application for any reasons other than the prevention and punishment of genocide. If a state were to agree to bring an application in exchange for financial gain or diplomatic benefit, this motivation might not align with the purpose underlying the international obligation(s) at issue, but it is difficult to think of a scenario where it would be ‘entirely at odds’ in the manner described by Judge Donoghue. It is therefore highly unlikely that the ‘exceptional circumstances’ threshold would be met in these imaginary proxy state situations. Even if it were, it would not be the proxy state model itself that amounted to an abuse of process, but the manner in which it was used.

It is also worth highlighting the ‘clear evidence’ criterion. Judge Donoghue was of the opinion that this threshold was met in *Equatorial Guinea v. France* in part because the supposedly diplomatic premises in question were clearly not being used as such (French investigative teams had searched the buildings and found no diplomatic correspondence or documentation; this was not refuted by Equatorial Guinea), and because the statement of the President of Equatorial Guinea supposedly demonstrated that his purpose was ‘a personal one’, namely ‘to address difficulties faced by his son’.¹³¹ It

¹²⁷ ICJ, *Immunities and Criminal Proceedings* (n. 124), 150.

¹²⁸ ICJ, *Immunities and Criminal Proceedings* (n. 124), Dissenting Opinion of Judge Donoghue, 15.

¹²⁹ ICJ, *Immunities and Criminal Proceedings* (n. 124), Dissenting Opinion of Judge Donoghue, 15.

¹³⁰ ICJ, *Immunities and Criminal Proceedings* (n. 124), Dissenting Opinion of Judge Donoghue, 18.

¹³¹ ICJ, *Immunities and Criminal Proceedings* (n. 124), Dissenting Opinion of Judge Donoghue, 14-16.

will be rare that the evidence is this apparent – and even in this situation, the Court found contrary to Judge Donoghue that the evidence was insufficient.

Even if the ‘exceptional circumstances’ threshold were met, evidence is likely to be a significant hurdle. Inherent in the supposedly abusive scenarios set out above, whether real or imagined, is a lack of transparency. If Exxon-Mobil did indeed finance or otherwise encourage the application in *Guyana v. Venezuela*, the arrangements are certainly not on public record. It would be extremely difficult if not impossible for the ICJ to be provided with sufficient information and evidence to determine the factual circumstances and whether or not they amounted to an abuse of process. This may be contrasted with the comparatively transparent and public process that led to the Gambia’s application.¹³² Indeed, the more ‘abusive’ a situation is, the less information is likely to be available about it.

In sum, the proxy state model is not inherently an abuse of process. Even considering the nightmare scenarios whereby proxy states bring cases purely for personal gain are unlikely to be inadmissible on such grounds. The two main criteria of ‘exceptional circumstances’ and ‘clear evidence’ are simply unlikely to be met largely due to the high threshold that has been set by the Court for both of them. Provided, therefore, that the case is brought by a state of its own free will and not subject to coercion, it seems likely that the abuse of process threshold will not be met.

The conclusion that the proxy state model is not inherently abusive of judicial processes is of course favourable towards the use of this dynamic in the furtherance of common interests. The possibility that the same dynamic could be used for personal (state) financial or political gain without any likely finding of inadmissibility on grounds of abuse of process does, however, mean that the proxy state model does not exclusively serve the common interest. It could indeed be used to counter such interests as well as to further them. The fact that the ICJ has accepted the operation of this model in *Gambia v. Myanmar* means that the tool undoubtedly exists, but does not determine how that to may be used, nor by whom.

3. Equality of the Parties and Procedural Fairness

Although Myanmar raised the issue of the equality of the parties only in relation to the standing of a non-injured state more generally,¹³³ Judge Xue linked this concern specifically with the proxy-state model. She noted that:

¹³² See above, especially section II. 2. c).

¹³³ *Preliminary Objections of Myanmar* (n. 9), 340.

'When the applicant is in fact acting on behalf of an international organization, albeit in its own name, the respondent may be placed in a disadvantageous position before the Court. [...] With the organization in the shadow, inequality of the Parties may be hidden in the composition of the Court, thereby undermining the principle of equality of the parties, one of the fundamental principles of the Court for dispute settlement.'¹³⁴

Judge Xue highlights in particular the potential inequity where the judges deciding a case happen to be nationals of states which are members of the international organisation backing the application.¹³⁵ She makes a comparison with the International Tribunal for the Law of the Sea which has specific rules for equivalent situations. Certain specific international organisations can bring cases before the International Tribunal for the Law of the Sea (ITLOS) and the Seabed Disputes Chamber under certain circumstances.¹³⁶ Article 22 of the Rules allows *inter alia* for judges to be withdrawn from the bench at the President's discretion, and in consultation with the parties, if 'two or more judges on the bench are nationals of member States of the international organization concerned'.¹³⁷

The potential for bias in judicial decision making, or even the perception of such bias, could indeed be a problem under the proxy-state model. The ICJ Statute and Rules contain no equivalent provision for the withdrawal of judges in these circumstances. It is not, however, an entirely new problem. As has previously been acknowledged, ICJ procedure has evolved in relation to bilateral, adversarial disputes that did not tend to involve broader common interests of this type.¹³⁸ We are increasingly seeing such tensions in a variety of aspects of Court procedure.

The increased use of third party intervention at the ICJ has also highlighted the potential tension between judicial independence and nationality of a state with a stake in the case at hand. In the ongoing *Allegations of Genocide (Ukraine v. Russia)* case, 7 out of the 16 judges (including the President) were nationals of states that had lodged declarations of interven-

¹³⁴ ICJ, *Gambia v. Myanmar* (n. 1), Dissenting Opinion of Judge Xue, 10.

¹³⁵ ICJ, *Gambia v. Myanmar* (1), 10.

¹³⁶ Statute of the International Tribunal for the Law of the Sea (1982), Arts 20 and 37.

¹³⁷ ITLOS Rules of the Tribunal, ITLOS/8, <https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf>, last access 11 February 2025, Article 22(4).

¹³⁸ See ICJ, *Gambia v. Myanmar* (n. 1), Dissenting Opinion of Judge Xue, 10 and Declaration of Judge *Ad Hoc* Kress, 35; ICJ, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), judgment of 25 September 1997, ICJ Reports 1997, 7, Separate Opinion of Judge Weeramantry, 118; Craig Eggett and Sarah Thin, 'Third-Party Intervention before the International Court of Justice: A Tool for Litigation in the Public Interest?' in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 75-97.

tion.¹³⁹ According to Russia, ‘multiple interventions and public statements made by such States undoubtedly put undue and unnecessary pressure on the Judges and the Court as a whole, and concerns regarding conflicts of interests may also arise’.¹⁴⁰ The Court, Russia argued, should not allow intervention ‘to be used as a vehicle to circumvent the procedural safeguards in the Statute and the Rules of Court to maintain equality of the parties, in particular, in terms of the composition of the Court, to the detriment of the Russian Federation. This would irretrievably upset the balance between the Parties.’¹⁴¹

The parallels are clear. Just as the *Ukraine v. Russia* raised concerns regarding connections between sitting judges and intervening states, the proxy-state dynamic raises similar concerns related to the connections between judges and states parties to the organisation behind the application. One could imagine that a judge of the nationality of one of these state parties might look more favourably on such an application. In *Ukraine v. Russia*, however, the Court’s response was brief:

‘The Court observes that the fact that some judges on the Bench are nationals of States seeking to intervene cannot affect the equality of the Parties because intervening States do not become parties to the proceedings. In any event, all judges are bound by their duty of impartiality.’¹⁴²

This ‘duty of impartiality’ refers to the understanding that ICJ judges are independent from their nation state and do not represent their state in any way. All members of the bench are formally understood and expected to be impartial as regards the interests and desires of states to which they have some form of connection.¹⁴³ The Court has thus far appeared to be satisfied with this formal impartiality, and it certainly seems from the *Ukraine v. Russia* intervention proceedings that the Court is unlikely to entertain such arguments to the extent that they would act as a bar to jurisdiction. There will, of course, always be pressures on judges related to their state of nationality and its allies or political position. In that sense this is an issue that is

¹³⁹ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Provisional Measures, The Russian Federation’s Written Observations on Admissibility of The Declarations of Intervention Submitted by France, Germany, Italy, Latvia, Lithuania, New Zealand, Poland, Romania, Sweden, The United Kingdom and The United States of 24 March 2024, 48.

¹⁴⁰ ICJ, *Allegations of Genocide* (n. 139).

¹⁴¹ ICJ, *Allegations of Genocide* (n. 139).

¹⁴² ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russia), provisional measures, order of 5 June 2023 on the admissibility of the declarations of Intervention, ICJ Reports 2023, 354 (51).

¹⁴³ See ICJ Statute, Article 20; Rules of Court, Article 4.

inherent in having an international judiciary, and not one that is any worse in relation to the proxy-state model.

One way of removing or reducing such tensions is to allow for judges to withdraw themselves where it would be inappropriate to maintain their position on the bench. In the proceedings relating to the admissibility of the declarations of intervention in *Ukraine v. Russia*, Judges Donoghue, Tomka and Abraham declined to assume the functions of the presidency on the ground that each of them was a national of a state seeking to intervene.¹⁴⁴ This was merely noted in the Order on the admissibility of the declarations of intervention and there is therefore no publicly-available explanation as to precisely why these judges took this decision, nor on what basis this recusal was carried out. It is worth noting that this voluntary withdrawal only relates to the presidency, and not to the bench as such. This would suggest that it is primarily an issue of *perceived* procedural fairness, since the powers of a president do not differ greatly from the powers of a 'normal' sitting judge, except in situations where the bench is split equally and the president exercises the deciding vote.¹⁴⁵

Such voluntary steps or informal expectations could go some way to reducing this particular concern, at least as regards the perception of bias. However, their impact is necessarily limited. For one thing, as just noted, thus far such voluntary withdrawals only related to the presidency and therefore do not alter the make-up of the bench as such. Second, it is entirely possible that most or even all judges might be connected by nationality to a particular international organisation, as several such organisations are global in nature and have hundreds of member states. Formalising the expectation that a judge connected to the initiating international organisation must refrain from exercising the functions of the presidency could result in a situation where no member of the bench would be able to take on the role of president. In short, these voluntary withdrawals may be helpful in some situations but are essentially sticking plasters to a deeper concern related to impartiality. For now at least, the Court has deemed it sufficient to rely on formal guarantees of independence, but there may come a time where this proves inadequate.

¹⁴⁴ ICJ, *Allegations of Genocide*, order of 5 June 2023 (n. 142), 24.

¹⁴⁵ ICJ Statute, Article 55.

IV. Conclusions

This article has explored the potential benefits and implications of the proxy-state model for the promotion and protection of common interests. It established, first, that international organisations are indeed capable of representing and furthering common interests in certain circumstances. It then identified key benefits the international organisations can bring to the furtherance of common interests through international adjudication.

There are, however, still concerns. Section III. of this article analysed three key issues that have been raised in relation to the proxy-state model. In particular, this section highlights that the proxy state model broadly understood could also facilitate (and could already be facilitating) the influence of other nonstate actors (such as corporations) in international adjudication. It is thus best understood as a tool which could be used to either further or to counter the common interest, depending on the user. This section also highlights the need to bear in mind the implications of such a model for key aspects of adjudication, such as the equality of the parties and procedural fairness. The formalist approach of the Court has so far meant a lack of engagement with these challenges.

Nonetheless, these notes of warning are not so great as to overshadow the benefits that this role of international organisations could offer. Overall, this article has established that the proxy-state model could indeed hold the key to more and better examples of common interest adjudication before the ICJ. It represents a new form of engagement by international organisations with the Court and arguably with international law more generally. The international legal landscape is changing, and common interests are a significant part of that change. Proxy states, it seems, may have an important role to play.

Climate Change Before International Courts and Tribunals: Reflections on the Role of Public Interest in Advisory Proceedings

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Abstract

This article examines the advisory proceedings in relation to climate change before the International Court of Justice, the International Tribunal for the Law of the Sea, and the Inter-American Court of Human Rights

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through the lens of the broader phenomenon of public interest litigation. It focuses on certain substantive, institutional, and procedural dimensions of the advisory proceedings, construed as a form of public interest litigation. First, it argues that international courts and tribunals should innovate by allowing broader participation while considering the constraints of their statutes and rules of procedure. Second, this article examines how prior advisory opinions, even though non-binding, may shape the subsequent practice of States, and considers the impact that the advisory opinions on climate change may have. Ultimately, this article questions whether these advisory opinions may have a catalytic effect on ensuring the protection of other global commons in the future.

Keywords

Public interest litigation – ICJ – ITLOS – IACtHR – climate change

I. Introduction

Climate change is among the most pressing threats to global commons and to the survival of human species and biodiversity. It affects the lives of the present and future generations. The evidence of climate change and the harm that it has already caused, and will continue to cause, to humans, ecosystems, and the stability of international relations is overwhelming.¹ The threat posed by climate change is existential to small island developing States (SIDS) as their very survival is at stake. Despite the efforts of States to develop a legal framework to tackle climate change, including through the United Nations Framework Convention on Climate Change (UNFCCC),² the Kyoto Protocol,³ and the Paris Agreement,⁴ which are almost universally ratified, that framework is far from robust or satisfactory. Many obligations contained in those instruments could be described as programmatic at best and vague or

¹ See e.g. Intergovernmental Panel on Climate Change (IPCC), ‘Climate Change 2023: Synthesis Report’ <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf>, last access 17 February 2025.

² United Nations Framework Convention on Climate Change of 9 May 1992, 1771 UNTS 107.

³ Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997, 2303 UNTS 162.

⁴ Paris Agreement of 12 December 2015, Decision 1/CP.21, FCCC/CP/2015/L.9, Annex, 3156 UNTS 79.

ineffective at worst. In particular, the instruments' compliance and enforcement mechanisms are limited.

In the face of the unprecedented threat posed by climate change, individuals and, most recently, States and international organisations, have turned to international courts and tribunals to clarify the content of obligations that States have undertaken in this area. Litigation efforts before domestic courts have been underway for more than two decades, but it is only in recent years that similar actions have been taken on the international plane.⁵ Quasi-judicial mechanisms such as the Human Rights Committee or the Committee on the Rights of the Child have now delivered important pronouncements on the scope of obligations of States under the relevant human rights instruments in connection with the effects of climate change.⁶ The European Court of Human Rights (ECtHR) has also delivered important decisions in contentious cases on the obligations that States Parties to the European Convention on Human Rights have in respect of the effects and impact of climate change upon the enjoyment of human rights.⁷ In our view, it is the advisory proceedings before three different international courts and tribunals, namely the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and the Inter-American Court of Human Rights (IACtHR) that are most likely to shape the future conduct of States and other stakeholders, thus fostering broader normative change. This is so since the advisory opinions cumulatively cover different areas and legal issues relating to States' obligations in respect of climate change, and are not limited to specific facts of a given contentious case.

This article examines the phenomenon of public interest litigation. It does so through the lens of the three abovementioned advisory proceedings on climate change. While two of the proceedings are still pending at the time of writing this article, certain lessons can already be drawn with respect to the institutional and systemic repercussions of the advisory function in these cases as a form of public interest litigation.

⁵ UNEP and Sabin Center for Climate Change Law, 'Global Climate Litigation Report: 2023 Status Review' <<https://doi.org/10.59117/20.500.11822/43008>>, last access 17 February 2025.

⁶ See e.g. Committee on the Rights of the Child, *Sacchi and others v. Argentina and others*, Communication No. 104/2019, CRC/C/88/D/104/2019; Human Rights Committee, *Daniel Billy and others v. Australia (Torres Strait Islanders)*, Communication No. 3624/2019, CCPR/C/135/D/3624/2019.

⁷ ECtHR (Grand Chamber), *Duarte Agostinho and others v. Portugal and 32 other States*, decision of 9 April 2024, no. 39371/20; ECtHR (Grand Chamber), *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, judgment of 9 April 2024, no. 53600/20; ECtHR (Grand Chamber), *Carême v. France*, decision of 9 April 2024, no. 7189/21.

The article proceeds as follows. Section II. defines and reflects on the notion of public interest litigation. Section III. situates the climate change advisory proceedings within the broader landscape of public interest litigation before international courts and tribunals. Section IV. looks at how international courts and tribunals have adapted their advisory function to the growing public interest dimension thereof. The article concludes that, through the exercise of their advisory function, international courts and tribunals can play an important role in the advancement of the public interest on the international plane, and contribute to safeguarding the global commons, including but not limited to the preservation of our climate.

II. Definition of Public Interest Litigation

There is no agreed definition of public interest litigation in international law.⁸ Having its origins in domestic legal systems,⁹ ‘at the international level, the existence of public interest litigation is in itself contentious’.¹⁰ At the minimum, ‘the conception of a public interest in international law entails the existence of a common concern or interest towards compliance with an international obligation’.¹¹ The notion of public interest is thus closely intertwined with that of community, global commons, shared values, and compliance.

Public interest litigation on the international plane should serve to advance common values of the international community. But what are those common values? For instance, Spijkers states that although ‘there might be many fundamental disagreements when it comes to the identification of global values, [...] there are nonetheless certain beliefs that all human beings subscribe to. [...] The realisation of these common beliefs is in everyone’s interest.’¹² In other words, the defining element is the higher sense of unity and common purpose.¹³ Although the notion of international community is

⁸ Justine Bendel and Yusra Suedi, ‘Introduction’ in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 1-6 (3); Marion Esnault, ‘On the Pertinence of “Public Interest” for International Litigation’, in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 9-33 (9).

⁹ For references see Esnault (n. 8), 9.

¹⁰ Bendel and Suedi (n. 8), 3.

¹¹ Carlos Antonio Cruz Carrillo, ‘The Role of Advisory Opinions in Addressing Public Interest Issues’ in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 170-199 (172).

¹² Otto Spijkers, ‘Global Values in the United Nations Charter’, NILR 59 (2012), 361-397 (366).

¹³ See Bruno Simma, ‘From Bilateralism to Community Interest in International Law’, RdC 250 (1994), 217-384 (245).

not new, it has certainly evolved and has been consolidated over the 20th century. This is a testimony to an ‘ideological evolution of the international society’ of States,¹⁴ but also fundamentally to a profound structural change in the international legal order. Today, the select club of peremptory norms (*ius cogens*), *erga omnes* and *erga omnes partes* obligations facilitates the task of identifying core values of the international community. The core values protected by these norms justify the legal interest that every member of that community has in requiring compliance by others.¹⁵

Further, who is the ‘public’ in public interest litigation?¹⁶ Is it necessarily the equivalent of the international community of States, or is it a broader or narrower concept? Bendel and Suedi argue that the ‘public’ can be a group of individuals within a country (e. g. the Rohingyas in Myanmar), a handful of States parties to a treaty who may wish to uphold their obligations *erga omnes partes*, the international community of States at large, or even the international community that comprises all entities, including international organisations and individuals.¹⁷ Indeed, the idea that ‘community’ interests stretch well beyond States is implicit not only in the specific categories of norms mentioned above, but also in a broader set of values relating to international peace and security, the protection of the environment or human rights, or fundamental concepts such as the ‘heritage of mankind’.¹⁸ To a varying extent, the latter has for instance shaped the framework and global

¹⁴ Michel Virally, ‘Panorama du droit international contemporain’, RdC 183 (1983), 9-382 (28).

¹⁵ See Simma (n. 13), 233 (defining community interest as ‘a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or inter se but is recognized and sanctioned by international law as a matter of concern to all States’). For the analysis of legal standing before international courts and tribunals see Farid Ahmadov, *The Right of Actio Popularis before International Courts and Tribunals* (Brill 2018); François Voeffray, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales* (PUF 2004).

¹⁶ See Paula W. Almeida and Miriam Cohen, ‘Mapping the “Public” in Public Interest Litigation’ in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 98-134.

¹⁷ Yusra Suedi and Justine Bendel, ‘Public Interest Litigation: A Pipe Dream or the Future of International Litigation?’ in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 34-72 (42-45); see also Sarah Thin, ‘Community Interest and the International Public Legal Order’, NILR 68 (2021), 35-59.

¹⁸ See Christian Tomuschat, ‘Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia?’, in: Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 1132-1146 (1134-1137) (categorising community interests into those that directly concern the community of States (e. g. those pertaining to the international peace and security) and those that aim at the protection of individuals or groups of individuals). See also Giorgio Gaja, ‘The Protection of General Interests in the International Community: General Course on Public International Law’, RdC 364 (2012), 9-185.

governance in respect of the deep seabed, climate, the ozone layer, or outer space.¹⁹ Thus, public interest litigation refers to legal proceedings initiated to ensure compliance with certain communitarian obligations or to protect certain interests that concern the international community as a whole or part thereof.

Finally, ‘litigation’ before international courts and tribunals, which includes contentious and advisory proceedings, may have as its object the compliance of an actor with its international obligations, the legal consequences of a breach of those obligations, or a pronouncement on legal questions that concern the interests of the international community. The purpose of this form of international litigation is to protect the interests of the international community (or part thereof), not the interests of individual members.²⁰ Cases brought in respect of *erga omnes partes* obligations, where a State is a party to an international convention, or *erga omnes* obligations, i.e. owed to the international community as a whole, are an important category of public interest litigation on the international plane, but certainly do not exhaust that notion.

III. Climate Change Advisory Proceedings as Public Interest Litigation

1. Origins and Growth of Public Interest Litigation in Contentious Cases Before International Courts and Tribunals

Before the end of the 20th century, international dispute settlement was dominated by bilateral disputes between States. These disputes concerned predominantly diplomatic or consular relations, territorial sovereignty, diplomatic protection, and maritime delimitation, leaving ample space for a type of transactional justice (*justice transactionnelle*) to develop, but little space for the public interest.²¹ Since the 1990s, there has been an important quantitative and qualitative shift in international dispute settlement. Quanti-

¹⁹ Manfred Lachs, ‘Quelques réflexions sur la communauté internationale’ in: Daniel Baridonnet and others (eds), *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (Pedone 1991), 349-357 (356).

²⁰ Jane A. Hofbauer, ‘Not Just a Participation Trophy? Advancing Public Interests through Advisory Opinions at the International Court of Justice’, *The Law & Practice of International Courts and Tribunals* 22 (2023), 234-272 (237).

²¹ Georges Abi-Saab, ‘Cours général de droit international public’, *RdC* 207 (1987), 9-463 (269).

tatively, most disputes before international courts and tribunals today involve individuals or investors, on the one hand, and States, on the other hand, largely attributable to the proliferation of hundreds of bilateral investment treaties, the advent of investor-State dispute settlement, and access to regional human rights courts. Qualitatively, there has been a considerable increase in contentious inter-State cases and requests for advisory opinions that relate to the protection of global commons or concern the interests of the international community. This qualitative shift reflects the emergence and proliferation of the communitarian obligations *erga omnes* and *erga omnes partes* in customary international law and major multilateral instruments, respectively.

In 1951, the ICJ recognised that, in respect of certain obligations, States ‘do not have any interests of their own; they merely have, one and all, a common interest’.²² However, this statement of principle by the Court was not given any practical effect for nearly 40 years. The Court’s initial trepidation with respect to the consequences of recognising *erga omnes* obligations is evident in its 1966 *South West Africa* decisions.²³ States, too, treaded carefully, as can be seen from the debates on *erga omnes* obligations at the International Law Commission (ILC) during the codification of State responsibility between 1949 and 2001.²⁴ An important milestone was reached with the Court’s famous *dictum* in the 1970 *Barcelona Traction* judgment explicitly recognising obligations *erga omnes*.²⁵ However, it was not until much later that States started having recourse to international courts and tribunals to seek compliance with those obligations.²⁶

Ultimately, the ICJ has been instrumental in affirming a progressive move away from the ‘bilateralism of relationships’²⁷ and the game of

²² ICJ, *Reservations to the Convention on Genocide*, advisory opinion of 28 May 1951, ICJ Reports 1951, 15 (23).

²³ ICJ, *South West Africa* (Ethiopia v. South Africa / Liberia v. South Africa), second phase, judgment of 18 July 1966, ICJ Reports 1966, 6 (para. 99).

²⁴ For an analysis see Tom Ruys, ‘Legal Standing and Public Interest Litigation – Are All *Erga Omnes* Breaches Equal?’, *Chinese Journal of International Law* 20 (2021), 457–498 (497) (concluding that ‘[p]ractice illustrates that public interest litigation remains slow on the uptake and that there is a general reluctance – due to political and economic reasons, or the fear of becoming a target for counter-allegations of wrongful conduct oneself – to invoke international responsibility over *erga omnes* breaches in judicial proceedings’).

²⁵ ICJ, *Barcelona Traction, Light and Power Company, Limited (New Application)* (Belgium v. Spain), judgment of 5 February 1970, ICJ Reports 1970, 3 (para. 33).

²⁶ For an analysis of the jurisprudence on the issue of standing in respect of *erga omnes* obligations in proceedings before the Court, see Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005), 179–197.

²⁷ Andrea Gattini, ‘Actio Popularis’ in: Helene Ruiz-Fabri (ed.), *MPEiPro* (online edn, Oxford University Press 2019).

reciprocities towards the recognition of collective or ‘community interests’.²⁸ This shift has been visible in the expanding variety and complexity of cases brought before the Court in recent years. These include pending cases that arise from armed conflicts or mass atrocities.²⁹ The Court has also had to settle disputes that dealt with claims of genocide, racial discrimination, and reparations for wide-scale armed conflict related and environmental damage.³⁰

While the ICJ had given indications as to the character of *erga omnes* obligations in its earlier jurisprudence going back to the aforementioned advisory opinion of 1951³¹ it was not until 2012 that the Court unequivocally recognised the standing and legal interest of every State party to a multilateral convention to bring proceedings against another State party in respect of *erga omnes partes* obligations. In the *Belgium v. Senegal* case, the ICJ recalled that States parties to the Convention against Torture share a collective interest in preventing acts of torture and ensuring that perpetrators do not escape accountability. Accordingly, ‘each State party has an interest in compliance with [the obligations *erga omnes partes*] in any given case’.³²

²⁸ Simma (n. 13), 235.

²⁹ See e.g. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), preliminary objections, judgment of 22 July 2022, ICJ Reports 2022, 477; ICJ, *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Canada and The Netherlands v. Syrian Arab Republic), provisional measures, order of 16 November 2023, ICJ Reports 2023, 587.

³⁰ See respectively ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), merits, judgment of 26 February 2007, ICJ Reports 2007, 43; ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine v. Russian Federation), preliminary objections, judgment of 8 November 2019, ICJ Reports 2019, 558; ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), reparations, judgment of 9 February 2022, ICJ Reports 2022, 13; ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), compensation, judgment of 2 February 2018, ICJ Reports 2018, 15.

³¹ ICJ, *Reservations to the Convention on Genocide* (n. 22), 23; ICJ, *East Timor* (Portugal v. Australia), judgment of 30 June 1995, ICJ Reports 1995, 90 (para. 29); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), preliminary objections, judgment of 11 July 1996, ICJ Reports 1996, 595 (para. 31); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, ICJ Reports 2004, 136 (paras 155-157); ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), jurisdiction and admissibility, judgment of 3 February 2006, ICJ Reports 2006, 6 (para. 64); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), (n. 30), para. 147.

³² ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), judgment of 20 July 2012, ICJ Reports 2012, 422 (para. 68).

By recognising Belgium's standing, as a State-party to the Convention against Torture,³³ to invoke Senegal's responsibility for breaches thereof, the Court effectively took the position that public order considerations are not alien to international law, and that all States have an interest in the respect and proper performance of certain international obligations. Other cases involving community interests have followed, and the Court has consistently upheld this position.³⁴ For instance, the Court has recently been seized of two applications that concern community interests under the Genocide Convention as a basis for the Court's jurisdiction. The first case was brought by The Gambia against Myanmar for alleged violations of that Convention in respect of the Rohingya. This case does not directly concern The Gambia, but the latter is acting in pursuit of *erga omnes partes* obligations under the Genocide Convention.³⁵ In another recent case, South Africa instituted proceedings against Israel in respect of alleged genocide against the Palestinians in the context of an ongoing armed conflict in the Gaza strip.³⁶ As with the *Gambia v. Myanmar* case, South Africa is not directly affected by the conduct of Israel, but rather acts as a party entitled to seek compliance with the Genocide Convention that it considers to be breached by Israel. Both contentious cases further solidify the tenets of public interest litigation.

At the same time, the ICJ remains an inter-State judicial mechanism, which is the product of a time when the main actors of international law were States. As such, its statute and institutional setting are limited to inter-State cases and highly deferential to sovereign interests, even where individuals or groups of individuals are central to the facts underlying the dispute. Thus, while the standing of States in contentious proceedings involving *erga omnes (partes)* obligations is no longer controversial as such, questions remain as to

³³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 85.

³⁴ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar) (n. 29), paras 106-112. For an analysis of the relevant case law see Priya Urs, 'Obligations Erga Omnes and the Question of Standing before the International Court of Justice', LJIL 34 (2021), 505 (509-516).

³⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar) (n. 29), paras 112-113. For an analysis of this case, see Michael Becker, 'The Plight of the Rohingya: Genocide Allegations and Provisional Measures in The Gambia v. Myanmar at the International Court of Justice', Melbourne Journal of International Law 21 (2020), 428-449. See also, Sarah Thin, "'Proxy States" as Champions of the Common Interest? Implications and Opportunities', HJIL 85 (2025), 69-96.

³⁶ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), application of 29 December 2023, <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>>, last access 17 February 2025.

the effects of breaches of those obligations from the perspective of the rules of treaty law or the content of State responsibility.

The ICJ has not been the only dispute settlement mechanism that has had to adjust to the increasingly multilateral and communitarian dimension of disputes and legal questions relating to global commons. While under-theorised,³⁷ in recent years, ITLOS has experienced a notable rise in public interest litigation in contentious cases, particularly concerning environmental protection and human rights at sea.³⁸ Relatedly, the Tribunal has consistently emphasised the importance of considerations of humanity in maritime law enforcement, which reflects a certain conception of public interest in the regime governing maritime spaces and the exercise of jurisdiction within them.³⁹

Unsurprisingly, public interest litigation has been a common feature before regional human rights mechanisms. For instance, the IACtHR has been asked to address both individual and collective human rights violations,⁴⁰ and its expansive interpretation of the American Convention on Human Rights has allowed it to explicitly consider the notion of public interest.⁴¹ Public interest litigation has been a feature of the Inter-American system since its inception as a consequence of its structural set-up, including the significant role that non-governmental organisations (NGOs) play in the Court's proceedings⁴² and the participation of victims.⁴³ Advisory proceedings, as described in Article 64 of the American Convention on Human Rights,⁴⁴ play a critical role in fostering the development of international human rights law and

³⁷ See Miriam Cohen and Nouwagnon Olivier Afogo, 'The Contribution of the International Tribunal for the Law of the Sea to the Protection of Human Rights and the Public Interest at Sea', PKI Global Justice Journal (2023), <<https://globaljustice.queenslaw.ca/news/the-contribution-of-the-international-tribunal-for-the-law-of-the-sea-to-the-protection-of-human-rights-and-the-public-interest-at-sea?>>, last access 17 February 2025.

³⁸ See ITLOS, *The 'Arctic Sunrise'* (The Netherlands v. Russian Federation), provisional measures, order of 22 November 2013, ITLOS Reports 2013, case no. 22, 230; *M/V 'Louisa'* (*Saint Vincent and the Grenadines v. Spain*), judgment of 28 May 2013, ITLOS Reports 2013, case no. 18, 4 (para. 155).

³⁹ ITLOS, *M/V 'Saiga' (No. 2)* (Saint Vincent and the Grenadines v. Guinea), judgment of 1 July 1999, ITLOS Reports 1999, case no. 2, para. 155.

⁴⁰ See Salvador Herencia Carrasco, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change', R. Q. D. I. (hors-série) (2015), 199-220 (209).

⁴¹ Carrasco (n. 40), 204-205.

⁴² Bert B. Lockwood, 'Advisory Opinions of the Inter-American Court of Human Rights', Den. J. Int'l L. & Pol'y 13 (1984), 245-267 (247).

⁴³ See Thomas M. Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice', Stan J. Int'l. L. 47 (2011), 279-332.

⁴⁴ American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, (entered into force 18 July 1978).

strengthening its application across the Americas. The public interest nature of these proceedings lies in their capacity to clarify, guide, and advance human rights norms transcending the interests of individual litigants or States. By offering legal guidance on abstract or emerging issues, the advisory proceedings can contribute to the prevention of human rights violations and the harmonisation of regional legal standards or norms. For instance, in its 2014 advisory opinion on *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*,⁴⁵ the IACtHR examined the rights of children in the context of immigration detention, providing normative guidance to States. Similarly, the advisory opinion OC-24/17,⁴⁶ addressing the rights of same-sex couples and gender identity, has had an impact in Latin American countries.⁴⁷ While the advisory opinions are not legally binding, their moral and persuasive authority often compels States to adopt reforms, and may generate a ripple effect across the region.⁴⁸

2. Advisory Proceedings as a Form of Public Interest Litigation Before International Courts and Tribunals

International courts and tribunals may be inclined to give greater weight to considerations of public interest in the context of advisory proceedings.⁴⁹ This section addresses the ways in which public interest considerations may have played out in the advisory opinion delivered by the ITLOS in May 2024, and the extent to which considerations of public interest may have impacted the proceedings and the opinions to be delivered by the ICJ and the IACtHR.

a) The ITLOS Advisory Opinion on Climate Change

The climate change advisory opinion delivered by ITLOS in May 2024 is a landmark development from the perspective of public interest litigation, both

⁴⁵ IACtHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, advisory opinion of 19 August 2014, OC-21/14.

⁴⁶ IACtHR, *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples*, advisory opinion of 24 November 2017, OC-24/17.

⁴⁷ See e.g. Jorge Contesse, 'Sexual Orientation and Gender Identity in Inter-American Human Rights Law', *North Carolina Journal of International Law* 44 (2019), 353-386.

⁴⁸ See e.g. Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2012), 37.

⁴⁹ Brian McGarry, 'Obligations Erga Omnes (Partes) and the Participation of Third States in Inter-State Litigation', *The Law & Practice of International Courts and Tribunals* 22 (2023), 273-300; Hofbauer (n. 20), 271.

in terms of its substantive reasoning as well as the procedure that was followed.

First, ITLOS recognised that the anthropogenic greenhouse gas emissions constitute marine pollution, thus placing these emissions firmly within the regulatory framework of the United Nations Convention on the Law of the Sea (UNCLOS).⁵⁰ The opinion emphasises the interconnectedness of climate change, marine pollution, and the obligations of States under UNCLOS to protect and preserve the marine environment from the deleterious effects of greenhouse gas emissions. In particular, ITLOS refused to accept that the specific obligations under the United Nations (UN) climate change regime should displace the application of UNCLOS in respect of the deleterious effects of climate change, suggesting that the maxim of '*lex specialis derogat lege generali*' has no place in the interpretation of the Convention'.⁵¹ This approach is objectively correct and presents UNCLOS as a critical legal instrument in addressing the global climate crisis. The same approach may also be adopted by the ICJ and the IACtHR in respect of the relationship between the UN climate change regime and customary international law. If this is the case, it would serve the public interest of ensuring that States' obligations in respect of climate change are understood in a comprehensive and holistic manner.

Secondly, the advisory opinion demonstrates the ITLOS' role as a forum for addressing global environmental concerns that transcend national borders. Climate change disproportionately affects vulnerable States, such as small island nations, which face existential threats due to rising sea levels and ocean acidification. The proceedings before ITLOS involved the participation of a wide range of States and international organisations. By delivering a robust opinion, adopted unanimously by 21 judges, based on views expressed by a considerable variety of participants, ITLOS amplified the voices of vulnerable States, fostering inclusivity in global climate governance.

Thirdly, the proceedings in and of themselves were emblematic of a broader trend in public interest litigation, where international courts and tribunals are increasingly being called upon to interpret and enforce norms that go beyond purely inter-State interests and considerations. Indeed, this was not the first time that ITLOS showed particular openness to integrating considerations of public interest in the exercise of its advisory function. The ITLOS

⁵⁰ 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, <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_corr.pdf>, last access 17 February 2025 (hereafter Request by the COSIS), paras 159-179.

⁵¹ ITLOS, *Request by the COSIS* (n. 50), para. 224.

Seabed Disputes Chamber and the full Tribunal had delivered two highly influential advisory opinions over the past decade that have provided considerable service to the governance of the Area and the sustainable use of marine living resources, respectively.⁵²

b) The Pending Advisory Proceedings on Climate Change Before the ICJ and the IACtHR

The advisory proceedings before the ICJ, including most prominently those currently pending in respect of climate change, carry an important public interest dimension. First, the entities that can request advisory proceedings before the ICJ are those that are already tasked with realising certain common goals. For instance, the UN organs such as the General Assembly or the Security Council, or specialised agencies, are supposed to represent the collective interest of the UN Member States. In requesting an advisory opinion on legal questions that fall within the purview of their functions, international organisations or organs thereof act as ‘the trustees of a community interest’.⁵³ As such, even if the advisory function, at least in the context of the ICJ, was intended to have a quasi-constitutional dimension, i. e. of elucidating the law for the benefit of other UN organs and agencies,⁵⁴ over time the advisory function has increasingly been used to clarify international law in respect of matters of wider community interest. Often, the mandate of the requesting body is focused on a specific interest of the international community or humankind. For instance, when the International Seabed Authority (ISA) requested the advisory opinion from the ITLOS Seabed Disputes Chamber, following the proposal by Nauru, it acted in its capacity as a guardian of the heritage of humankind which are the resources of the Area.⁵⁵

Secondly, the presentation of a request for an advisory opinion from the ICJ reflects a complex set of political, diplomatic, and legal factors, particu-

⁵² ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area*, advisory opinion of 1 February 2011, ITLOS Reports 2011, case no. 17, 10; ITLOS, *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, advisory opinion of 2 April 2015, ITLOS Reports 2015, case no. 21, 4.

⁵³ Cruz Carrillo (n. 11), 177.

⁵⁴ See e.g. ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion of 11 April 1949, ICJ Reports 1949, 174; ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, advisory opinion of 3 March 1950, ICJ Reports 1950, 4; ICJ, *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*, advisory opinion of 13 July 1954, ICJ Reports 1954, 47.

⁵⁵ International Seabed Authority, ‘Decision of the Council of the International Seabed Authority requesting an advisory opinion pursuant to Article 191 of the United Nations Convention on the Law of the Sea’ of 6 May 2010, ISBA/16/C/13.

larly where it originates in the General Assembly or Security Council. Whether the request in turn has a public interest dimension will thus be determined in part by the negotiating history, the wording of the resolution adopted, and ultimately the way in which the questions have been formulated. The request in respect of climate change is a case in point.⁵⁶ The unequal bargaining power of States in multilateral settings such as that of the General Assembly may either increase or diminish the scope for public interest considerations making their way into the text of the questions for the advisory opinion. Moreover, entities other than States, namely individuals or representatives of civil society may play a significant role in shaping the requests for advisory opinions and channelling public interest considerations into questions formulated in those requests. For instance, the role of students from 12 Pacific Island States was instrumental to the very inception of the campaign undertaken by Vanuatu, which led to the adoption by 132 States at the General Assembly of the resolution requesting the advisory opinion from the Court.⁵⁷ This was only the second time in history that a resolution requesting an advisory opinion was adopted by consensus, a feat that may in part be explained by lobbying from a global alliance of more than 1800 civil society organisations.⁵⁸ The impact of actors other than States in garnering support for a request in public interest cases is significant.⁵⁹

Thirdly, advisory opinions are intended to clarify legal questions posed by requesting bodies, such as the General Assembly in the case of the ICJ, without the need to consider any specific facts. This allows international courts and tribunals greater flexibility to interpret legal principles in abstract terms or to address broader legal questions of international concern.⁶⁰ On

⁵⁶ Margaretha Wewerinke-Singh, Jorge E. Viñuales and Julian Aguon, 'The Role of Advocates in the Conception of Advisory Opinion Requests', *AJIL Unbound* 117 (2023), 277-281; see also Maria Antonia Tigre and Margaretha Wewerinke-Singh, 'Beyond the North-South Divide: Litigation's Role in Resolving Climate Change Loss and Damage Claims', *RECIEL* 32 (2023), 439-452.

⁵⁷ See Wewerinke-Singh, Viñuales and Aguon, 'Role of Advocates' (n. 56), 278. See also, Naveena Sadasivam, '*How a Small Island Nation Is Taking Climate Change to the World's Highest Court*', *Grist*, 27 June 2023, <<https://grist.org/international/vanuatu-ralph-regenvanu-international-court-loss-and-damage/>>, last access 17 February 2025.

⁵⁸ Climate Action Network International, 'Thousands of Civil Society Organisations Call on Countries to Support Vanuatu Climate Justice Initiative', 5 May 2022, <<https://climatenet.org/2022/05/05/thousands-of-civil-society-organisations-call-on-countries-to-support-vanuatu-climate-justice-initiative/>>, last access 17 February 2025.

⁵⁹ See Wewerinke-Singh, Viñuales and Aguon, 'Role of Advocates' (n. 56), 277.

⁶⁰ See 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, ICJ Reports 2024, Separate Opinion of Judge Nolte, paras 3-6 <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-08-en.pdf>>, last access 17 February 2025.

several occasions, the ICJ has refused to consider an allegedly incomplete factual record as a compelling reason to warrant the exercise of its discretion not to deliver the advisory opinion requested.⁶¹

Fourth and finally, the extent to which advisory proceedings can serve as a channel for public interest considerations will depend on the openness of those proceedings, the resulting diversity of participants and views expressed, and how States and other stakeholders give effect to the findings made, even if they are formally non-binding. As discussed below, inclusivity and wide participation in advisory proceedings can have a significant impact.⁶²

When compared to the ICJ or ITLOS, regional human rights courts have long channelled the public interest in advisory proceedings on questions that transcend the interests of a particular State or constituency. As noted earlier, public interest considerations have played a critical role in several advisory opinions delivered by the IACtHR, and thus may impact how change is effected on a domestic and regional level.⁶³ For instance, its 2017 Advisory Opinion on the *Environment and Human Rights* provided a groundbreaking analysis on the intersection of the right to a healthy environment, invoking several public interest considerations.⁶⁴ Notably, the IACtHR recognised the intrinsic link between environmental protection and the rights of future generations, framing the right to a healthy environment as having both individual and collective connotations.⁶⁵ By recognising an autonomous right to a healthy environment and mandating cooperation among states to address global environmental challenges, the opinion reinforced the principle that the right to a healthy environment is not merely a national concern but a shared international responsibility.⁶⁶ This opinion contributed to the recognition of

⁶¹ See, most recently, 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, <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>>, last access 17 February 2025, paras 46-47; see also ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, first phase, advisory opinion of 30 March 1950, ICJ Reports 1950, 65 (72); ICJ, *Western Sahara*, advisory opinion of 16 October 1975, ICJ Reports 1975, 12 (para. 46).

⁶² See generally, Wewerinke-Singh, Viñuales and Aguon, 'Role of Advocates' (n. 56), 277.

⁶³ See e.g. IACtHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (n. 45); IACtHR, *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples* (n. 46).

⁶⁴ IACtHR, *The Environment and Human Rights*, advisory opinion of 15 November 2017, OC-23/17.

⁶⁵ IACtHR, *The Environment and Human Rights* (n. 64), para. 59.

⁶⁶ IACtHR, *The Environment and Human Rights* (n. 64). See also Maria Antonia Tigre and Natalia Urzola, 'The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene', *Journal of Human Rights and the Environment* 12 (2021), 24-50.

the human right to a healthy and sustainable environment in certain domestic legal settings and by the General Assembly of the United Nations.⁶⁷ A detailed list of questions in the context of the pending advisory proceedings on climate change before the IACtHR presents the Court with a further opportunity to clarify the content of obligations of States, having regard to the needs of most vulnerable groups, including indigenous communities, children, and future generations.⁶⁸

In sum, advisory proceedings before international courts and tribunals are a useful tool for protecting and enforcing the public interest.⁶⁹ As noted by Hofbauer, they can be used to clarify and interpret ‘public interest obligations without a breach thereof necessarily having already occurred, or in the case of breaches by multiple parties’; they can also assist the international community ‘in finding a response to a breach of public interests’.⁷⁰ There are of course examples of advisory opinions that have failed to serve the public interest, such as in the *Legality of the Threat or Use of Nuclear Weapons*.⁷¹ However, there are many other positive examples from both the ICJ and ITLOS.⁷²

The utility of advisory proceedings as a form of public interest litigation is particularly pronounced in the advisory proceedings on climate change. Climate change involves complex legal issues. It also impacts all States, but in different ways. The opinions requested have the potential to advance public interest by emphasising States’ collective responsibility to protect the environment for the benefit of present and future generations.⁷³ They should clarify certain key obligations of conduct both under the UN climate change regime, but also fundamentally under customary international law, in the case

⁶⁷ UNGA Res 76/300 of 28 July 2022, A/RES/76/300.

⁶⁸ IACtHR, *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, 9 January 2023. See also Monica Feria-Tinta, ‘An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human Rights’, *Questions of International Law* 102 (2023) 45–60.

⁶⁹ Hofbauer (n. 20), 236–237.

⁷⁰ Hofbauer (n. 20), 237.

⁷¹ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226. See Hofbauer (n. 20), 248 ff.

⁷² See e.g. ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States with Respect to Activities in the Area* (n. 52); ITLOS, *Request for Advisory Opinion Submitted by the SFRC* (n. 52); IACtHR, *The Environment and Human Rights* (n. 64); ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, advisory opinion of 25 February 2019, ICJ Reports 2019, 95.

⁷³ See generally, Maria A. Tigre, ‘It Is (Finally) Time for an Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives’, *Charleston Law Review* 17 (2024), 623.

of the opinion requested of the ICJ. They may also address the extent to which general secondary rules of State responsibility apply in respect of the harm resulting from the failure of States to meet their obligations in respect of climate change. They may further address the interplay of the public interest with the capacity of States to take action, that is the issue of common but differentiated responsibility. Finally, they may link the protection of the environment with the concept of intergenerational equity.⁷⁴

3. Novel Issues for Public Interest Litigation Arising from the Parallel Climate Change Advisory Proceedings

As discussed in Section III. 1. above, public interest litigation before international courts and tribunals has raised discrete issues for these institutions, such as that of standing. However, the climate change advisory proceedings represent the first time that similar questions are being addressed by three different courts in parallel, and as a result, certain novel issues have come to light.

The first issue is that there are significant differences between how the advisory function of ITLOS, the ICJ, and the IACtHR is carried out. They have different procedural and evidentiary rules impacting, for example, who can submit written and oral observations. There are also significant differences in their subject matter jurisdiction: the ICJ is the only mechanism of general competence that may consider any obligations under international law; the ITLOS is competent to interpret UNCLOS and other international agreements relating to the purposes of UNCLOS;⁷⁵ and finally, the IACtHR has the competence to interpret the American Convention on Human Rights and other related human rights instruments.⁷⁶ For instance, as Tigre and Rocha argue, ‘since the wording of human rights law is open-ended and relies on its application to concrete cases, the ICJ and the Inter-American Court of Human Rights may offer competing views on climate

⁷⁴ See for example, IACtHR, *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, 9 January 2023, 1 and 6 (which refers specifically to the impact of climate change on future generations).

⁷⁵ Art. 288 United Nations Convention on the Law of the Sea of 12 December 1982, 1833 UNTS 397 (UNCLOS).

⁷⁶ Art. 64 American Convention on Human Rights of 22 November 1969, 1144 UNTS 123. See also IACtHR, ‘*Other Treaties*’ *Subject to the Consultative Jurisdiction of the Court* (Art. 64 *American Convention on Human Rights*), advisory opinion of 24 September 1982, OC-1/82, IACHR Series A No. 1, ILM 22 (1983), 14.

change and human rights. Moreover, the Inter-American Court of Human Rights must rely on the Framework Convention on Climate Change and the Paris Agreement as an interpretative benchmark, which entails providing its own views on the obligations under these treaties.⁷⁷ As a result, there is potential for contradiction or for convergence in the advisory opinions rendered.⁷⁸

Secondly, the questions posed in the requests to ITLOS, the ICJ, and the IACtHR are very broad when compared to previous examples of requests for advisory opinions involving the public interest. Although the judges at ITLOS did not find it necessary to reformulate the questions, the judges of the ICJ and the IACtHR may do so.⁷⁹ Arguably, ITLOS did not need to reformulate the questions posed by the Commission of Small Island States on Climate Change and International Law (COSIS), which by comparison were limited in scope.⁸⁰ It will be interesting to see if any such potential reformulation will impact the opinion provided and the extent to which public interest considerations make their way into the judicial reasoning. Similarly, there is a number of inter-related questions in the requests for advisory opinions before the ICJ and the IACtHR, which may in turn lead the international courts and tribunals to focus on some of the issues more prominently than others. Thus, for instance, it is likely that the ICJ will defer to ITLOS' advisory opinion on the proper interpretation of the relevant obligations under UNCLOS concerning the deleterious effects of climate change.

The third novel issue that has arisen in the advisory proceedings on climate change concerns the diversity of participants and the degree of openness of the proceedings to the participation of States and intergovernmental organisations. While some of these mechanisms are particularly open to external participation like the IACtHR, only States and intergovernmental organisations may appear before inter-State mechanisms like the ICJ or ITLOS. Notwithstanding this constraint, the advisory proceedings before ITLOS involved the participation of 32 Contracting Parties and nine organisations at the written stage of the proceedings, and 35 Contracting Parties and three

⁷⁷ Maria Antonia Tigre and Armando Rocha, 'Competing Perspectives and Dialogue in Climate Change Advisory Opinions', *AJIL Unbound* 117 (2023), 287-291 (288).

⁷⁸ Tigre and Rocha (n. 77), 288-290.

⁷⁹ For instance, the ICJ did so in the past, where the question was unclear or vague, inadequately formulated, or did not reflect the legal question really in issue. See e.g. ICJ, *Application for Review of Judgment No 273 of the United Nations Administrative Tribunal*, advisory opinion of 20 July 1982, ICJ Reports 1982, 325 (paras 46-48); ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion of 20 December 1980, ICJ Reports 1980, 73 (paras 35-37).

⁸⁰ ITLOS, *Request by the COSIS* (n. 50), paras 138-152.

organisations in the oral proceedings.⁸¹ Similarly, in the advisory proceedings before the ICJ, the Court received 91 written statements by States and international organisations and 62 written comments on those statements; 96 States and 11 international organisations took part in the oral proceedings.⁸² In the advisory proceedings before the IACtHR, nine States presented written views, along with over 200 submissions by *amici curiae*, including law professors and academic institutions, non-governmental organisations and representatives of civil society.⁸³

The breadth of participation, certainly before ITLOS and the ICJ, is unprecedented and, while it may have been difficult to manage from an administrative and logistical perspective, it may nonetheless influence how the public interest in respect of climate change will be taken into account. It should also have a positive impact on the legitimacy of the proceedings, particularly if both formal and informal (i. e. observations that are not officially part of the case file) participation is considered. It may further have a substantive impact by contributing to the issuance of opinions that reflect the often-differing perspectives of the participants.

Finally, several novel substantive issues have arisen in the context of the climate change advisory opinions that are likely to feature in other international public interest litigation. For instance, the proceedings have to tackle the relationship between science and law. In its advisory opinion, ITLOS relied heavily on scientific evidence of the effects of climate change when opining on legal obligations of States under UNCLOS.⁸⁴ The ICJ is likely to follow suit.⁸⁵ Further, in light of the questions before the ICJ and the IACtHR, it is unclear whether and, if so, to what extent, international courts and tribunals can opine upon the rights of future generations. Finally, a crucial question at the heart of these advisory proceedings is whether general rules on State responsibility can be adapted to the type(s) of harm resulting

⁸¹ Statements not submitted pursuant to articles 138, para. 3, and 133, para. 3, of the Rules of the Tribunal, albeit not part of the case file, are made available on the ITLOS website: <<https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>>, last access 17 February 2025.

⁸² ICJ, *Obligations of States in respect of Climate Change*, <<https://icj-cij.org/case/187/written-proceedings>>, last access 17 February 2025. This article was completed before the opening of the oral proceedings in this case on 2 December 2024, and thus did not take into account any written or oral observations.

⁸³ IACtHR, *Climate Emergency and Human Rights*, Observations on the Request for an Advisory Opinion <https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634>, last access 17 February 2025.

⁸⁴ ITLOS, *Request by the COSIS* (n. 50), paras 46-66.

⁸⁵ See e. g. ICJ, 'The Court Meets with Scientists of the Intergovernmental Panel on Climate Change (IPCC)', Press Release no. 2024/75 of 26 November 2024.

from climate change, which does not affect States equally and, in fact, disproportionately affects certain vulnerable communities. These peculiar features of climate change international proceedings introduce novel questions that may have a lasting impact on public interest litigation in other areas of law, as well as on the advisory function of the international courts and tribunals more generally.

IV. Climate Change Advisory Proceedings: Paving the Way to New Institutional Developments and Enhancing the Role of Courts as Guardians of International Law

1. Openness of International Courts and Tribunals to More Diverse Participation

As noted above, the level of participation in the climate change advisory proceedings was unprecedented. This issue is critical in the context of public interest litigation of this kind. Broad participation should enrich the submissions made and have a positive impact on the legitimacy of the proceedings.⁸⁶ As a result, it may also support the implementation of the findings made.

Given the importance of this issue, it is essential to consider potential avenues for development and improvement. One such avenue could be the adaptation of the procedural rules of the ICJ and ITLOS, two inter-State mechanisms, to accommodate the formal participation of actors other than States and intergovernmental organisations in certain advisory proceedings. As Wewerinke-Singh, Garg and Hartmann argue, '[t]he participation of a diverse array of States and international organisations in the advisory proceedings underscores that addressing the climate crisis is of global concern. Broad participation and contributions will enrich the Court's understanding of the complex legal dimensions of climate change and add extra legitimacy to proceedings'.⁸⁷ However, in light of the existing statutory constraints, the participation of other actors is limited.

In its rules and practice, the ICJ has construed narrowly the term 'international organization' in Article 66(2) of its Statute, thus excluding entities, such as non-governmental organisations, from the possibility to formally partici-

⁸⁶ Margaretha Wewerinke-Singh, Ayan Garg and Jacques Hartmann, 'The Advisory Proceedings on Climate Change before the International Court of Justice', *Questions of International Law*, 30 November 2023, <<http://www.qil-qdi.org/the-advisory-proceedings-on-climate-change-before-the-international-court-of-justice/>>, last access 17 February 2025, 23-43.

⁸⁷ Wewerinke-Singh, Garg and Hartmann, 'Advisory Proceedings on Climate Change' (n. 86), 42.

pate in advisory proceedings.⁸⁸ In accordance with the Court's Practice Direction XII, adopted in 2004, any written statement or document submitted by such entities to the Court on their own initiative is 'not to be considered part of the case file' but 'will be placed in a designated location in the Peace Palace' and may be consulted by States and intergovernmental organisations presenting written or oral statements.⁸⁹ States and intergovernmental organisations have at times referred to the briefs of non-governmental organisations submitted in this way; they have also used statements of individuals in their arguments. However, little is known as to whether such submissions are considered by the Court, aside from where they are incorporated into the submissions of participants.⁹⁰ Thus, while the Court has demonstrated some openness through its Practice Direction XII, participation is still fundamentally limited to States and intergovernmental organisations.

ITLOS has shown some innovation in this regard. Like the ICJ, ITLOS does not consider such unsolicited written observations as part of the case file. However, it has gone a step further than the ICJ by making them available on its website, thus fostering transparency and participation, even if indirect. This was the case, for instance, of written statements submitted by the World Wildlife Fund for Nature (WWF) and Greenpeace in the context of advisory proceedings before ITLOS.⁹¹ The ICJ could adopt a similar practice. At the IACtHR, there is much greater openness to participation, as '[a]ny person or institution' may submit written observations.⁹² Submissions

⁸⁸ Art. 69(4) ICJ Rules of Court, which interprets the term 'public international organization' in Article 34(3) of the ICJ Statute as denoting 'an international organization of States'. This interpretation should not necessarily be applied *mutatis mutandis* to the interpretation of the term 'international organization' in Art. 66(2) of the ICJ's Statute. But see also ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Correspondence, ICJ Reports 1970, 636-639, 644 and 647.

⁸⁹ ICJ, Practice Direction XII.

⁹⁰ See e.g. ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* (n. 72). Written Comments of the Republic of Mauritius of 1 March 2018, <<https://www.icj-cij.org/sites/default/files/case-related/169/169-20180301-WRI-05-00-EN.pdf>>, last accessed 17 February 2025, para. 4.114.

⁹¹ See e.g. ITLOS, *Request for an Advisory Opinion submitted by the SRFC* (n. 52), Amicus Curiae brief from WWF International, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_Written_Statement_1_WWF.pdf> and <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round2/C21_Written_Statement_2_WWF.pdf>, last accessed 17 February 2025; ITLOS Seabed Disputes Chamber, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (n. 52), Statement of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/C17_Written_Statement_Greenpeace.pdf>, last accessed 17 February 2025.

⁹² Art. 44 Rules of Procedure of the IACtHR of 16 November 2009.

by an *amicus curiae* are thus considered by the IACtHR, whereas the unsolicited written observations submitted to the ICJ and ITLOS are not, absent their incorporation into the submissions of the participants. In our view, in the context of advisory opinions of a public interest nature, it would be beneficial for the inter-State mechanisms to develop means for broader formal participation in the proceedings, as the IACtHR and other regional mechanisms have done, where it would serve the mandate of the institution in question and assist it in providing the opinion requested.⁹³

In proceedings with a public interest component, the participation of a diversity of voices (e.g. academia and civil society) should increase the chances that an opinion has been prepared on the basis of all relevant information, both legal and factual. This statement is a logical extension of the effect of the broad participation of intergovernmental organisations in the climate change advisory proceedings before the ICJ and ITLOS. The ICJ, for its part, authorised the participation of 11 international organisations in the climate change advisory proceedings, comprising the European Union, the African Union, the Pacific Community, the Organisation of African, Caribbean and Pacific States, the Melanesian Spearhead Group and the Forum Fisheries Agency, the Commission of Small Island States on Climate Change and International Law (COSIS), the International Union for Conservation of Nature (IUCN), and the Organization of the Petroleum Exporting Countries (OPEC).⁹⁴ As may be expected, the submissions by these intergovernmental organisations were diverse as a result of their differing mandates and technical expertise (e.g. IUCN and OPEC).

Interestingly, in relation to IUCN, ITLOS has consistently authorized it to participate in advisory proceedings under Article 133(3) of the Rules of Tribunal, including in the proceedings on climate change, even though the IUCN is not exclusively composed of States, making its status as an inter-governmental organisation open to question.⁹⁵ By allowing IUCN to partici-

⁹³ For a brief overview of the relevant legal framework governing participation in regional and sub-regional jurisdictional mechanisms see Cruz Carrillo (n. 11), 181.

⁹⁴ ICJ, Press Releases 2023/29, 2023/32, 2023/33, 2023/42, 2023/46, 2023/48, 2023/70, <<https://www.icj-cij.org/case/187/press-releases>>, last access 17 February 2025.

⁹⁵ See e.g. ITLOS, *Request by the COSIS* (n. 50), Written Statement of the IUCN, 13 June 2023 and ITLOS/PV.23/C31/16, 32 ff.; ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area* (n. 52) (Written Statement of the IUCN and ITLOS/PV.2010/4/Rev.2, at 14 ff); Philippe Gautier, 'Standing of NGOs and Third-Party Intervention before the International Tribunal for the Law of the Sea', *Revue Belge de droit international* 47 (2014), 205 (213); Vladyslav Lanovoy, 'Access to and Participation in Proceedings Before International Courts and Tribunals' in: Edgardo Sobenes, Sarah Mead and Benjamin Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (Springer 2022), 428-429.

pate in the proceedings, the ICJ might also be giving first signs of an incremental openness or departure from its strict interpretation of Article 66 (2) of its own Statute. There is no reason of principle why Article 66(2) of the Statute, which employs the term ‘international organizations’ rather than ‘public international organizations’ as found elsewhere in the Statute, could not be interpreted in a broader manner, i. e. not being limited to intergovernmental organisations. The object and purpose of that provision is precisely to allow the Court to obtain all the information it considers necessary in order to form its views on questions before it.⁹⁶

It is also true that broader participation does not come without challenges and risks. It could present significant administrative and logistical challenges for these institutions given their limited resources. A balance must thus be struck between breadth of participation and the good administration of justice. Broader participation also raises concerns about the potential politicisation of the proceedings, abuse, and the usual floodgates arguments. These concerns have prompted calls to revisit whether a better approach may be to expand the pool of bodies entitled to request advisory opinions.⁹⁷ Inspiration could be drawn from the African regional system of human rights, where non-governmental organisations are entitled to request an advisory opinion from the African Court of Human and People’s Rights.⁹⁸ However, any such substantive reforms would require major structural changes for these institutions and would be difficult to achieve. Smaller procedural changes could be achieved quite easily. In the case of the ICJ, the Court could, through its procedural rules, reinterpret the notion of ‘international organization’ in Article 66(2) to include entities other than intergovernmental organisations. Perhaps, even more realistically, Practice Direction XII could be easily modified by the Court in order to broaden the scope of organisations that can submit ‘written statements and/or documents’ outside of the formal case record, which is currently restricted to ‘international non-governmental organizations’, and to provide participants, and the public at large, with easier access to those submissions through publication on their website, as ITLOS has done in its practice.

⁹⁶ Andreas Paulus, ‘Article 66’, in: Andreas Zimmermann and Christian Tams (eds), *The Statute of the International Court of Justice* (3rd edn, Oxford University Press 2019), 1812-1834 (1821 and 1833).

⁹⁷ Hofbauer (n. 20), 262-266.

⁹⁸ Art. 4 para. 1 Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights of 10 June 1998 (Protocol AfChHPR). See eg ACtHPR, *Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (SERAP), advisory opinion of 26 May 2017, no. 001/2013.

2. The Potential Effect(s) of the Advisory Opinions on Climate Change: Beyond the Binding/Non-Binding Dichotomy

The three advisory opinions will undoubtedly serve to consolidate the legal framework on climate change and further its implementation by States in their conduct. The conduct of States can be affected by intrinsic and extrinsic factors inherent to advisory opinions, as outlined below.

Taking the intrinsic factors that may affect the conduct of States first, while advisory opinions are not binding, they are still an authoritative statement of the law. The weight given to the advisory opinions can be seen both in the practice of States and that of international courts and tribunals. For example, in its decision on preliminary objections in the *Mauritius/Maldives* case, an ITLOS Special Chamber ascribed great weight to the ICJ's reasoning and determinations in the *Chagos* advisory opinion. It held that:

‘An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the ‘principal judicial organ’ of the United Nations with competence in matters of international law.’⁹⁹

The Special Chamber of the ITLOS relied on the ICJ's finding in the *Chagos* advisory opinion that the decolonisation of Mauritius was not lawfully completed and affirmed, on this basis, that the United Kingdom cannot ‘have any legal interests in permanently disposing of maritime zones around the Chagos Archipelago by delimitation’.¹⁰⁰ In relying on the finding of the ICJ that the continued administration of the Chagos Archipelago by the United Kingdom was illegal, the Special Chamber of ITLOS went on to conclude that the United Kingdom was not an indispensable party to the proceedings between Mauritius and the Maldives.¹⁰¹ The Special Chamber justified its approach by emphasising that the *Chagos* opinion addressed broader obligations *erga omnes partes*, rather than solely a bilateral dispute, such that its findings could be relied upon in related cases.¹⁰² The recently concluded agreement between Mauritius and the United Kingdom on the

⁹⁹ ITLOS Special Chamber, *Dispute Concerning Delimitation of the Maritime Boundary in the Indian Ocean (Mauritius/Maldives)*, preliminary objections, judgment of 28 January 2021, ITLOS Reports 2021, 7 (para. 203).

¹⁰⁰ ITLOS Special Chamber, *Mauritius/Maldives* (n. 99), para. 247.

¹⁰¹ ITLOS Special Chamber, *Mauritius/Maldives* (n. 99), para. 248.

¹⁰² ITLOS Special Chamber, *Mauritius/Maldives* (n. 99), paras 166, 188-189.

return of the Chagos Archipelago¹⁰³ underscores the practical and political significance of the *Chagos* advisory opinion, as it not only strengthened Mauritius's claims but also catalysed negotiations for resolving the long-standing dispute between the two States.¹⁰⁴ Furthermore, domestic cases have engaged with the ICJ's opinion,¹⁰⁵ demonstrating the rippling public interest effect an advisory opinion can have beyond the court or tribunal initially concerned.

Similarly, other past advisory opinions in respect of global commons have resonated widely in the subsequent practice of States and case law. That has been the case, for instance, of the ITLOS Seabed Disputes Chamber's advisory opinion, the reasoning of which has been relied on in other areas of international law¹⁰⁶ as well as by domestic courts.¹⁰⁷ Advisory opinions on climate change are likely to generate a similar effect on future litigation, both international and domestic.¹⁰⁸ For instance, the IACtHR 2017 advisory opinion on *Human Rights and the Environment* (OC-23/17), '[a]rguably, [...] opened the door for rights-based climate litigation through the recognition of States' responsibilities for transboundary harms (including climate change-related harms) and the precautionary principle'.¹⁰⁹ In a similar vein, if the ICJ provides specific guidance on issues such as the content and modalities of certain primary obligations in respect of climate change or the availability of reparations for breaches of those obligations, that reasoning may well be

¹⁰³ UK and Mauritius Joint Statement, 3 October 2024, <<https://www.gov.uk/government/news/joint-statement-between-uk-and-mauritius-3-october-2024>>, last access 17 February 2025.

¹⁰⁴ See generally Massimo Lando, 'Advisory Opinions of the International Court of Justice in Respect of Disputes', *Colum. J. Transnat'l L.* 61 (2023), 67-132; Jorge Contesse, 'The Rule of Advice in International Human Rights Law', *AJIL* 115 (2021), 367-408.

¹⁰⁵ See Philippa Webb, 'The United Kingdom and the Chagos Archipelago Advisory Opinion: Engagement and Resistance', *Melbourne Journal of International Law* 21 (2021), 726-748 (742-744).

¹⁰⁶ IACtHR, *The Environment and Human Rights* (n. 64), paras 103, 142, 158. See also ICJ, *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Written Observations of New Zealand of 4 April 2013, para. 104; ICSID, *Aven and others v. Costa Rica*, ICSID case no. UNCT/15/3, Respondent's Post-Hearing Brief of 13 March 2017, para. 540.

¹⁰⁷ See e.g. Supreme Court of New Zealand, *Trans-Tasman Resources Limited v. The Taranaki – Whanganui Conservation Board*, judgment of 30 September 2021, [2021] NZSC 127, para. 94.

¹⁰⁸ See e.g. Annalisa Savaresi, 'Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea"' in: Ivano Alogna, Christine Bakker and Jean-Pierre Gausci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021), 366-392.

¹⁰⁹ Maria Antonia Tigre, Natalia Urzola and Juan Sebastián Castellanos, 'A Request for an Advisory Opinion at the Inter-American Court of Human Rights: Initial Reactions', *Climate Law*, 17 February 2023, <<https://blogs.law.columbia.edu/climatechange/2023/02/17/a-request-for-an-advisory-opinion-at-the-inter-american-court-of-human-rights-initial-reactions/>>, last access 17 February 2025.

taken up in future international and domestic public interest litigation efforts, including before the ICJ.¹¹⁰ The three opinions are bound to have an impact if they clarify the scope of the obligations to mitigate and adapt to the effects of climate change, the scope and degree of due diligence required, or the regime on loss and damage, which are particularly controversial under the existing climate change legal regime. Thus, the non-binding nature of the advisory opinions does not hinder their potential impact on the advancement of climate justice.

While advisory opinions can offer significant advantages for addressing climate change cases, particularly in clarifying States' obligations under international law and fostering normative development, there are potential pitfalls. For instance, the *Kosovo* advisory opinion¹¹¹ was criticised for its narrow interpretation of the question presented to it and limited engagement with broader legal implications, leading to controversy over its utility and precedential value.¹¹² Careful attention must be thus paid to the formulation of the questions put to the Court, ensuring they address key legal uncertainties without becoming overly abstract or disconnected from practical realities. Unlike the *Kosovo* opinion, climate change advisory opinions have the potential to clarify both the specific obligations under the relevant treaty regimes and under customary international law, as well as the linkages that may exist with other branches of international law and the general secondary obligations on State responsibility, while fostering participation of particularly vulnerable States and non-State actors.

Turning now to extrinsic factors that may affect the conduct of States, i. e. those unrelated to the non-binding character of advisory opinions and the quality of their reasoning, at least three can be singled out. First, advisory opinions may be used by States to streamline or even bypass certain aspects of climate negotiations, enabling States to focus on implementing measures.¹¹³ For instance, as noted earlier, the *Chagos* advisory opinion revitalised negotiations between the United Kingdom and Mauritius in respect of the return by the former to the latter of the Chagos archipelago. Further, by setting out and clarifying the law applicable to a given issue, international

¹¹⁰ Daniel Bodansky, 'Advisory Opinions on Climate Change: Some Preliminary Questions', *RECIEL* 32 (2023), 185-192, (186) (suggesting that the 'advisory opinion requests seek to effectuate a paradigm shift in international climate change law, from a system of exclusively negotiated law to one that involved adjudicated law').

¹¹¹ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, advisory opinion of 22 July 2010, ICJ Reports 2010, 403.

¹¹² See generally Hurst Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?', *LJIL* 24 (2011), 155-161.

¹¹³ For the possible impact on climate change negotiations specifically see Bodansky (n. 110), 191.

courts and tribunals may contribute to preventing bilateral disputes between States from arising.¹¹⁴

Secondly, the submissions made by States in the context of advisory proceedings may have a knock-on effect on the development of international law and thus serve to shape future State behaviour. These statements may be considered subsequent practice in connection with specific treaty obligations or, alternatively, contribute to the development of relevant practice and *opinio juris* in connection with certain rules or principles of general international law.¹¹⁵ In the context of climate change, they may also empower domestic constituencies to exert pressure on the State and other stakeholders from within and to keep them to account in terms of further implementation measures to combat and mitigate the effects of climate change. Bodansky helpfully provides reflections as to a ‘range of diffuse effects’ that advisory opinions on climate change might have. These include bolstering domestic climate litigation, giving greater prominence to certain issues in the international policymaking on climate change, bolstering arguments of some States and undermining those of others, further clarifying procedural issues such as that of standing or technical aspects of the required causal link for climate change reparations.¹¹⁶ Most importantly, the significance of opinions to be delivered by the ICJ and the IACtHR, as well as that recently delivered by ITLOS, ‘might depend as much on [their] ability to shape public consciousness and define normative expectations for a broad variety of actors as on [their] direct influence on states’.¹¹⁷ As Wewerinke-Singh and others posit, advisory opinions by the three international courts and tribunals ‘could spur and (re)invigorate climate action by various groups, especially youth groups, by providing a tangible example of local activism turning into global action for climate justice’.¹¹⁸

¹¹⁴ Laurence Boisson de Chazournes, ‘Advisory Opinions and the Furtherance of the Common Interest of Humankind’, in: Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers 2002), 107. On the authority of the ICJ advisory opinions see generally Vahid Rezadoost, ‘Unveiling the “Author” of International Law – The “Legal Effect” of ICJ’s Advisory Opinions’, *Journal of International Dispute Settlement* 15 (2024), 506-533.

¹¹⁵ See ILC, ‘Draft Conclusions on Identification of Customary International Law, With Commentaries’, in: ILC, *Report of the International Law Commission on the Work of Its Seventieth Session* (30 April-1 June and 2 July-10 August 2018), UN Doc. A/73/10, 2018, 118-155 (135) (Commentary to Conclusion 7(2)), noting that whenever ‘a State’s practice as a whole is found to be inconsistent, that State’s contribution to a “general practice” may be reduced’.

¹¹⁶ Bodansky (n. 110), 190.

¹¹⁷ Bodansky (n. 110), 190; see also Daniel Bodansky, ‘The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections’, *Ariz. St. L.J.* 49 (2017), 689-712 (707).

¹¹⁸ Wewerinke-Singh, Garg and Hartmann, ‘Advisory Proceedings on Climate Change’ (n. 86), 41.

Thirdly, several risks are inherent to a greater use of the advisory function of international courts and tribunals as a form of public interest litigation. While the first two risks are not necessarily related to climate change advisory proceedings only, they are worth mentioning as potential drawbacks of overuse of the advisory function and its impact on public interest litigation more broadly. On the one hand, the making of a request for an advisory opinion involves a challenging negotiating process and, as a result of political, economic, and other compromises made, the outcome may not necessarily reflect best the public interests in question. On the other hand, there is a risk that advisory opinions may be used as a tool to create law where it simply does not exist. International courts and tribunals tend to tread carefully when it comes to pronouncements that may be regarded as pushing the boundaries of the existing law.¹¹⁹ At the same time, they are naturally reluctant to make a declaration of *non liquet*.¹²⁰ Last but not least, there is a risk of fragmentary opinions by different international courts and tribunals on the overlapping aspects of climate change.¹²¹ Having regard to the context and scope of questions in the climate change advisory proceedings, that risk is not to be underestimated in the decentralised legal order which knows of no hierarchy or any formal coordination among international courts and tribunals.

V. Conclusion

Conceived in a straitjacket of synallagmatic bilateralism,¹²² the international legal order has come a long way to recognise and, most importantly, allow for an enforcement of collective or community interests. International courts and tribunals are busier than ever before and are, today, frequently called to adjudicate upon disputes or provide guidance on legal questions that

¹¹⁹ ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 71), para. 18 (the Court ‘states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend’).

¹²⁰ ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 71), para. 105(2) E; see also ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 71), Dissenting Opinion of Judge Higgins, paras 29–30.

¹²¹ Concerning the question of fragmentation see generally ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the ILC, finalized by Mr. Martti Koskenniemi, UN Doc. A/CN.4/L.682 and Add. 1 (13 April 2006). See also Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

¹²² Voefray (n. 15), xx (Préface by Georges Abi-Saab) (the author’s translation from the original in French: ‘dans le carcan du bilatéralisme synallagmatique’).

concern the protection of shared values and interests of the international community. Over the past two decades, international courts and tribunals have pronounced on a number of issues that concern the global commons, both as part of their contentious and advisory functions. The incremental increase of public interest litigation before international courts and tribunals raises the question as to whether and, if so, how to revisit the function(s) of dispute settlement mechanisms and the impact they may have on affording greater protection to global commons.

This article has addressed the concept of public interest litigation through the lens of advisory proceedings on climate change before the ICJ, ITLOS and IACtHR. The main argument of the article is that advisory proceedings in general, and the climate change advisory proceedings specifically, have the potential to contribute to the protection of global commons and may have a positive effect on fostering further public interest litigation on the international plane. This argument was developed by analysing how the climate change advisory proceedings could pave the way for new institutional developments, and to what extent they may enhance the role of international courts and tribunals as guardians of international law. The article examined the potential effects of advisory opinions on the behaviour of States. While the three opinions hold great promise as to their impact, the advisory function of international courts and tribunals is still subject to several institutional constraints. These constraints could be tempered with a view to advancing the public interest, for example by making even small changes that would allow greater participation by entities other than States and intergovernmental organisations. Breadth of participation in public interest litigation of this kind is particularly important where the questions put before international courts and tribunals concern the global commons and require the treatment of diverse scientific, socio-economic, and legal considerations, which may not necessarily be fully addressed by States participating in the proceedings.

Repairing Harm to Common Interests and Common Spaces: Recent Institutional Developments Across Public International Law

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Abstract

Common spaces and interests are taking central stage in international law. In the context of judicial proceedings concerned with such interests and spaces, reparation raises particularly complex legal issues. For one, the common or shared character of these interests and spaces makes traditional avenues to seek reparation in bilateral disputes inadequate. Similarly, the requirement that only victims harmed by a wrongful conduct be entitled to reparation prompts reflections as to the relevance of the common character of the interest protected for the actual determination of victims. In acknowledging the limited tools available under international law, this paper aims to review some creative institutional solutions at the reparations stage that have recently emerged across various legal regimes. It will consider first the potential role of international organisations as claimants representing the rights and interests of the international community. Secondly, attention will shift to the role of ‘trust

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funds' as concrete tools for implementing reparations, focusing on both funds established by treaties offering legal protection for common spaces as well as funds set up in the context of international criminal justice as an additional avenue for guaranteeing redress to victims. Pursuing this aspect further, the paper will focus on the emergence of a human right to reparation and on the advantages of collective solutions, while taking into account concerns relating to the capacity of such solutions to effectively reach victims and to accurately reflect the harm inflicted upon them.

Keywords

Reparations – human rights – common spaces – international responsibility – victims' rights

I. Introduction

It is a generally accepted principle under international law that a finding of responsibility for an internationally wrongful act gives rise to an obligation to make full reparation¹, the objective being to 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.² However, the application of this principle may appear problematic when common spaces and interests are at stake, given the factual and conceptual issues that characterise certain categories of international disputes – e. g., environmental ones.

Multiple causality is without any doubt a relevant aspect. Harm to common spaces is usually the result of the conduct of several States: even when they can be identified, the link between conduct and its effects may be hard to prove, making the apportioning of reparations difficult to perform. Furthermore, the presence of several responsible subjects can raise doubts as to the actual function of reparations, as the rectification of one's conduct may ultimately prove pointless if all others do not modify theirs, as well. In a similar vein, in situations of harm to common interests and space, victims and perpetrators may even coincide.

¹ See ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts', (2001) ILCYB, Vol. II, Part Two, Art. 31. The document will be hereinafter referred to as ARSIWA.

² PCIJ, *Case concerning the Factory at Chorzów*, merits, judgment of 13 September 1928, Collection of judgments, Ser. A, No. 17 (1928), 47.

Looking more closely at the forms of reparations available in an inter-State context, prioritising restitution – in accordance with the Permanent Court of International Justice (PCIJ) in *Chorzów* as well as by the International Law Commission (ILC) in its work of codification³ – sits well with its capacity to best serve the global value of common spaces and interests. Nevertheless, restitution poses significant challenges, especially in the environmental sphere, due not only to the often-irreversible nature of harm and to the disproportionate burden on the respondent, but also to the type of obligation breached: as was made clear by the International Court of Justice (ICJ) in *Pulp Mills*, restitution does not provide an appropriate remedy for procedural obligations.⁴ At the same time, the difficulty to quantify environmental harm is a common feature of litigation in this field, especially when the very existence of a species is at stake.

In this scenario, conceiving of international law as resting on reciprocity, centred around bilateral types of disputes, makes it particularly ill-equipped to deal with the adjudication of breaches concerning common spaces and interests. As it is known, non-reciprocal situations might find expression in *erga omnes partes*⁵ or *erga omnes* obligations.⁶ As reiterated in the case-law of the ICJ since the famous *Barcelona Traction*,⁷ these obligations concern obligations of a State towards the international community as a whole (*erga omnes*), or the parties to a treaty (*erga omnes partes*), thus entailing the legal interest of all States in their protection.⁸ As it will be better illustrated in the next section, even assuming that a breach of obligation based on primary norm can be identified, issues of responsibility and reparation are far from settled.

Before entering into the merits of the analysis, some terminological remarks are necessary, the first of which concerns the term ‘common spaces and interests’, that will be employed to refer to physical spaces and interests whose protection transcends the perspective of individual States and requires

³ See the ILC, ARSIWA (n. 1), Commentaries on Article 35, 96-97.

⁴ ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), merits, judgment of 20 April 2012, ICJ Reports 2010, 14 (para. 275).

⁵ ILC, ARSIWA (n. 1), Art. 48 para. 1 lit. a). In this case, of course, the obligation is due to all States parties to a treaty.

⁶ ILC, ARSIWA (n. 1), Art. 48 para. 1 lit b).

⁷ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Gambia v. Myanmar), preliminary objections, judgment of 22 July 2022, ICJ Reports 2022, 477 (paras 107 ff.); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), provisional measures, order of 26 January 2024, ICJ Reports 2024, (para. 33).

⁸ ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), merits, judgment of 5 January 1970, ICJ Reports 1970, 3 (para. 33).

the action of the whole international community. For the purposes of the present analysis, common spaces are not necessarily situated beyond national jurisdiction (such as Antarctica or high seas), but can also fall under one State's jurisdiction (e.g. cultural property), their main feature lying in their relevance for the whole humankind. Though the idea of common interests (e.g. the preservation of international peace) is mainly linked to immaterial aspects, the two notions may overlap as, for example, the protection of cultural property of outstanding value or of biological diversity can be referred to both a physical space and to the underlying interest.

A further terminological remark concerns the terms 'damage', 'harm' and 'injury': as these terms might acquire different nuances in the various areas of international law that are relevant for the present article, I will mainly draw from the work of the ILC in related areas. Considering that this work focusses on compensation as a form of reparation, and consistently with the language used by Art. 36 ARSIWA (Articles on the Responsibility of States for Internationally Wrongful Acts), the term 'damage' will refer to any harm that has already taken place⁹ and that is susceptible of being financially assessed, while 'harm' will be given a generic meaning, concerning any 'detrimental effect'¹⁰ on a given legal good, and without any specific reference to compensation. Finally, for the sake of simplicity, and notwithstanding the broad resort to this term made by human rights jurisprudence, the term 'injury' or 'injured' will only be used in relation to Art. 31 ARSIWA or in other textual quotations.

In the light of the above, the purpose of this paper is to take stock of recent institutional developments in international law addressing reparations of harm to common interests and spaces. In particular, it will zoom in on the potential role of international organisations in their protection, on the function and rationale of 'trust funds' as a means to ensure reparation and on the prospects of success of using international human rights law to obtain remedy. This paper is structured as follows: after a short introduction (section I.), section II. will consider international organisations as representatives of a general interest for the purpose of reparations. Section III. will discuss the use of 'trust funds', either established under international criminal law procedures (sub-section III. 1.) or created in order to provide protection for a legal

⁹ The distinction, from a temporal viewpoint, between 'harm' and 'damage' has been sketched by the ILC in its work on allocation of loss in case of transboundary harm. See ILC, 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities with Commentaries', (2006) ILCYB, Vol. II, Part Two, 63, Princ. 1 para. 11.

¹⁰ ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries', (2001) ILCYB, Vol. II, Part Two, 152, Art. 2 para. 4.

good within the framework of treaty law (sub-section III. 2). Finally, section IV. will focus on the possible synergies between the individual ‘right to a remedy’ and the use of ‘trust funds’, followed by some concluding observations in section V.

II. The Identification of Claimants Entitled to Represent a Common Interest: A Role for International Organisations?

Protecting common spaces and interests under current international law demands that the entities concerned by the harm are identified and that they are entitled to invoke the breach and to benefit from reparation, including financial compensation. If, as mentioned above, at the level of primary norms, such a purpose can form the object of *erga omnes partes* or *erga omnes* obligations, the corresponding secondary norm is found in Art. 48 ARSIWA, allowing the invocation of the breach by any State other than the injured one, when the obligation is owed to a group of States or to the international community as a whole. According to para. 2 of this provision, any State from the relevant community is entitled to invoke responsibility, including performance of the obligation of reparation ‘in the interest of the injured State or of the beneficiaries of the obligation breached’. Despite being clearly inspired by the idea of overcoming a strictly reciprocal notion of international obligation, Article 48 does not necessarily offer an easy avenue for the protection of common spaces and interests, *inter alia* because of the conceptually complex distinction it introduces between injured and not (directly) injured States.

In the light of these elements, it is suggested that international organisations or Non-Governmental Organisations (NGOs) could play an important role in invoking state responsibility for breaches of common interests – that is, in this context, in representing a legal interest shared by multiple legal subjects or even by the international community as a whole. A recent example in this respect has been provided by the European Court of Human Rights in the well-known *KlimaSeniorinnen* case. While reaffirming the general prohibition of *actio popularis* enshrined in its mandate,¹¹ the Court underlined the progressive recognition of the role of environmental NGOs in climate change-related cases.¹² This prompted the judges to admit the *locus*

¹¹ ECtHR (Grand Chamber), *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, judgment of 9 April 2024, no. 53600/20, para. 460; *ex multis* ECtHR, *Asselbourg and others v. Luxembourg*, decision of 29 June 1999, no. 29121/95, 10.

¹² ECtHR, *KlimaSeniorinnen* (n. 11), para. 491, 497–498.

standi of the applicant association, in order to protect the human rights of those who are or might be affected by the impact of climate change, provided that some requirements are complied with.¹³

International practice offers some interesting examples where international organisations have been or might be allowed to act for a common space or interest. In this regard, a prominent example concerns the law of the sea and, specifically, the *régime* applicable to the seabed and the ocean floor (the ‘Area’) as regulated by Part XI of the United Nations Convention on the Law of the Sea (UNCLOS), the provisions of which clearly assert the relevance of this space for the entire international community, considered also in its human perspective, and establish obligations for *all* States.¹⁴ While qualifying the Area as ‘common heritage of mankind’,¹⁵ the Convention bars the exercise of State jurisdiction in this space¹⁶ and, accordingly, considers the geographical locations of States irrelevant.¹⁷ A pivotal role in this system is assigned to the International Seabed Authority (ISA) which, according to Article 137, paragraph 2, acts on behalf of humankind. In its advisory opinion on the responsibility of sponsoring States for activities in the Area adopted in 2011, the International Tribunal for the Law of the Sea (ITLOS) addressed the potential liability of any State sponsoring exploration and exploitation activities in the Area, therefore touching upon the issues of reparation and compensation. When considering a scenario in which damage is inflicted on the Area and on its resources constituting the common heritage of humankind, the Tribunal postulated that ‘subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States’.¹⁸

Leaving aside the vagueness of this wording, and focussing instead on the first of these entities, a question arises as to whether the institutional nature of the ISA could justify a privileged *status* in this respect, enabling it to claim compensation without any further justification but the position it occupies in

¹³ ECtHR, *KlimaSeniorinnen* (n. 11), para. 499-502.

¹⁴ Meagan S. Wong, ‘The United Nations Convention on the Law of the Sea 1982’ in: Malgosia Fitzmaurice, Attila Tanzi and Angeliki Papantoniou (eds), *Multilateral Environmental Treaties* (Edward Elgar Publishing 2017), 145-165 (161). Emphasis in the text.

¹⁵ United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 3, Art. 136.

¹⁶ Art. 137 United Nations Convention on the Law of the Sea (n. 15).

¹⁷ Art. 140 United Nations Convention on the Law of the Sea (n. 15).

¹⁸ ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, advisory opinion of 1 February 2011, case no. 17, para. 179. The point is further strengthened in the following paragraph where, based on the entitlement of the Authority to act on behalf of humankind, the Tribunal stresses that each State Party ‘may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the Area’ (para. 180).

the governance of the Area, even in the absence of an explicit provision. Besides the possible need of formal amendment, further concerns might stem from practical and political challenges. These latter would be linked, notably, to the actual capacity of the ISA to represent the common interest in the protection of the seabed without being influenced by conflicting private constituencies. Doubts in this respect were expressed, in particular, on the occasion of the adoption of the controversial ‘Mining Code’, i. e. the set of norms establishing the legal framework for the exploration and exploitation of seabed. In that context the ISA was severely criticised for its allegedly close relationships with mining corporations, resulting in an embedded ‘industry-driven agenda’. According to this view, the advancement of private interests linked to mining would be pursued through a biased use of its institutional structures, whose impartiality would be jeopardised by the presence of mining industry representatives within State delegations or by ‘sliding doors’ between ISA organs and corporations. A further issue of debate concerns the alleged lack of transparency of the Authority affecting, among other things, the functioning of the Legal and Technical Commission, the ISA advisory scientific organ, normally working in closed and unrecorded meetings and through working groups whose mandate and composition are often not made public.¹⁹

With more specific regard to the negotiation of the Mining Code that should take place in 2025, the doubts about the capacity of the ISA to genuinely represent the interests of mankind in the ‘Area’ have been also raised in relation to procedural issues affecting decision-making in this field and, notably, to the modalities through which agenda items can be proposed in view of an Assembly meeting. The problem is all but theoretical, given the polarisation currently taking place within the ISA, with some Members arguing in favour of the possibility to start deep seabed exploitation within two years even in the absence of any regulation, and other Members calling for the adoption of a general policy based on precaution before any activity takes place. When the latter group asked for the inclusion of a specific agenda item on this topic in 2023, the initiative was blocked by other Members, with a renewed proposal being submitted at the following meeting.²⁰

¹⁹ David Billet et al., ‘Enhancing Scientific Expertise at the ISA’, 12 April 2023, 10, available at: <https://www.pewtrusts.org/-/media/assets/2023/04/code-project_enhancing-scientific-expertise-at-the-isa.pdf>, last access 19 February 2025.

²⁰ Pradeep Singh, ‘Deep Seabed Mining: A General Policy at the International Seabed Authority?’, EJIL: Talk!, 10 June 2024; British Institute of International and Comparative Law, Deep Seabed Mining & International Law: Is a Precautionary Pause Required?, 31 May, 2023, available at: <https://www.biicl.org/documents/166_deep_seabed_mining_event_report.pdf>, last access 19 February 2025.

A further example of the potential role played by international organisations in the representation and advancement of common interests may be found in the context of cultural property protection, especially when such property is deemed to have universal value. While this area forms the object of the well-known 1972 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on World Heritage,²¹ relevant legal norms are also found in international humanitarian law, including those codified in the Statute of the International Criminal Court.²² While the Court is concerned with individual criminal responsibility and not with state responsibility, the universal value vested in cultural property might nevertheless raise the issue of representing a common interest at the reparation stage. A possible role in this respect for an international organisation finds reflection, *inter alia*, in Article 85 of the Rules of Procedure of the Court, whose paragraph b) includes, within the notion of ‘victim’, organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion. Moreover, under Article 98, paragraph 4, reparations might be addressed through the Trust Fund to an intergovernmental, international or national organisation.

The obligation to make good any intentional destruction of cultural property of outstanding value – in that case, ancient buildings and mausoleums in Timbuktu (Mali) – was at the centre of the *Al-Mahdi* case before the International Criminal Court (ICC), which resulted in the imposition of a nine-year sentence on the defendant. Despite recognising the interest of the entire international community in world cultural heritage,²³ the Court did not actually identify any tangible mechanism for representing this viewpoint at the reparations phase and decided to subsume harm caused to the national or international community under that suffered by local inhabitants.²⁴ The decision was grounded on the ‘prioritisation’ of reparation for the benefit of those groups whose enjoyment of cultural heritage is particularly intense,²⁵ strengthened by the lack of any application for this purpose,

²¹ Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972, 1037 UNTS 152 (World Heritage Convention).

²² Art. 8 para. 2 lit. e) iv, Rome Statute of the International Criminal Court of 17 July 1998, 2187 UNTS 3 (ICC Statute).

²³ ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, judgment of 27 September 2016, ICC-01/12-01/15, para. 17.

²⁴ ICC, *Al Mahdi*, Reparations, order of 17 August 2017, ICC-01/12-01/15, paras 52 ff.

²⁵ ICC, *Al Mahdi*, Reparations (n. 24), para. 53. The influence of a ‘human rights lens’ on the decision to prioritise reparations for local inhabitants is emphasised by Haydee J. Dijkstal, ‘Destruction of Cultural Heritage before the ICC: The Influence of Human Rights on Reparations Proceedings for Victims and the Accused’, JICJ 17 (2019), 391-412 (405-406).

including any attempt in this sense by the UNESCO.²⁶ In this respect, it is important to note that the interest of the national and international community that this latter organisation aims to advance and represent²⁷ should not be seen merely as an inter-State one, as opposed to a victim's interest, but rather as a common interest, taking account of the universal value of the cultural property destroyed. This is evident from the trial judgment, in which the Court stressed the international community's condemnation of the crimes²⁸ and the 'particular gravity' of the facts, as they affected not only the direct victims, but also people more widely throughout Mali and the international community.²⁹

When compared to the previous example, the *Al-Mabdi* case offers less straightforward solutions for imagining an institutional avenue for channeling compensation towards the international community, especially considering that UNESCO is not endowed with the same capacity and authority to represent the interest of such community as that explicitly attributed to the ISA by UNCLOS. Even admitting that UNESCO be entitled to submit a claim, additional doubts might stem from the power asymmetry that would result between the World Heritage Committee, on the one hand, and the General Conference and the Executive Board, on the other. As the protection of cultural heritage under the 1972 Convention is assigned to the former, the latter would play a secondary role in this kind of decision, in contrast to their apical role within UNESCO structure. In addition, any potential role for such Committee in the framework of a criminal procedure would raise legal and political issues if one considers its restricted composition, i. e. twenty-one elected Parties: the sensitive nature of this feature is confirmed by the request, addressed by the General Assembly to State Parties in the Operational Guidelines, to voluntarily reduce their term of office from six to four years.³⁰ Yet the very fact that the Court did mention UNESCO's failure to act suggests that international organisations of this kind may in the future apply for victim status under the ICC legal framework and receive judicial recognition of their standing to claim reparations for common interests protected by the ICC Statute.

²⁶ ICC, *Al Mabdi*, Reparations (n. 24), para. 52.

²⁷ This idea notably emerges in the Preamble of the Convention on Cultural and Natural Heritage, underlining that parts of such heritage 'need to be preserved as part of the world heritage of mankind as a whole'.

²⁸ ICC, *Al Mabdi*, Reparations (n. 24), para. 67.

²⁹ ICC, *Al Mabdi*, Reparations (n. 24), para. 80.

³⁰ Operational Guidelines for the Implementation of the World Heritage Convention, 31 July 2024, para. 21.

III. Compensation for Damage and Redress Through ‘Trust Funds’

As codified by Art. 31 ARSIWA, ‘reparation for injury’ caused by an international wrongful act can take different forms – restitution, compensation for damage, satisfaction – which are hierarchically ordered.³¹ However, especially when mass violations of human rights are concerned, a distinction must be made between compensation following responsibility for an internationally wrongful act and other remedial measures whose main purpose is to provide redress. What is underlined here is that compensatory measures may be strictly informed by the logic of Art. 36 ARSIWA and provide an amount of money as a way to compensate damage caused by a wrongful act or, under a different perspective, be more focussed on the victim and on the harm suffered, leaving the responsibility of the perpetrator somehow in the background. Rather than a matter of context (judicial or non-judicial), such a distinction is a matter of approach – that, according to the terminology used by authoritative doctrine, can be brought under the categories of ‘retributive’ and ‘transitional’ justice³² – and, when common spaces and interests are at stake, is not always easy to translate into practice. The complexities inherent in the protection of these latter often lead competent organs to adopt, more or less knowingly, hybrid institutional avenues such as retrieving of financial resources to the benefit of harmed individuals.

In this respect, an interesting solution is increasingly being provided by ‘trust-funds’, i. e., for the purposes of this article, institutional mechanisms targeted at the collection and distribution of financial resources for the sake of victims or with a view to protecting specific spaces or interests. This kind of institutional device can, of course, take on very different forms, also depending upon the sub-set of international law norms at issue: for simplicity, a distinction will be drawn between funds established within the framework of international criminal justice and funds set up by treaties or United Nations resolutions.

³¹ According to ILC, ARSIWA (n. 1), Art. 36.1, the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

³² Dinah Shelton, *Remedies in International Human Rights Law* (online edn, Oxford University Press 2015), 17, 20 ff.

1. The Use of ‘Trust Funds’ Between Reparations for International Crimes and ‘Crowdfunding’

The first category of ‘trust funds’ is part and parcel of the institutional structure of courts and tribunals established in the area of international criminal law. Before taking a closer look at some of these funds, it is worthwhile underscoring some of the characteristics of reparations in this context, especially when compared to international human rights law. In the latter area reparations are based on a finding concerning a breach of obligations incumbent on States, with related orders generally made in favour of the victims; conversely, in the field of international criminal justice, orders are issued after the defendant has been found guilty of a crime and are therefore issued against him or her.³³ Although some authors warn against the potential conceptual difficulties encountered when mixing individual criminal responsibility with the right to reparation,³⁴ the common root of these notions – i. e., the breach of human rights – makes cross-fertilisation between the two a fruitful exercise from both a theoretical and a practical viewpoint.³⁵

One of the most remarkable examples of ‘trust fund’ is represented by the Trust Fund for Victims (TFV) of the ICC, the rationale of which is to offer an additional avenue for the implementation of reparation orders, especially when defendants are unable to pay the amount requested or due to the high number of victims.³⁶ Alongside the ‘money and other property collected through fines or forfeiture’ referred to in Article 79, paragraph 2, of the Statute of the Court, the Fund is regularly financed through ‘other resources’,³⁷ i. e. donations by ICC Member States. The ‘crowdfunding’ nature of this mechanism transcends the adversarial approach to criminal justice and rather reinforces the transitional justice side of the procedure, as the entities that are technically not involved in the judicial activity of the Court may actively contribute to the reparation of damage.

The TFV has been resorted to in the *Al-Mahdi* case mentioned above, where the intentional destruction of religious buildings was partially repaired through the payment of individual compensation to victims who were direct descendants of the saint entombed in one of the mausoleums, or whose

³³ Miriam Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice* (Cambridge University Press 2020), 32.

³⁴ Frédéric Mégret and Raphael Vagliano, ‘Transitional Justice and Human Rights’ in: Cheryl Lawther and Luke Moffet (eds), *Research Handbook on Transitional Justice* (Elgar 2017), 95-116 (105).

³⁵ Cohen (n. 33), 32.

³⁶ Art. 79 ICC Statute; Rule 98 paras 2, 3 ICC Rules of Procedure and Evidence.

³⁷ Rule 98 para. 5 ICC Rules of Procedure and Evidence.

livelihood depended exclusively on these latter.³⁸ However, the most substantial part of reparations was collective in nature – i. e. directed at a community or group – and comprised measures such as the restitution of buildings in conjunction with UNESCO, assistance for the return of victims to Timbuktu and programmes providing psychological support³⁹. Interestingly, collective reparations have also been awarded by way of the payment of one euro in symbolic compensation to the Government of Mali (representing Malians) and to UNESCO (representing the international community).⁴⁰

The TFV is not an isolated case. Similar bodies have been established within hybrid courts, such as the Special Panels for Serious Crimes in East Timor⁴¹ or the Extraordinary Chambers in the Courts of Cambodia (ECCC).⁴² Despite the differences in their respective origin and functioning, common features of these judicial institutions include not only the mere existence of a ‘fund’, but also the possibility for it to be replenished by entities that were not directly involved in the crime. If, on the one hand, this technique can be traced back to the frequent difficulties faced by international criminal courts in gathering financial resources, it is submitted that the common nature of the values at stake (attaching e. g. to fundamental rights) should also be taken into account, thus making a ‘trust fund’ a particularly suitable solution both in terms of forms of reparation and the retrieval of the necessary resources.

The practice of these tribunals, including the use of funds, also displays some weaknesses linked to the tendency to frame compensation as projects. In particular, their over-reliance on external funding would work as an ‘entry point’ for the so-called ‘projectification’⁴³ that, in turn, has negative consequences in terms of transparency. According to this view, the need to ensure adequate funding of donors leads to the proliferation of actors involved in the reparations phase and in the design of projects, with many decisions

³⁸ ICC, *Al Mahdi*, Decision on the Updated Implementation Plan from the Trust Fund for Victims, judgment of 4 March 2019, ICC-01/12-01/15, paras 23 ff.

³⁹ ICC, *Al Mahdi*, Implementation Plan (n. 38), paras 62 ff.

⁴⁰ ICC, *Al Mahdi* (n. 23), para. 106.

⁴¹ Under this system, compensation obtained by submitting a civil claim can be complemented by a Trust Fund, financed through money and other property collected through fines, forfeiture, foreign donors or other means. Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, Art. 25, Art. 49.

⁴² According to the ECCC Internal Rules, only collective and moral reparations may be awarded. In setting out the modalities of implementation, the Chamber may decide either that the costs will be borne by the convicted person or that reparations will be funded externally; in this latter case, reparations will be given effect through a project. ECCC Internal Rules (Rev. 9) as revised on 9 January 2015, Art. 23 *quinquies*.

⁴³ Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Cambridge University Press 2022), 243-244.

between donors, implementing organisations and concerned populations taken out of court,⁴⁴ as well as lawyers and judges turned into ‘managers’ with no expertise.⁴⁵

Further criticism is directed against a general lack of accountability that informs the procedure of these tribunals and that inevitably also extends to the reparations phase: not only are international criminal courts far from acting on behalf of humanity and are not really accountable to any constituency,⁴⁶ but they also manage reparations without genuinely representing the interests of the victims. This is often the result of specific institutional arrangements that allow them very limited room to express their viewpoint, as in the case of the ECCC, where ‘Lead Co-Lawyers’ selected by the Court will file a single claim for collective and moral reparations on behalf of the whole group of victims.⁴⁷ Similar concerns have been raised about the ICC procedure, where all the victims are represented by a single counsel.⁴⁸ Moreover, it has been observed how reliance on donors for funding and on NGOs for implementation of projects risks make courts more accountable to these entities than to the victims.⁴⁹ In the case of the ECCC, this tendency finds confirmation, for instance, in the cooperation between NGOs, the Victims Support Section and Lead Co-Lawyers in the design of reparation projects.⁵⁰

Finally, the use of trust funds and the ensuing resort to collective reparations adds to existing concerns on fairness and equitable distribution of resources between victims. Unlike remedies granted under genuine transitional justice schemes, reparations decided by international criminal courts reflect the necessary selectivity of prosecutorial choices⁵¹ but also, as remarked by some scholars, the procedures regulating victims’ participation.⁵² This latter is fraught with obstacles stemming from the obligation to be

⁴⁴ Sperfeldt (n. 43), 259.

⁴⁵ Sperfeldt (n. 43), 252 ff.

⁴⁶ The point is emphasised by: Frédéric Mégret, ‘In Whose Name? The ICC and the Search for Constituency’ in: Christina De Vos, Sarah Kendall and Carsten Stahn (eds), *Contested Justice* (Cambridge University Press 2015), 23-45 (23 ff.).

⁴⁷ Rule 12 *ter* para. 4 Rule 23 ECCC Internal Rules.

⁴⁸ Rule 22 ICC Rules on Procedure and Evidence. See Isha Jain, ‘Theorizing the International Criminal Court’s Model of Justice: The Victims’ Court?’, *Journal of Victimology and Victim Justice* 2 (2019), 1-10 (5 ff.).

⁴⁹ On the role of NGOs in reparation projects see, among others: Rachel Killean and Luke Moffett, ‘What’s in a Name? “Reparations” at the Extraordinary Chambers in the Courts of Cambodia’, *Melbourne Journal of International Law* 21 (2020), 115-143 (128 ff.).

⁵⁰ Rule 12 *bis* para. 3 ECCC Internal Rules.

⁵¹ Randle C. De Falco, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice* (Cambridge University Press 2022), 232.

⁵² Claire Garbett, ‘The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice’, *Restorative Justice* 5 (2020), 198-220 (207 ff.).

represented up to linguistic barriers, leading to a ‘pyramid’, with only the top benefiting from a remedy.⁵³ Some modalities adopted in the management of ‘trust funds’ might even exacerbate said selectivity, especially as far as the use of ‘other resources’ (i.e. voluntary contributions) are concerned. This is particularly true of the practice of setting aside resources to secure funding in view of future orders, which might discriminate between victims who will receive compensations and others that, though in urgent need, could be deprived of this possibility.⁵⁴

2. ‘Treaty-Based’ Funds: A Complementary Resource to Achieve Protection of Common Spaces and Interests?

Unlike trust funds, which form part and parcel of judicial mechanisms, treaty-based funds have a completely different origin and rationale, as they are based on treaties pursuing the protection of a specific legal good. In other words, financial resources made available under these schemes do not repair harm stemming from a breach of a norm, nor they constitute a form of penalty against a responsible subject. They are solely instruments geared towards the accomplishment of a shared purpose. Within this broad landscape, a distinction can be nevertheless made between funds established under human rights instruments, that are somehow inspired by a transitional justice logic, and funds set up by treaties on the protection of the environment and of cultural property, falling under the category of technical assistance.

Starting from the former type of funds, it is worthwhile recalling the attempts made at United Nations (UN) level, in particular the Voluntary Trust Fund on Contemporary Forms of Slavery,⁵⁵ the Voluntary Trust Fund for Victims of Trafficking in Persons⁵⁶ and the Voluntary Fund for Victims of Torture.⁵⁷ Without entering into the merits of the characteristics and operation of each individual fund,⁵⁸ for the purposes of the present analysis, it is

⁵³ Fiona McKay, ‘What Outcomes for Victims?’ in: Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (online edn, Oxford University Press 2015), 921-954 (944-945).

⁵⁴ William Schabas, ‘Art. 79’ in: William Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016), 1190.

⁵⁵ UNGA Res 46/122 of 17 December 1991, A/RES/46/122.

⁵⁶ UNGA Res 64/293 of 30 July 2010, A/RES/64/293.

⁵⁷ UNGA Res 36/151 of 16 December 1981 A/RES/36/151.

⁵⁸ For a thorough and detailed analysis see Miriam Cohen, ‘Reparación de las violaciones de los derechos humanos: ¿Qué papel tienen los fondos fiduciarios? Una visión exploratoria de los fondos internacionales’, *Revista do Instituto Brasileiro de Direitos Humanos* 22 (2022), 243-258 (248) ff.

sufficient to note that their rationale is not to allocate financial resources based on applications by victims, but rather to benefit these latter through the implementation of projects proposed by NGOs and other associations. Despite the limited role assigned to individuals, the mission of these funds is nevertheless reparative in nature, in seeking to offer redress following the perpetration of serious breaches of human rights. UN funds do not receive any contributions out of the regular UN budget and accept donations from a wide range of actors, including States, non-governmental organisations, businesses and other private entities, including individuals.

Shifting to the second category, there are various examples of ‘trust funds’ set up by treaties with the purpose of protecting specific spaces, especially when these are deemed to represent a common interest of humankind. In this respect, the ‘special fund’⁵⁹ set up by Article 52 of the Agreement under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (hereinafter *BBNJ Convention*) undoubtedly deserves to be mentioned. According to the Convention, the fund will obtain resources from a variety of sources, including annual contributions by developed Parties,⁶⁰ ‘payments’ based on the sharing of monetary benefits from the utilisation of marine genetic resources and related digital sequence information,⁶¹ ‘additional contributions’ from Parties and private entities, ‘additional funds’ set up by the Conference of the Parties for the same purposes⁶² and the Global Environmental Facility⁶³ (GEF) set up within the World Bank. The ‘special fund’ and the GEF will be used, *inter alia*, to support capacity-building projects on conservation and sustainable use of marine resources⁶⁴ that, in the light of the broader principles informing the *BBNJ Convention*, include the maintenance and restoration of ecosystem integrity and resilience.⁶⁵

⁵⁹ Art. 52 para. 4 lit. b) Agreement Under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction of 19 June 2023 (BBNJ Treaty), not yet in force. The provision also sets up a ‘voluntary trust fund’, the objective of which is however limited to facilitating the participation of representatives of developing States Parties in the meetings of the relevant bodies.

⁶⁰ Art. 14 para. 6 BBNJ Treaty (n. 59).

⁶¹ Art. 14 para. 7 BBNJ Treaty (n. 59).

⁶² Art. 52 para. 5 BBNJ Treaty (n. 59).

⁶³ Given the limited scope of this paper, it is only possible to mention in passing the Global Environmental Fund, which serves the purposes of several environmental treaties; the Fund is mainly intended for developing States and receives funding from both State and private actors. Contributions are managed via a set of trust funds managed by the World Bank acting as a trustee and served by a Secretariat. See Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (Cambridge University Press 2018), 336 ff.

⁶⁴ Art. 52 para. 6 BBNJ Treaty (n. 59).

⁶⁵ Art. 7 lit. h) BBNJ Treaty (n. 59).

Although the funds mentioned in this paragraph are not linked to any dispute settlement mechanism, their contribution to the pursuance of a common space or interest should not be underestimated. As far as human rights-related funds are concerned, it is submitted that they could be used, prior the necessary institutional arrangements, as a subsidiary contribution to reparations awarded on the basis of international criminal proceedings – not differently, after all, from the ‘other resources’ collected under ‘trust funds’ set up in that context. If such a hypothesis is difficult to implement in relation to technical assistance to parties to treaties on the protection of the environment, both for the difficulties inherent in litigation in this field and for the lack of adequate institutional structures aimed at guaranteeing the effectiveness of States’ obligations, then the capacity of some of these instruments to provide ‘global public goods’ through the financing of additional costs incurred by developing States could encourage forms of institutional connection and cooperation between different international organisations, including international courts.⁶⁶

IV. The Human Right to a Remedy as an Additional Avenue for the Restoration of Common Spaces and Interests

The picture sketched out above must be completed by taking into account a different aspect of reparation measures, i. e. the so-called ‘human right to a remedy’. Whilst the customary status of this right is still to some extent controversial,⁶⁷ its progressive consolidation in international law is now

⁶⁶ Laurence Boisson de Chazournes, ‘Financial Assistance’ in: Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021), 937-955 (945). More specifically, the Author distinguished these legal tools, defined as ‘second generation mechanisms’, from ‘first generation’ ones, simply aimed at financing general functions of the environmental agreement.

⁶⁷ Some hesitancy in acknowledging a customary right to reparation is expressed, for example, by those authors who, whilst admitting the ‘growing tendency’ to recognise an individual right to direct action, point to the vitality of diplomatic protection (Dominique Carreau and Fabrizio Marrella, *Droit international* (Pedone 2022), 546. A nuanced view is also expressed by Peters, who draws a distinction between an emerging customary right to procedural remedies and the substantive obligation of reparation, which is still ‘an open question’ (Anne Peters, *Beyond Human Rights* (Cambridge University Press 2016), 180 ff. Tomuschat strengthens this point by highlighting the fact that compensation is necessarily linked to the activity of a competent treaty body (Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, Oxford University Press 2014), 408.

evident.⁶⁸ The notion covers both ‘formal’ access to justice by individuals as well as the ‘substantive’ availability of an effective remedy, without which the corresponding duty to provide redress would be deprived of all meaning.⁶⁹ Focussing, for the purposes of our analysis, on this second aspect, it is interesting to note that a right to a remedy, including financial compensation, is provided for under several human rights treaties⁷⁰ as well as in EU law.⁷¹

The customary nature of this right has been supported by a number of authoritative voices, including some ICJ judges: one instance of this may be found, in particular, in Judge Cançado Trindade’s opinion in the *Diallo* case, where he repeatedly underlined the status of *titulaire* of rights and beneficiary of reparations of not only Mr Diallo⁷² but also, more generally, victims of human rights breaches.⁷³ The reasoning was invoked and strengthened by Judge Yusuf in his separate opinion in *Armed Activities on the Territory of the Congo*, where he restated the idea by quoting Article 33 of the ARSIWA, paragraph 2 of which contains a reference, albeit under the

⁶⁸ Heidy Rombouts, Pietro Sardaro and Stef Vandeginste, ‘The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights’ in: Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds), *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005), 345-503 (451); Francesco Francioni, ‘The Rights of Access to Justice’ in: Francesco Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press 2007), 1-56 (33 ff.); Antonio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011), 197 ff.; Dinah Shelton (n. 32), 17; Ludovic Hennebel and Hélène Tigroudja, *Traité de droit international des droits de l’homme* (2nd edn, Pedone 2018), 1390; Riccardo Pisillo Mazzeschi, *International Human Rights Law. Theory and Practice* (Springer 2021), 362-363.

⁶⁹ In this respect, it is important to note that the literature is not unanimous in its response to the question as to whether the right to obtain reparation following a breach of human rights is separate from (although linked to) the right of access to justice, or whether this latter right includes the right to reparation (Mazzeschi (n. 68), 361).

⁷⁰ A set of international treaties establishes an obligation for States to repair damage suffered by victims of human rights abuses through domestic proceedings: see e.g. Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 11 May 2011, entered into force on 1 August 2014, Article 30. The direct award of reparation and compensation by international human rights courts based on their constitutive instruments represent a different case: Art. 41 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213-I-2889 UNTS 222; Art. 63 para. 1 American Convention on Human Rights of 22 November 1969, 1144-I-17955 UNTS 144.

⁷¹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14 November 2012, 57-73, Article 16.

⁷² ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), compensation, judgment of 19 June 2012, ICJ Reports 2012, 324 Separate opinion of Judge Cançado Trindade (para. 5).

⁷³ ICJ, *Diallo* (n. 72), para. 30.

form of a mere no-prejudice clause, to any right arising from the international responsibility of a State, accruing directly to ‘any person or entity other than a State’.⁷⁴

In this context, it is once again useful to remember the distinction, mentioned above, between reparations following an internationally wrongful act and remedies having as their main purpose assistance to vulnerable victims. However, as already observed in relation to the use of trust funds, existing international practice shows that it is often hard to draw a line between retributive and transitional justice. Such uncertainties overlap with those relating to the distinction between different forms of reparations: if the difficulties in the application of the *Chorzów* principle often make compensation and satisfaction the only viable options to repair, especially when reparations are collective in nature, some measures are actually hard to classify under one or the other heading. These ambiguities also find reflection in the hortatory language used by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter *Basic Principles*)⁷⁵ according to which restitution ‘should, whenever possible, restore the victim to the original situation’.

These issues are effectively exemplified by the international legal framework and case-law on the protection of indigenous rights, especially – though not exclusively – in relation to illegal deprivation of land. According to the current state of the art, the fullest codification of this right may be found in a non-binding instrument, namely the United Nations Declaration on the Rights of Indigenous Peoples,⁷⁶ Article 28 of which sets out the right to a remedy or, ‘when this is not possible’, to just, fair and equitable compensation (para. 1), pointing out that it ‘shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress’ (para. 2).⁷⁷

These principles have been consistently upheld within the case-law of the Inter-American Court of Human Rights (IACtHR) in its application of Article 21 of the American Convention on Human Rights, codifying the

⁷⁴ ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), reparations, judgment of 9 February 2022, 13, Separate opinion of Judge Yusuf (para. 38). ILC, ARSIWA (n. 1), with Commentaries, 2001, 67.

⁷⁵ UNGA Res 60/147 of 15 December 2005, A/RES/60/147.

⁷⁶ UNGA Res 61/295 of 17 September 2007, A/RES/61/295.

⁷⁷ On this point and, in general, on the UN Declaration on the Rights of Indigenous Peoples, see Malgosia Fitzmaurice, ‘The 2007 United Nations Declaration on the Rights of Indigenous Peoples’, *Austrian Review of International and European Law Online* 17 (2015), 137-265 (231).

right to property. In the *Sarayaku* case,⁷⁸ the Court ordered collective reparations based on the damage suffered by the community and, in the case of the *Garifuna Community*, underlined how individual reparations would have been inconsistent with the community's world view and collective way of life⁷⁹. Within this perspective, the obligation to title, delimit and demarcate land that usually accompanies any finding by the Court that Article 21 has been breached may be seen not just as a legal remedy for wrongful appropriation of land, but also as the restoration of environmental and cultural conditions that are essential for the survival of these peoples.⁸⁰ Finally, recent IACtHR reparation orders in favour of indigenous peoples award financial compensation not to individual households but to the community itself, through the creation of a Community Development Fund intended for development projects, as well as for the restoration of forested areas.⁸¹

In a similar vein, in its case-law concerning the rights of indigenous populations, the African Commission on Human and People's Rights (ACHPR) has since the beginning matched 'classical' reparation measures such as compensation and recognition of land rights (through demarcation, delimitation and titling) to information and consultation rights, relief and resettlement assistance, environmental restoration and compulsory impact assessments for potentially harming economic projects.⁸² However, it was not until the *Ogiek* case that the collective dimension of indigenous rights has been explicitly endorsed⁸³: beside pecuniary reparations for material and moral damage to the community, the African Court obliged the State to guarantee title to land 'with legal certainty' and to fully recognise the com-

⁷⁸ IACtHR, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, merits and reparations, judgment of 27 June 2012, paras 317, 323.

⁷⁹ IACtHR, *Case of the Garifuna Community of Triunfo de la Cruz and Its Members v. Honduras*, merits, reparations, and costs, judgment of 8 October 2015, para. 55.

⁸⁰ IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, merits, reparations and costs, judgment of February 6, 2020, paras 241, 331. See in this respect Ludovic Hennebel, H el ene Tigroud a, 'Art. 63-1' in: Ludovic Hennebel and H el ene Tigroud a (eds), *The American Convention on Human Rights: A Commentary* (Oxford University Press 2022), 1326. The Authors note, however, that in cases concerning mass human rights claims, the Court maintained an approach centred on an individualised approach to harm suffered.

⁸¹ IACtHR, *Garifuna Community* (n. 79), paras 295 ff.; IACtHR, *Lhaka Honhat (Our Land) Association v. Argentina* (n. 80), paras 337 ff.

⁸² African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center, et al. v. Nigeria*, report of 27 October 2021, case no. 155/96; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, report of 25 November 2009, case no. 276/2003.

⁸³ Lucie Paiola, 'La jurisprudence de la Cour Africaine des droits de l'homme et des peuples relative aux droits des peuples' in: Guillaume Le Floch (ed.), *La Cour Africaine des droits de l'homme et des peuples* (Pedone 2023), 280-304 (303-304).

munity as an indigenous people of Kenya.⁸⁴ The decision also put particular emphasis on consultation obligations, to be complied with during the whole reparations process, in relation to leases or concessions that had been granted over indigenous land, and to any future project on ancestral land. Finally, the Court set out the establishment of a community development fund to serve as a repository of all the funds ordered as compensation, together with a Committee for its management.

Looking at these examples, it is clear that the creation of funds to compensate damage stemming from human rights violations represents a meaningful institutional feature from multiple points of view, first of all because it strengthens the very idea of a right to a remedy by consolidating States' practice; in addition, it is consistent with the collective (as referred to a group) nature of the underlying rights and of the damage caused. Thirdly, the emphasis on restorative rather than compensatory solutions adequately reflects the needs of communities concerned, while making it clear that the corresponding 'duty to repair' is in no way jeopardised by the special characteristics of common spaces and interests.

The undeniably positive aspects of the use of 'trust funds' in this area do not however completely displace some doubts concerning their effectiveness and, notably, their actual capacity to provide redress. According to this view, such arrangements essentially amount to a 'lump sum agreement', embracing multiple claims without actually addressing victims' needs and often under-assessing harm. Similar issues arose with respect to the reparations order issued by the ICJ in the case of *Armed Activities on the Territory of the Congo* mentioned above. After having underlined the evidentiary difficulties inherent in any armed conflict of a large scale⁸⁵ and in the one at issue in particular,⁸⁶ the Court declared itself *convinced*⁸⁷ that the best available approach was the one balancing a low standard of proof with a limited amount of evidence and decided to award, albeit on an exceptional basis, compensation under the form of a global sum.⁸⁸ Quoting the jurisprudence of the Ethiopia-Eritrea Claims Commission, it further noted that, in cases of mass claims, courts have adopted such a solution that, in the light of 'equitable considerations' reflects the damage that can be established with sufficient certainty through the available evidence (though probably not reflecting the

⁸⁴ African Court of Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, reparations, judgement of 23 June 2022, case no. 006/2012, 51 ff.

⁸⁵ ICJ, *Armed Activities* (n. 74), paras 93-94.

⁸⁶ ICJ, *Armed Activities* (n. 74), para. 64.

⁸⁷ ICJ, *Armed Activities* (n. 74), para. 108. Emphasis added.

⁸⁸ ICJ, *Armed Activities* (n. 74), para. 106.

totality of damage suffered by each victim).⁸⁹ This general approach informed the whole reasoning of the Court on reparations, prompting it to determine, for almost each category of damage alleged by the Democratic Republic of the Congo (DRC), a lump sum, while at the same time underlining the insufficient evidence provided, the exceptionality of the context and the undeniable existence of harm.⁹⁰ According to the judgment, the entire amount of compensation should be managed through a fund established by the DRC and effectively distributed to victims, with the supervision of civil society representatives and of international experts; at the same time, the Court encouraged – but did not order – the adoption of measures for the benefit of affected communities as a whole.⁹¹

This solution was heavily criticised by Judge Yusuf who, in his separate opinion, objected to the choice made by the Court to allocate ‘global sums’ to victims on the basis of ‘equitable considerations’, instead of identifying and quantifying heads of damage.⁹² According to the Judge, this methodological flaw resulted in a narrow, State-centred approach to reparations, which was closer to the logic of diplomatic protection than that of redress for human rights violations.⁹³ Based on this and other examples,⁹⁴ Judge Yusuf seized the opportunity to clearly assert the entitlement of individuals and communities ‘who directly suffered the injury’ to receive compensation for damage and defined the Court’s choice to award compensation through a global fund as an ‘easy solution’.⁹⁵ This latter was therefore directly linked to the failure to identify damage clearly, thus sacrificing of the needs of victims: on the contrary, in the Judge’s opinion, the situation required both individual and collective reparations, compensation, rehabilitation, and non-pecuniary satisfaction,⁹⁶ which was considered to be the most appropriate in this type of situation.⁹⁷ By referring to the case-law of the IACtHR, the practice of the TFV within the ICC, as well as the Paris Principles on Children Associated with Armed Forces or Armed Groups,⁹⁸ the opinion emphasised the appro-

⁸⁹ ICJ, *Armed Activities* (n. 74), para. 107.

⁹⁰ This conclusion has been reached with respect to the loss of civilian lives (ICJ, *Armed Activities* (n. 74), para. 166), injuries to persons (para. 181), rape and sexual violence (para. 193), recruitment of child soldiers (para. 206), displacement of populations (para. 225), damage to property (para. 258), damage to natural resources (para. 366).

⁹¹ ICJ, *Armed Activities* (n. 74), para. 408.

⁹² ICJ, *Armed Activities* (n. 74), para. 24ss.

⁹³ ICJ, *Armed Activities* (n. 74), para. 37.

⁹⁴ ICJ, *Armed Activities* (n. 74), para. 39.

⁹⁵ ICJ, *Armed Activities* (n. 74), para. 40.

⁹⁶ ICJ, *Armed Activities* (n. 74), para. 43.

⁹⁷ ICJ, *Armed Activities* (n. 74), paras 41 ff.

⁹⁸ The Principles were adopted by the United Nations Children’s Fund in February 2007.

priateness of collective reparations, especially when compared to direct cash benefits, and taking into account the long period of time that had elapsed between the commission of the crimes and the launch of judicial action.⁹⁹

The main purpose of the separate opinion is thus to reject any easy equation between an individual right to a remedy and an individualised approach to compensation, consistent with the idea that a well-targeted rehabilitation program may fulfil its purpose more appropriately than a ‘general fund’.¹⁰⁰ At the same time, one should not forget that this judicial decision took place in an adversarial context where the task of the court is to adjudge and declare possible violations of international law and to establish a just and fair compensation based on legal principles, including those about evidence and burden of proof. In this broader scenario, the specificities of the ICJ also have a relevant bearing: despite forming a part of its judicial function, the awarding of reparations is not a frequent task for the Court. In the light of these elements, the choice to apply a low standard of proof, and to resort to pieces of evidence other than those provided by the parties, already represents a significant deviation from the methods usually followed by judicial organs and is on the contrary more in line with the methodology frequently used in the context of mass claims.¹⁰¹ Though ‘convinced’ that the *do ut des* between such flexibility and a ‘traditional’ approach to compensation was the only avenue to reach a politically acceptable outcome, the Court did not miss the chance to remark how its compromise was mainly due to the failure by the parties in dispute to both negotiate on the issue and to collect evidence in view of a reparations judgement.¹⁰² With respect to the former aspect (negotiations), it is interesting to note that the Court did not limit itself to stigmatising the conduct of the parties, but made clear that the search for an agreement is the standard practice in international law.

The *Armed Activities* case clearly shows that, while the collective nature of damage and of related reparations in the context of mass violations may not allow one to completely eschew legal principles governing the consequences of a wrongful act, it is true that the specific features of these situations may lead to a softening of some categories. At the same time, it also teaches that the design of reparations measures should not be seen as an *aut aut* process,

⁹⁹ ICJ, *Armed Activities* (n. 74), para. 45.

¹⁰⁰ The argument is made in particular by Frédéric Mégret, ‘The Case for Collective Reparations Before the International Criminal Court’ in: Jo-Anne M. Wemmers (ed.), *Reparation for Victims of Crimes against Humanity. The Healing Role of Reparations* (Routledge 2014), 171-189 (171 ff.).

¹⁰¹ The point is emphasised by Jacomijn van Haersolte-van Hof, ‘Innovations to Speed Mass Claims: New Standards of Proof’ in: Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes* (Oxford University Press 2013), 14-23 (22-23).

¹⁰² ICJ, *Armed Activities* (n. 74), paras 66-67.

but rather as a starting point for the identification of hybrid solutions. The latter might take on the shape of individualised reparations matched to collective projects – as the ICJ, albeit mildly, actually suggested – based on the possibility in some fora of granting *locus standi* to both individuals and collective entities. As has been remarked, a further option in this respect is represented, for example, in the ‘pilot judgment’ technique under the European Court of Human Rights that, while dealing with an individual claim, tries to address the underlying structural problem and therefore reach a higher number of prospective victims.¹⁰³

V. Concluding Observations

The protection of common spaces and interests calls for specific institutional solutions during the reparations phase. This paper has first analysed whether and through which means some international organisations may be entitled to represent the interest of the international community to the protection of common spaces and interests. In this regard, suggestions from both non-contentious (the ITLOS advisory opinion issued in 2011) and contentious (the ICC reparations judgment in the *Al-Mahdi* case) proceedings have been raised to support of the possibility of reparations being claimed through international organisations. At the same time, as the ICC ruling has shown, the concrete implementation of these approaches may prove to be challenging, not least given the participation of victims more directly harmed by the offence.

Subsequently, this paper has focussed on the use of ‘trust funds’ not only as collectors of financial resources, but also as institutional venues where reparations can be designed, taking into account the framework of international criminal justice on one side and of international treaties for the protection of common spaces (notably, the *BBNJ Convention*) on the other. As far as the former are concerned, the paper analysed, in particular, the relationship between their rationale and their institutional features, highlighting how the specific characteristics of the harm caused to the victims of international crimes has resulted both in a preference for collective solutions as well as in the ‘crowdfunding approach’ to gathering resources. While funds set up by treaties protecting common spaces simply aim to provide financial and technical assistance to States parties, the relevance of their purpose raises a question as to whether it is possible to resort to them in order to complement remedies granted under dispute settlement mechanisms and, in a broader

¹⁰³ McKay (n. 53), 946.

sense, with a view to advance a goal benefitting the whole international community.

From a cross-sectional perspective, a common feature of these funds consists in the support they might receive from the whole international community, even regardless of the actual involvement of a given State in the relevant situation. This approach is consistent with the diffuse enjoyment of common spaces and interests, which in turn finds reflection in the preference, emerged in several international venues, for restoration and rehabilitation rather than pure compensation. At the same time, generalised financial support for this kind of purpose confirms the consolidation of a human ‘right to a remedy’, often taking the shape of collective reparations projects with a view to redressing the harm suffered by a large number of victims. In this respect, the case-law on the protection of indigenous rights is particularly meaningful, as it shows the clear relationship between the legal and moral drivers for settling disputes – often concerning the enjoyment of ancestral land and the related community links – and the institutional mechanism identified, i. e. the creation of common funds managed by the indigenous community as a whole.

However, the institutional choices sketched out above and, in particular, the use of common funds, are not entirely devoid of challenges, as the effective implementation of a human right to a remedy cannot be achieved simply by labelling reparations as ‘collective’. On the contrary, such a right requires a methodological approach aimed precisely at identifying harm and, at the same time, adopting remedies that are actually targeted at victims’ rehabilitation, whilst offering the most appropriate avenue for the restoration of common spaces and interests.

The Implementation and Compliance Committee of the ABBNJ: a Legal Prospection on Potential Modalities and Procedures

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Abstract

The Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (ABBNJ) stands for the new generation of agreements implementing the United Nations

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Convention on the Law of the Sea. Among the novelties of the ABBNJ is the sophisticated implementation process supported by an institutional framework and a dispute settlement mechanism. This paper zooms in on one of the implementing bodies established in the Agreement, the Implementation and Compliance Committee (IC). While the modalities and rules of procedure of the IC are to be determined by the Preparatory Commission and the first Conference of the Parties, some questions arise. What type of functions and procedures is the IC expected to perform? What degree of participation may the stakeholders of the ABBNJ enjoy in such procedures? What is the relationship between the IC and the dispute settlement mechanism of the ABBNJ? In addressing these and other issues, the paper proceeds as follows. In a first section, the paper situates the implementation and compliance techniques of the Agreement by looking at the approaches followed in the United Nations Convention on the Law of the Sea Convention (LoSC) and other agreements. A second section delves into procedural aspects of the IC, such as the composition of the IC, the most suitable non-compliance procedures and the question of standing to trigger them. In a third section, the paper examines the complementary role of the IC to the dispute settlement mechanism. It examines the role of the IC in preventing disputes, the value of the IC's decisions in contentious and advisory proceedings, and the role of the IC in facilitating the implementation of judicial and arbitral decisions.

Keywords

BBNJ – implementation – compliance – cooperation – treaty bodies – dispute settlement mechanism

I. Introduction

The Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (ABBNJ or Agreement) promises a complementary framework to manage and conserve marine resources in areas beyond national jurisdiction.¹ Overall, the ABBNJ, as an implementation treaty of the United Nations Convention on the Law

¹ Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (adopted 19 June 2023, not yet into force) UN Doc. A/CONF.232/2023/4, Article 1 (2). (ABBNJ).

of the Sea (LoSC), covers four thematic areas: marine genetic resources, area-based management tools (ABMTs), environmental impact assessment (EIA), and marine technology transfer. When it comes to implementation and compliance techniques, the Agreement follows the practice of existing multilateral environmental agreements (MEAs) by fostering cooperation and facilitative frameworks. Indeed, the Agreement creates a comprehensive institutional framework to facilitate its implementation and to manage compliance. However, the ABBNJ also contains a dispute settlement mechanism inspired by that of the LoSC, with some procedural adaptations though.

Within this bigger picture of the ABBNJ, this paper zooms in on one of the treaty bodies established in the Agreement, the Implementation and Compliance Committee (IC or the Committee) established in Article 55. As explained below, similar bodies operate under other MEAs, through which for example Parties and members of the public can initiate non-compliance proceedings against another Party. These bodies, usually staffed by legal and technical experts, provide technical and legal assistance to Parties on issues where a Party is or may be in non-compliance. Similarly, the ABBNJ sets out the contours of the IC as a body intended to facilitate the implementation of and promote compliance with the Agreement, in a facilitative, non-adversarial and non-punitive framework.² However, the particular modalities and rules of procedures of the IC will be decided in the first meeting of the Conference of the Parties (COP).³ In preparation for this, in 2024, the United Nations General Assembly established a Preparatory Commission for the entry into force of the ABBNJ and the convening of its First Meeting of the COP (PreCom).⁴ Two meetings of the PreCom will take place in April and August 2025.⁵ Among the issues to be discussed will be the terms of reference and modalities of operation and rules of procedure for the Implementation and Compliance Committee, as well as the selection process for its members.⁶

In light of the above, a question arises regarding the added value of a treaty body, such as the IC, in a multilateral treaty that aims to protect and govern activities on a global scale, by reconciling the interests of multiple stakeholders. Depending on the competences granted to the IC, its role may range

² ABBNJ, Article 55 (1).

³ The rules and procedures will be discussed in the first conference of the parties, pursuant Article 56 (4).

⁴ UNGA Res 78/272 of 24 April 2024, A/RES/78/272, para. 3. See also UNGA Res 78/560 of 13 August 2024, A/78/L.102.

⁵ UNGA Res 78/560 of 13 August 2024, A/78/L.102.

⁶ UNGA, 'Annex to the Statement by the Co-Chair of the Preparatory Commission at the closing of the organizational meeting' of 1 July 2024, UN Doc. A/AC.296/2024/4, 3, I (2) and (3).

from a passive treaty body, responsible only for monitoring the periodic reporting obligations established by the treaty, to a proactive entity entrusted with facilitative procedures, open to the stakeholders identified in the Agreement. The purpose of this paper is to inform delegations and stakeholders participating in the upcoming sessions of the PreCom. To this end, the paper reflects on two fundamental questions. Firstly, what kind of IC is the most suitable to address and manage compliance with the ABBNJ? Secondly, whether and to what extent the IC complements the dispute settlement mechanism established in the Agreement.

The paper proceeds as follows: *First*, it examines the implementation techniques envisaged in the ABBNJ by drawing on the approaches followed in LoSC, MEAs, and shared resources agreements. *Second*, the paper reflects on the benefits of the composition, modalities and procedures to be ascribed on the IC in the rules of procedure. *Third*, the paper closes by reflecting on the relationship between the IC and the dispute settlement mechanism and proposes a complementarity approach.

II. Implementation Techniques in Treaties

The BBNJ Agreement, far from being a ‘High Seas Treaty’, as it is sometimes erroneously referred to,⁷ is rather an implementation agreement to certain provisions of the LoSC. In fact, it is a multifaceted treaty⁸ which expands on the conservation and sustainable use of biodiversity beyond national jurisdiction by addressing four topics: marine genetic resources, area-based management tools, environmental impact assessment and capacity-building, and marine technology transfer. At the outset, the BBNJ Agreement is a treaty concerning the management and conservation of natural resources located in areas beyond national jurisdiction, over which no state has sovereignty or sovereign rights, but are of common concern for humankind.⁹ While the treaty follows a state-centred approach, just as the LoSC,

⁷ This author considers that it is inaccurate and misleading for the public to refer to the BBNJ Agreement as the ‘High Seas Treaty’. The BBNJ Agreement is a treaty whose object and purpose are to regulate a particular aspect of the high seas, namely biodiversity. It does not regulate other aspects of the high seas, such as navigation, fishing, submarine cables and pipelines, underwater cultural heritage, human rights at sea, or other legitimate uses. The only treaties with such a broad scope are the 1958 Convention on the High Seas and Part VII of the LoSC.

⁸ Daniel Bodansky, ‘Four Treaties in One: The Biodiversity Beyond National Jurisdiction Agreement’, *AJIL* 118 (2024), 229-323 (300).

⁹ Nico Schrijver, ‘Managing the Global Commons: Common Good or Common Sink?’, *TWQ* 37 (2016), 1252-1267 (1253).

the Agreement seems to expand the meaning of common concern of mankind by recognising the interests of non-state actors, such as Indigenous People, local communities, the scientific community, civil society, and other relevant stakeholders. In concrete, under certain provisions of the Agreement, states now have duties of public notification and consultation owed to other states and relevant non-state actors.¹⁰ In this regard, Parties to the treaty have a common interest in ensuring compliance with relevant treaty obligations. However, the inclusion of non-state actors within the scope of procedural obligations of the Agreement, may increase the degree of transparency and accountability over the implementation and compliance with the Agreement.

The question then arises as to how to ensure a balance between the interests of states and non-state actors in the high seas, and how to reconcile such interests with the sustainable use of biodiversity beyond national jurisdiction. One should recall that the Agreement is grounded on the fundamental principles of cooperation and sovereign equality, as indicated in the preamble,¹¹ the object and purpose¹² and some other provisions.¹³ For instance, each of the four main sections of the treaty entails procedural obligations calling for notification, consultation and transparency among Parties and relevant stakeholders. In other words, Parties are instructed to actively operationalise the principle of cooperation in implementing and complying with the Agreement. In order to achieve this objective, the Agreement establishes a novel system comprising obligations owed to states and non-state actor and treaty bodies to facilitate the functioning of the treaty system. This new system indeed has been the result of combining the foundations and principles of the LoSC with the cooperative frameworks established in other multilateral environmental agreements. Within this context, it is pertinent to briefly underscore how implementation and compliance work in the LoSC and MEAs, and which elements of each one are now present in the Agreement.

At the outset, the International Law Commission (ILC) has defined implementation as to include the ‘measures that states may take to make treaty provisions effective at the national level, including implementation in their national laws’.¹⁴ Article 53 of the ABBNJ introduces a similar word-

¹⁰ See, for example, Articles 21 (2)(c) and 32 (3).

¹¹ ABBNJ, Preamble, para. 2.

¹² The object and purpose of the treaty is: ‘to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term’. BBNJ Agreement, Article 2.

¹³ ABBNJ Article 8 (1).

¹⁴ ILC, ‘Draft Guidelines on the Protection of the Atmosphere, with Commentaries’, (2021) Report of the International Law Commission on the 72nd Session, UN Doc. A/76/10, 13-51, Guideline 10, Comment 1.

ing.¹⁵ For its part, compliance comprises the ‘mechanisms or procedures at the international level that verify whether states in fact adhere to the obligations of an agreement or other rules of international law’.¹⁶ In the context of environmental agreements, Viñuales and Dupuy consider that implementation is a process integrated by four main stages: information, facilitation, management, and reparation.¹⁷

In order to establish a foundation for the subsequent discussion of the implementation and compliance techniques of the ABBNJ, it is first necessary to examine, in summary, the approaches that have been followed in the LoSC and among MEAs, which in turn provided the inspiration for the implementation techniques in the ABBNJ.

1. Implementation and Compliance Techniques in the LoSC

When it comes to implementation and compliance techniques, the LoSC relies on the good faith of states to implement and comply with their treaty obligations.¹⁸ In instances where a Party is found to be in non-compliance with its treaty obligations, the pool of tools available under the LoSC appears to be somewhat limited but effective. This is not to say that the approach of the LoSC is incorrect, but rather to understand this treaty in the context and the time in which it was negotiated. The negotiation process probably favoured those implementation techniques with which they were more familiar and which had been already accepted in practice. As noted by Galindo Pohl, the LoSC is as ‘an illustrative reflection of the status of the society of states in its period of transition to a community of states’.¹⁹ Within this context, this section will elaborate on two features of the LoSC which are relevant to understand how the Agreement innovates

¹⁵ Article 53 reads as follows:

‘Article 53 Implementation

Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure the implementation of this Agreement.’

¹⁶ ILC, Draft Guidelines on the Protection of the Atmosphere, with Commentaries (n. 14), 13-51, Guideline 11, Comment 1. See also the definition of implementation and compliance provided by UN Environment Programme (UNEP). UNEP, Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (UNEP 2006), 59.

¹⁷ Jorge Viñuales and Pierre Marie-Dupuy, *International Environmental Law* (Cambridge University Press 2018), 294.

¹⁸ Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331, Article 26.

¹⁹ Reynaldo Galindo Pohl, ‘The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea’ in: Francisco Orrego Vicuña, *The Exclusive Economic Zone: A Latin American Perspective* (Routledge 2019), 31-59 (59).

in the implementation and compliance techniques. Namely, the lack of an institutional framework in the LoSC and its impact in managing non-compliance issues; and the presence of a robust dispute settlement mechanism.

As to the facilitation and management of non-compliance issues, the LoSC is more limited from an institutional perspective. As is well known, the LoSC created three main institutions: First, the International Tribunal for the Law of the Sea, which can assist in managing non-compliance and addressing reparation claims. Second, the Commission on the Limits of the Continental Shelf, to provide recommendations on how to delineate a potential continental shelf beyond 200 NM, and to provide scientific and technical advice if requested.²⁰ And third, the International Seabed Authority, as the regulatory body to organise and control activities in the Area.²¹ Beyond these institutions, the LoSC lacks an institutional framework, such as a COP or a Secretariat. The United Nations (UN) Secretary General performs functions of a Secretariat, such as convening necessary meetings of States Parties.²² More precisely, these functions are performed through the Division for Ocean Affairs and the Law of the Sea (DOALOS).²³ With respect to facilitation, DOALOS, for example, is entrusted with providing advice and assistance upon request of States, through capacity-building (training, fellowships), technical assistance, and financial support.²⁴ However, Parties are not obliged to periodically report to DOALOS on the implementation of the LoSC. A particular exception on the reporting stage may be the obligation of prospectors and contractors to submit an annual report to the Secretary-General of the International Seabed Authority (ISA) regarding the activities carried out along the year.²⁵ Similarly, the contractor and the ISA shall undertake a periodic review of the implementation of the plan of work at intervals

²⁰ LoSC, Article 76, Annex II, Article 3(1); On the nature of the CLCS as an implementation mechanism, see Rukmini Das, 'Compliance with Science-Based Treaties' in: Christina Voigt and Caroline Foster (eds), *International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation* (Cambridge University Press 2024), 145-169.

²¹ LoSC, Articles 137 (1) and 157 (1).

²² LoSC, Article 319 (2); Serguei Tarassenko and Ilaria Tani, 'The Functions and Role of the United Nations Secretariat in Ocean Affairs and the Law of the Sea', *IJMCL* 27 (2012), 683-699.

²³ UNGA Res 49/28 'Law of the Sea' of 6 December 1994, A/RES/49/28, para. 15; UNSG, 'Organization of the Office of Legal Affairs' (18 January 2021) UN Doc. ST/SGB/2021/1, Section 9; Tarassenko and Tani (n. 22), 686-687.

²⁴ UNGA Res 49/28 'Law of the Sea', para. 15(e); UNSG, 'Organization of the Office of Legal Affairs', para. 9.2(i).

²⁵ For example, see International Seabed Authority (ISA), 'Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area' of 22 July 2013, ISBA/19/C/17, Regulation 6.

of five years.²⁶ Yet, beyond Part XI, the LoSC does not establish an international organisation, body, or equivalent process that addresses the governance of the high seas.²⁷

The LoSC includes a dispute settlement mechanism comprising diplomatic means and compulsory mechanisms. Thus, a Party being affected by a non-compliance issue can either resort to negotiations or voluntary conciliation, or rather trigger a compulsory procedure under Part XV of the Convention (adjudication, arbitration, or compulsory conciliation). In the particular case of areas beyond national jurisdiction, a Party to the LoSC may 'claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area'.²⁸ According to McCreath, enabling the international community such standing may enhance implementation and compliance with *erga omnes* obligations.²⁹ However, it has been suggested that communitarian disputes under the LoSC should be managed through mechanisms as those included in many MEAs.³⁰ Whilst the dispute settlement mechanism is a crucial feature of the LoSC and the Agreement, the need for cooperative frameworks to manage non-compliance issues as a complement to the dispute settlement mechanism may be useful. It is within this context that the practice among MEAs has been relevant for the development of the ABBNJ.

2. Implementation and Compliance Techniques in MEAs and Shared Resources Agreements

As noted, the implementation and compliance with the ABBNJ requires operationalising the principle of cooperation. In this respect, the principle of cooperation and its goals remain defined by the regime within which the objectives exist.³¹ In the context of MEAs, the fundamental objective of the

²⁶ For example, see International Seabed Authority (n. 25), Regulation 28.

²⁷ Tara Davenport, Ruth Mackenzie and Neil Craik, *Liability for Environmental Harm to the Global Commons* (Cambridge University Press 2023), 19.

²⁸ ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area*, advisory opinion of 1 February 2011, ITLOS Reports 2011, 10, para. 180.

²⁹ Millicent McCreath, 'Community Interests and the Protection of the Marine Environment within National Jurisdiction', ICLQ 70 (2021), 569-603 (601).

³⁰ Eirini-Erasmia Fasía, 'No Provision Left Behind – Law of the Sea Convention's Dispute Settlement System and Obligations Erga Omnes', *The Law and Practice of International Court and Tribunals* 20 (2021), 519-547 (545-546); Natalie Klein and Kate Parlett, *Judging the Law of the Sea* (Oxford University Press 2022), 339.

³¹ Laurence Boisson de Chazournes and Jason Rudall, 'Co-Operation' in: Jorge Viñuales (ed.), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press 2020), 105-132 (113).

Parties of the treaty is to protect the environment or utilise natural resources in a sustainable manner. In order to facilitate this, a series of mechanisms have been established with the aim of ensuring that all parties contribute to this shared objective. This section comments on these features in the context of MEAs and shared resources agreements.

The main objective of cooperation in MEAs is the protection and sustainable use of the environment, taking into account the potential risks posed by human activities³² and their impact on human health and other human rights.³³ To that aim, cooperation should be read and implemented in conjunction with other rules of international law, such as the prevention principle, the obligation to conduct an environmental impact assessment, the precautionary approach, or the obligation to inform, notify and consult.³⁴ MEAs create treaty bodies aimed at facilitating and monitoring the implementation and compliance of the treaty through cooperation.³⁵ For example, MEAs tend to establish a Secretariat, COPs, scientific and technical bodies, or an implementation committee, among others.³⁶ The institutional framework of MEAs also facilitates transparency and public participation, both of which are necessary for the legitimate implementation of cooperation.³⁷ As stated by Antonia and Abram Chayes ‘Transparency influences strategic interaction among parties to the treaty in the direction of compliance’ by facilitating coordination and reassurance.³⁸ In some cases, members of the

³² For example, the object and purpose of: United Nations Framework Convention on Climate Change of 9 May 1992, 1771 UNTS 107, Article 2.

³³ For example, the object and purpose of: Minamata Convention on Mercury of 10 October 2013, 3202 UNTS 54669; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean of 4 March 2018, 3388 UNTS 56654, Article 1.

³⁴ ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, judgment of 16 December 2015, ICJ Reports 2015, 665, para. 104.

³⁵ See Draft Guidelines on the Protection of the Atmosphere, with Commentaries (n. 14), 13-51, Guideline 11, para. 3; UNEP-University of Jeonsu, *Multilateral Environmental Agreement: Negotiator's Handbook* (University of Jeonsu 2007), 2.18-2-22.

³⁶ UNEP, *Compliance Mechanism under Selected Multilateral Environmental Agreements* (UNEP 2007), 20-21; Malgosia Fitzmaurice, ‘Environmental Compliance Control’ in: Anne Peters (ed.), *MPEPIL* (online edn, Oxford University Press 2021), para. 52.

³⁷ Malgosia Fitzmaurice, ‘The New Generation of Environmental Non-Compliance Procedures and the Question of Legitimacy’ in: Christina Voigt and Caroline Foster (eds), *International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation* (Cambridge University Press 2024), 49-70 (51); Boisson de Chazournes and Rudall (n. 31), 122.

³⁸ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995), 22 and 23.

public are also entitled to initiate a non-compliance procedure against a Party of a treaty.³⁹

The implementation of cooperation regarding shared resources treaties follows a similar trend, as their objective is to ensure the equitable use and the protection of the shared resource.⁴⁰ Mainly, there are two obligations reflecting this aim: the obligation to prevent transboundary environmental harm and the principle of equitable and reasonable use.⁴¹ Under the principle of equitable and reasonable use, states shall use and develop watercourses with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom, taking into account the interests of other states.⁴² In these treaties, the principle of cooperation functions as an umbrella under which states are to achieve optimal use and adequate protection of watercourses.⁴³ On this point, McCaffrey noted that ‘experience suggests that such cooperation is most effective when it is institutionalized’.⁴⁴ In practice, this is done through the establishment of river basin commissions, such as those for the Uruguay, Indus, the Nile, and Colorado Rivers, to name a few. For example, in the *Pulp Mills* case, the ICJ stressed the suitability of the Administrative Commission of the Uruguay River to implement ‘in good faith the consultation and co-operation procedures’.⁴⁵ Even multilateral treaties on watercourses, such as the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, rely on an institutional framework to foster cooperation among Parties and other stakeholders.⁴⁶

³⁹ UN Economic Commission for Europe, *Decision 1/7: Review of Compliance* of 2 April 2014, Doc. ECE/MP.PP/2/Add.8, para. 18; UN Economic Commission for Latin America and the Caribbean, *Decision I/3 – Rules relating to the Structure and Functions of the Committee to Support Implementation and Compliance* of 22 April 2022, Doc. 22-00344, Rule V (1).

⁴⁰ ILC, ‘Draft Articles on the Law of Transboundary Aquifers, with Commentaries’, (2008) ILCYB Vol II, Part Two, A/CN.4/SER.A/2008/Add.I (Part 2), 22-43, Article 1, para. 1 and 3; ILC, *Draft Guidelines on the Protection of the Atmosphere, with Commentaries* (n. 14), 13-51, Guidelines 2, 5 and 6.

⁴¹ *Convention on the Law of the Non-Navigational Uses of International Watercourses* of 21 May 1997, entered into force 17 August 2014, 2999 UNTS 52106, Articles 5 and 7 (UN Water Convention); *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* of 17 March 1992, entered into force 6 October 1996, 1936 UNTS 269, Article 2(1) and (2)(c) (UNECE Water Convention).

⁴² UN Water Convention (n. 41), Articles 5 and 6; UNECE Water Convention (n. 41), Article 2 (2)(c).

⁴³ UN Water Convention (n. 41), Article 8.

⁴⁴ Stephen C. McCaffrey, *The Law of International Watercourses* (Oxford University Press 2019), 463.

⁴⁵ ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, 113, para. 82.

⁴⁶ Laurence Boisson de Chazournes, *Fresh Water in International Law* (Oxford University Press 2013), 30-31.

In sum, the implementation and compliance techniques among MEAs and shared resources agreements depend on the institutionalisation of cooperation, either by creating treaty bodies or by establishing organisations to that aim. Moreover, transparency and public participation are fostered as a technique to foster compliance. In some cases, stakeholders, such as non-state actors, have an active role in monitoring compliance. These features, as will be explained in the next section, are incorporated in the ABBNJ.

3. Techniques in the ABBNJ

The ABBNJ opens a new chapter in the LoSC treaty system by introducing a complete implementation process that addresses reporting, facilitation, management, and reparation. As stated by Bodansky, the ABBNJ ‘is intended to be a dynamic agreement that evolves in response to new information and circumstances’.⁴⁷ In this respect, the ABBNJ institutionalises cooperation by creating an institutional framework to ensure transparency and to provide technical and facilitative assistance to the Parties. The Agreement establishes a Secretariat, a Clearing-House Mechanism managed by the Secretariat, a Conference of the Parties (COP), a technical and scientific body, a financial resources mechanism, and an implementation and compliance committee. Of these bodies, the Secretariat and the Clearing-House Mechanism are key to ensuring the necessary transparency, as Parties are required to share information on activities undertaken under the Agreement.

Part IX of the Agreement includes a dispute settlement mechanism mainly rooted in the system established under Part XV of the LoSC. Part IX includes diplomatic means and compulsory dispute settlement mechanism (adjudication, arbitration, and conciliation) with certain adjustments. For instance, certain categories of disputes are excluded from the compulsory dispute settlement, including dispute concerning the concurrent titles to sovereignty, jurisdiction, or other rights over continental or insular land territory.⁴⁸ Moreover, the Agreement allows the Conference of the Parties to request an advisory opinion from ITLOS.⁴⁹ In previous drafts of the treaty, advisory opinions formed part of the provisions on the dispute settlement mechanism,

⁴⁷ Bodansky (n. 8).

⁴⁸ ABBNJ Agreement, Article 60 (9) and (10). Joanna Mossop, ‘Dispute Settlement Provisions in the Agreement for Biodiversity Beyond National Jurisdiction’, *Portuguese Yearbook of the Law of the Sea* 1 (2024), 112-113.

⁴⁹ ABBNJ, Article 47 (7).

but they were finally moved to the part on the functions of the Conference of the Parties. Advisory opinions in the ABBNJ can be a useful legal tool for the clarification of legal issues in the implementation of the agreement. Thus, the advisory function of ITLOS may reflect the intention to create a solid facilitating mechanism for the implementation of the treaty, backed up, if necessary, by an authoritative legal opinion from ITLOS.

All in all, the ABBNJ introduces a complete implementation and compliance scheme composed of treaty bodies and a dispute settlement mechanism. While many things beg for further discussion and research on the implementation and compliance techniques in the ABBNJ, this paper will zoom in on one of the treaty bodies which will be responsible to facilitate and manage compliance among Parties, but which may also complement the dispute settlement mechanism, namely the IC.

III. The Implementation and Compliance Committee of the ABBNJ

Within the implementation and compliance techniques followed by MEAs, ICs can be created in a treaty provision or through a decision adopted by the COP.⁵⁰ Overall, the main objective of ICs is to foster the implementation of and compliance with an MEA, and prevent environmental damage.⁵¹ In practice, ICs have four main features. The first is their non-judicial and non-confrontational nature. Second, these mechanisms aim at facilitating compliance under a cooperative approach rather than stigmatising the concerned party with measures or sanctions. A third common feature is the relevance of the duty to cooperate between the Parties and the treaty bodies as a cornerstone of these mechanisms.⁵² A fourth feature is the idea that the IC represents the interests of the community of states Party to

⁵⁰ Fitzmaurice, 'New Generation' (n. 37), 58.

⁵¹ Viñuales and Dupuy (n. 17), 343-351; Fitzmaurice, 'Environmental Compliance Control' (n. 36), paras 52-55; Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth Mackenzie, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018), 172-178; Alan Boyle and Catherine Redgwell, *International Law and the Environment* (4th edn, Oxford University Press 2021), 254-260.

⁵² ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Azerbaijan v. Armenia), Preliminary Objections, Judgment of 12 November 2024 (unreported), para. 54; Attila Tanzi and Cesare Pitea, 'Non-Compliance Mechanisms: Lessons Learned and the Way Forward' in: Tullio Treves et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009), 569-570; Viñuales and Dupuy (n. 17), 343-344.

the treaty.⁵³ However, in contrast to a dispute settlement mechanism, ICs cannot determine State responsibility.⁵⁴

Within this context, Article 55 of the ABBNJ establishes an IC to facilitate the implementation and compliance with the provisions of the treaty. This provision reads as follows:

‘Article 55 Implementation and Compliance Committee

1. An Implementation and Compliance Committee to facilitate and consider the implementation of and promote compliance with the provisions of this Agreement is hereby established. The Implementation and Compliance Committee shall be facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.

2. The Implementation and Compliance Committee shall consist of members possessing appropriate qualifications and experience nominated by Parties and elected by the Conference of the Parties, with due consideration given to gender balance and equitable geographical representation.

3. The Implementation and Compliance Committee shall operate under the modalities and rules of procedure adopted by the Conference of the Parties at its first meeting. The Implementation and Compliance Committee shall consider issues of implementation and compliance at the individual and systemic levels, *inter alia*, and report periodically and make recommendations, as appropriate while cognizant of respective national circumstances, to the Conference of the Parties.

4. In the course of its work, the Implementation and Compliance Committee may draw on appropriate information from bodies established under this Agreement, as well as relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, as may be required.’

The nature and scope of the IC follows the trend among MEAs to ascribe to them a facilitative function which is to be fulfilled in a transparent, non-adversarial, and non-punitive process.⁵⁵ Particularly, the Committee will consider issues of implementation and compliance at the individual as well as a systemic level.⁵⁶ Notably, the IC can draw on information from other bodies, including global, regional, subregional and sectoral bodies,⁵⁷ a relevant feature to coordinate the relationship between the IC and the International Seabed Authority. However, the modalities and rules of procedures of the IC

⁵³ Justine Bendel, *Litigating the Environment: Process and Procedure Before International Courts and Tribunals* (Edward Elgar 2023), 247.

⁵⁴ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n. 52), para. 54.

⁵⁵ ABBNJ, Article 55 (1).

⁵⁶ ABBNJ, Article 55 (3).

⁵⁷ ABBNJ, Article 55 (4).

are to be discussed and adopted during the first COP, once the agreement enters into force.⁵⁸ As noted above, a PreCom will start discussions on *inter alia* the terms of reference and modalities for the operation of, and rules of procedures of the Implementation and Compliance Committee, and the selection process for the members of the IC.⁵⁹ Thus, at this stage, there is a need for reflection and consideration on the type of IC that the parties to the ABBNJ would like to have.

Against this backdrop, this section will address three considerations. Firstly, the composition of the IC. Secondly, the modalities and procedures that may be suitable for the IC to facilitate and manage non-compliance. Thirdly, the question of standing to trigger a non-compliance procedure before the IC, given the multiple stakeholders referred to in the Agreement.

1. Composition of the IC

As noted above, Article 55(2) of the ABBNJ refers to the members of the IC as persons ‘with appropriate qualifications and experience’, without clarifying the type of expertise necessary or requiring their impartiality. At the outset, the members of the IC should act with impartiality and act independently from their country of nationality. These features, for instance, may be relevant in determining whether a decision adopted by the IC can be considered as a subsequent agreement or practice in the interpretation of a treaty.⁶⁰ With respect to qualifications and experience, the practice among MEAs seems to follow a hybrid composition of legal and technical experts.⁶¹ The Agreement concerns legal aspects which require scientific and technical knowledge for its proper implementation. The determination of what constitutes the best available science and scientific information is a task where the expertise of other disciplines is necessary. In this regard, it is advisable for the IC to have a mixed composition. The legal experts should, at least, possess expertise and experience in general international law, law of the sea and environmental law. As to other scientific and technical experts, the list of required experts can only be non-exhaustive. Obviously, scientists with expertise in marine sciences, biology, or oceanography are required. Yet, also

⁵⁸ ABBNJ, Article 55 (3).

⁵⁹ UNGA, ‘Annex to the Statement by the Co-Chair of the Preparatory Commission at the closing of the organizational meeting’ of 1 July 2024, A/AC.296/2024/4, 3, I (2) and (3).

⁶⁰ ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries’, (2018) ILCYB, Vol. II, Part Two, Conclusion 13 (1), Comment (1).

⁶¹ On the question experts among ICs, Bendel (n. 53), 222-224.

other experts like anthropologists, economists, historians may be relevant to provide inputs when it comes to the activities concerning Indigenous People and local communities.

2. Modalities and Procedures

ICs' procedures can be seen as a public interest process where great attention is paid to due process and independence as a guarantee of legitimacy, and the Parties' common interest in protecting the object of the treaty.⁶² Let us reiterate the facilitative function of the IC and its role in identifying the root causes of non-compliance with a treaty. The reasons for non-compliance can range from intentional non-compliance to a lack of financial or technical capacity of the Party.⁶³ Whereas the former can be addressed through non-compliance procedures and dispute settlement, the latter can benefit from a facilitative procedure through which concrete co-operation solutions can be devised by the IC in coordination with the COP and other Parties. The functions and procedures of ICs differ among MEAs. Yet, for the purposes of illustrating the potential non-compliance procedures that Parties may wish to ascribe to the IC of the ABBNJ, it is worth noting the main procedures:

- **Reporting/Monitoring procedure.** This procedure draws on the obligation of states to periodically report on the measures they have adopted to implement their obligations under the MEA in question.⁶⁴ Periodic reports enable the IC to engage in a fact-finding quest on the implementation of the treaty, and, if non-compliance issues arise, the IC can then trigger one of the below explained procedures against the concerned Party.⁶⁵ For example, Article 54 of the ABBNJ obliges Parties to periodically report on the measures they have adopted to implement the treaty.

- **Procedure triggered by the IC.** The IC can initiate *motu proprio* a compliance procedure against a member state when it has knowledge that the Party is failing to comply with its obligations under an MEA. As a basis for its decisions, the committee can rely on the national reports submitted by the Parties under the monitoring procedure explained above, or on information submitted by other treaty bodies of an MEA or by relevant stakeholders (e. g. members of the public).

⁶² Boyle and Redgwell, (n. 51), 255; Jutta Brunnée, 'International Environmental Law and Community Interests' in: Eyal Benvenisti, Georg Nolte and Keren Yalin-Mor (eds), *Community Interests Across International Law* (Oxford University Press 2018), 172-174; Viñuales and Dupuy (n. 17), 347.

⁶³ Fitzmaurice, 'New Generation' (n. 37), 57.

⁶⁴ UNEP, *Compliance Mechanism* (n. 36), 9-10; Viñuales and Dupuy (n. 17), 294-296.

⁶⁵ Bendel (n. 53), 224-226.

- **Submission procedures.** In practice, a submission procedure can be triggered by a Party with respect to its own non-compliance issues; by a Party regarding the performance of another Party; by the COP; or by members of the public.⁶⁶ The outcome of a submission procedure generally entails facilitative measures such as technical and financial assistance to enhance compliance by the Party concerned. In a few cases, MEAs allow punitive measures, such as the suspension of rights and prerogatives.⁶⁷ However, new IC bodies, such as the Paris Agreement IC shows a preference for less intrusive measures which rather aim at facilitating compliance with the agreement.⁶⁸

- **Advisory or consultative procedure.** The advisory procedure enables a Party to request an advisory opinion from the IC on a legal or technical point which may cause a non-compliance situation. This procedure results in legal and technical advice with recommendations tailored to the needs of the Party, or Parties, concerned, but without measures stigmatizing any Party, as may be the perceived result of a submission procedure.⁶⁹

Bearing in mind the above-mentioned procedures, the COP of the ABBNJ will have to determine how many and what type of procedures it will ascribe to the IC. This is a task of great importance because the type of procedures foreseen will set the IC's margin of action. For example, the IC may move from being a body responsible for monitoring the periodic reporting requirement under Article 54 of the Convention to being an active body that investigates and addresses non-compliance issues through technical and legal recommendations.

This paper proposes that the IC should be vested with a submission, triggered by the IC and advisory procedures, as a tool through which the entire treaty system, (institutional framework, Parties, and stakeholders) can actively monitor the implementation of and compliance with the Agreement. As noted, the Agreement seeks to balance multiple interests, including those of non-state actors, through cooperation and transparency. In this regard, Article 55 should be read in the light of the object and purpose of the

⁶⁶ Particularly, the mechanisms of the Aarhus Convention and the Escazu Agreement provide for this option.

⁶⁷ For example, the mechanisms of the UNECE Aarhus Convention, Espoo Convention and Water Convention include the suspension of rights and prerogatives as a measure in response to non-compliance.

⁶⁸ Fitzmaurice, 'New Generation' (n. 37), 64.

⁶⁹ For example, the UNECE Water Convention and its Protocol on Water and Health provide for an advisory and consultative procedure, respectively. Carlos A. Cruz Carrillo, 'The Advisory Procedure in Non-Compliance Procedures: Lessons from the UNECE Water Convention' in: Christina Voigt and Caroline Foster, *International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation* (Cambridge University Press 2024), 99-120.

Agreement, and in accordance with the guiding principles established in Article 8. In particular, the guiding principles of common heritage of humankind and equity,⁷⁰ support the establishment of non-compliance procedures through which Parties can actively monitor and address non-compliance issues. Let us then share some considerations in connection with the submission, triggered by the IC and advisory procedures.

a) Submission Procedure

A submission and an IC-triggered procedure may be an appropriate venue to resolve a non-compliance issue which a Party may encounter. It should be recalled that the ABBNJ places cooperation at the centre, including compliance with consultation and notification obligations. If a Party fails to comply with such obligations, it may undermine the object and purpose of the Treaty or the interests of other Parties. In this context, a submission procedure entails an exchange of information and observations between the IC and the Party concerned, an assessment by the IC and tailored non-binding recommendations for the Party to implement. In this regard, two types of submission procedure should be considered for the IC of the ABBNJ.

First, a submission procedure can involve a Party with respect to their own non-compliance issues, where a technical or financial obstacle may impede compliance with a provision of the Convention. In fact, relying on this procedure can be a way to implement an obligation to cooperate under the Agreement.

A second type of submission procedure concerns situations where one Party initiates a process against another Party to manage and resolve a non-compliance issue. In the case of the ABBNJ, it is possible to think of a state-to-state submission procedure or a state-to-stakeholder procedure. As further discussed, it may be possible for a submission procedure to be triggered by a relevant stakeholder identified in the ABBNJ, such as Indigenous Peoples, local communities, or members of the public. In general, this type of submission procedure allows the Parties of the Agreement to actively engage in monitoring compliance with the Agreement. In a way, it may be conceived as a way to operationalise the principle of common concern of mankind for the biodiversity beyond national jurisdiction.

Although a state-to-state procedure may be perceived as a confrontational one, the outcome will be of a facilitative nature rather than punitive. In fact, it has been noted that state-to-state procedures before ICs fosters coopera-

⁷⁰ ABBNJ, Article 8.

tion and solidarity to reach an amicable solution under a conciliatory framework, instead of a contentious process with a binding outcome.⁷¹ The IC established under the Espoo Convention, which operates a submission/notification procedure, may serve as an example of this type of submission procedure. In *EIA/IC/S/2 Romania*, Ukraine triggered a submission to express concerns about Romania's compliance with its obligations regarding inland waterways in the Romanian sector of the Danube Delta. As Ukraine argued, Romania's conduct had significant adverse impacts on the environment of Ukraine, as well as on related ecosystem components.⁷² The IC determined that Romania complied with its obligations under the Convention. And yet, the IC prompted Romania to enhance cooperation with Ukraine by submitting information on the concerned activities.⁷³

b) Procedure Triggered by the IC

As noted, the IC can initiate *proprio motu* proceedings against a Party when it has information about a non-compliance issue related to that Party. This information may be collected by the IC or submitted to it by the COP, other Parties, or other stakeholders. In the context of the ABBNJ, this type of procedure is desirable given the procedural obligation included in the treaty, such as duties of notification and consultation among stakeholders. Having a commission-triggered procedure allows the IC to be more proactive in monitoring and addressing non-compliance issues as soon as it receives knowledge of it.

However, the rules of procedure of the IC should elucidate at least two procedural aspects. First, who may be entitled to submit information concerning non-compliance for the consideration of the IC. On this point, Parties and stakeholders should be entitled to do so, once again, considering

⁷¹ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n. 52), Dissenting Opinion of Judge Tladi, para. 20; ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Preliminary Objections, judgment, ICJ Reports 2021, dissenting opinion of Judge Sebutinde, 130, para. 3; Justine Bendel and Yusra Suedi, 'State-to-State Procedures Before Environmental Compliance Committees: Still Alive?' in: Christina Voigt and Caroline Foster, *International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation* (Cambridge University Press 2024), 131-132.

⁷² UNECE, *EIA/IC/S/2 Romania*, Findings and Recommendations, UN Doc. ECE/MPEIA/IC/2010/2, 14-24, para. 1.

⁷³ UNECE, *EIA/IC/S/2 Romania*, Findings and Recommendations, UN Doc. ECE/MPEIA/IC/2010/2, 14-24, para. 52.

the common interests for the observance of the Agreement. A second aspect concerns the type and the nature of information to be submitted and how should it be assessed by the IC. In this respect, the rules of procedure should also ensure equality of opportunity for the Party concerned to comment on the information submitted.

c) Advisory Procedure

Another viable procedure that may benefit the facilitative approach of the IC in the ABBNJ is an advisory or consultative procedure. The advisory procedure enables a Party to request an advisory opinion from the IC on a legal or technical question related to the implementation of a treaty provision. In contrast to submission and triggered by the IC procedures, an advisory procedure seeks to provide legal or technical advice before a non-compliance issue occurs. The facilitative and preventive approach of an advisory procedure may be attractive for Parties having legal and technical difficulties in implementing the treaty. Moreover, two or more Parties can agree to request an advisory opinion from the IC on how to carry out a particular activity or project within the frame of the Agreement. In other words, the advisory procedure is a conciliatory way to prevent a dispute, and to prevent environmental damage.⁷⁴

In practice, the advisory procedure is available under few MEAs, including the United Nations Economic Commission for Europe (UNECE) Water Convention and the Protocol on Water and Health.⁷⁵ For instance, the advisory procedure under the UNECE Water Convention is unequivocal in noting that it ‘shall not be regarded as alleging non-compliance’.⁷⁶ Under this procedure, two or more Parties can request an advisory opinion.⁷⁷ An example is the *Cijevna/Cem River Advisory Procedure*, between Montenegro and Albania. Montenegro requested the involvement of the IC in relation to the construc-

⁷⁴ For some considerations on conciliation and non-compliance mechanisms, see Malgosia Fitzmaurice, ‘The Potential of Inter-State Conciliation within the Framework of Environmental Treaties’ in: Christian Tomuschat and Marcelo Kohen, *Flexibility in International Dispute Settlement: Conciliation Revisited* (Brill/Nijhoff 2020), 95-110.

⁷⁵ UNECE, ‘Consultation Process of the Compliance Committee under the Protocol on Water and Health, as amended by the Committee at Its Tenth Meeting’, UN Doc ECE/MP.WH/C.1/2014/2, (17 December 2014), para. 1.

⁷⁶ UNECE, *Support to Implementation and Compliance*, Decision VI/1, UN Doc ECE/MP.WAT/37/Add.2, 2012, paras 18-23. On the UNECE Water Convention’s advisory procedure, Cruz Carrillo (n. 69), 99-120.

⁷⁷ UNECE, *Support to Implementation and Compliance*, Decision VI/1, UN Doc ECE/MP.WAT/37/Add.2, 2012, paras 20.

tion of small hydropower plants on the Cijevna/Cem River in Albania. In its advisory opinion, the IC recommended the Parties to enhance their efforts in conducting a joint monitoring and assessment of the project by establishing a bilateral cooperative framework.⁷⁸ Currently, the Parties are working on the establishment of such joint framework with the assistance of the IC.⁷⁹

The IC of the ABBNJ could benefit from an advisory or consultative procedure by providing the Parties with a tool to request advice on how to discharge their obligations. For example, one or more Parties willing to propose an Area-Based Management Tool (ABMT) may request an opinion on legal or technical issues that may arise in the process pursuant to Article 19 of the Agreement, including questions as to the exhaustiveness of the required consultations. An advisory procedure may also be the venue through which relevant stakeholders can interact with the proposing state in a constructive manner under the guidance of the IC. As stated by Elferink when commenting on ABMTs, the institutional framework ‘may contribute to the effectiveness of the measures adopted under Part III’.⁸⁰

3. Standing to Trigger Non-Compliance Procedures

As noted, the ABBNJ seeks to balance the interests of Parties and relevant stakeholders for the benefit of the common heritage of humankind. One of the techniques to do so is by providing venues for those stakeholders to actively monitor the implementation and compliance of the ABBNJ. In the context of the IC, this consideration is relevant when drafting the rules of procedure. Concretely, the rules of procedure should clarify who may be entitled to trigger and participate in the above-proposed non-compliance procedures.

a) State Parties and Non-State Parties

The well-established practice among MEAs is that Parties to the treaty are entitled to trigger a non-compliance procedure with respect to itself or

⁷⁸ UNECE, ‘Annex to the Report of the Implementation Committee on Its Twelfth Meeting’, UN Doc ECE/MP.WAT/IC/2021/1 (18 March 2021), 6-8.

⁷⁹ UNECE, ‘Messages to the Countries Involved in Advisory Procedure WAT/IC/AP/1 (Montenegro and Albania) Regarding the Next Steps in the Implementation of the Committee’s Legal and Technical Advice’, UN Doc. ECE/MP.WAT/IC/2022/4 (2023), 6-7.

⁸⁰ Alex Elferink, ‘Protecting the Environment of ABNJ Through Marine Protected Areas and Area-Based Management Tools’ in: Vito de Lucia, Alex O. Elferink and Lan Nguyen, *International Law and Marine Areas beyond National Jurisdiction* (Brill 2022), 205-241 (215).

against another Party, including an advisory procedure. Similarly, Parties are allowed to submit information for the consideration of the IC, which can assist initiating an advisory procedure or setting the ground for a procedure triggered by the IC. Some MEAs allow the IC to invite non-Parties to participate in a procedure as long as the non-Party consents to do so.⁸¹ Such a feature may be useful for those non-Parties to the ABBNJ that are willing to accept a facilitative procedure under the guidance of the IC, instead of, or before submitting the issue to a dispute settlement mechanism. As explained below, the ABBNJ establishes a general obligation to cooperate to prevent disputes.⁸² In this context, states Parties to the ABBNJ may discharge this obligation by engaging in one of the non-compliance procedures before the IC.

b) Relevant Stakeholders Identified in the ABBNJ

The ABBNJ recognises the interests of Indigenous Peoples and local communities, the scientific community, civil society, and other stakeholders for the implementation of certain provisions of the Agreement. For example, under the ABBNJ, a Party is obliged to notify and consult Indigenous Peoples and local communities when developing a proposal to establish an ABMT.⁸³ However, if a Party fails to do so, or it simply disregards the views of Indigenous Peoples and local communities in the proposal, the question arises as to whether these stakeholders can rely on the IC to ensure that a Party has duly consulted them.

In this context, when negotiating the rules of procedure of the IC, two procedural aspects should be considered. First, whether and to what extent identified stakeholders in the ABBNJ can trigger a non-compliance procedure. And second, whether these stakeholders can submit information for consideration by the IC. In other words, the question to be examined is whether stakeholders are entitled to appear as parties to a non-compliance proceeding or as *amicus curiae* before the IC. At the outset, these issues may be complex, as it would allow identified non-state actors to monitor the performance of states Parties.

The practice of MEAs enabling non-stat actors to trigger non-compliance procedures is limited to treaties following a human rights approach, a feature

⁸¹ For example, non-state Parties to the UNECE Water Convention can participate in the advisory procedure upon the invitation of the IC and the consent of that state.

⁸² ABBNJ, Article 56.

⁸³ ABBNJ, Article 19 (2) and (4)(c).

not reflected in the ABBNJ. For example, under the UNECE Aarhus Convention⁸⁴ and the Escazú Agreement⁸⁵, members of the public can trigger a submission procedure against a non-complying Party. In fact, submission procedures under the Aarhus Convention have been mainly triggered by members of the public.⁸⁶ However, it should be noted that the object and purpose of both MEAs is guaranteeing access rights for individuals of state Parties, including access to information, public participation, and access to justice. In contrast, the ABBNJ introduces notification and consultation as normative components to certain treaty provisions, but it is not the main goal of the treaty. Another example is the Protocol on Water and Health to the UNECE Water Convention, which allows for communications from one or more members of the public.⁸⁷ The only communication submitted at the time of writing was filed by Earthjustice against Portugal for failing to comply with its obligation under the Protocol. As a result, the meeting of state parties issued a declaration of non-compliance to Portugal.⁸⁸ Once again, the object and purpose of the Protocol is human-rights centred, i. e. concerns the protection of human health and well-being through improving water management, including the protection of water ecosystems, and through preventing, controlling and reducing water-related disease.⁸⁹

With respect to participation in non-compliance procedures, the practice among MEAs supports public participation in submitting information and to take part in non-compliance procedures. For example, the IC of the UNECE Water Convention allows for the submission of information by members of the public and their participation in the discussions of the IC regarding the non-compliance procedure.⁹⁰ Under the Protocol on Water and Health, the

⁸⁴ The Aarhus Convention enables NGOs to initiate a procedure against a Party. UNECE, Decision 1/7: Review of Compliance, Doc. ECE/MP.PP/2/Add.8, 2 April 2014, para. 18.

⁸⁵ ECLAC, Decision I/3 – Rules Relating to the Structure and Functions of the Committee to Support Implementation and Compliance, Doc. 22-00344 (22 April 2022), Rule V (1).

⁸⁶ UNECE, Compilation of Findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date, Version 14 August 2023. available at: <https://unece.org/sites/default/files/2023-08/Compilation_of_CC_findings_14.8.2023_eng.pdf>, last access 4 February 2025.

⁸⁷ UNECE, Annex to Decision I/2 Review of Compliance, ECE/MP.WH/2/Add.3 (3 July 2007), para. 16.

⁸⁸ UNECE, Findings and Recommendations with Regard to Case ECE/MP.WH/CC/CI/1 initiated by the Committee Concerning Compliance by Portugal, ECE/MP.WH/CC/CI/1 (15 July 2015).

⁸⁹ Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 17 June 1999, entered into force 4 August 2005, 2331 UNTS 202, Article 1.

⁹⁰ UNECE, Support to Implementation and Compliance, Decision VI/1, UN Doc. ECE/MP.WAT/37/Add.2, 2012, paras 28, 31 and 37.

IC may request the services of NGOs or members of the public to gather information to discharge its functions.⁹¹

Despite these examples, granting standing to non-state actors would mark a new stage in the implementation of the LoSC. However, the potential role that non-state actors could play in IC proceedings may be limited by the nature of the ABBNJ as treaty concerning the law of the sea and biodiversity rather than a human rights treaty. In other words, as an implementing treaty of the LoSC, the ABBNJ follows a state-based approach and contains obligations to consider the interests of identified stakeholders only in some treaty provisions. The role of non-state actors may therefore be limited to monitoring and ensuring compliance with these treaty provisions. However, even if this were the case, non-state actors may urge states to do more to achieve the object and purpose of the treaty. Evidence of such effects can be seen in the publicity surrounding the negotiation of the treaty and the ongoing ratification process. In fact, relevant stakeholders may follow closely the upcoming sessions of the PreCom, which may influence the IC's final rules of procedure.

As explained before, the IC of the ABBNJ may represent an added value to the implementation techniques enshrined in the treaty. Yet, whether the IC is a passive or a proactive treaty body, will depend on the scope and content of the rules of procedure to be discussed during the PreCom and the eventual first COP of the Agreement.

IV. The IC and the Dispute Settlement Mechanism

Part IX of the ABBNJ contains a dispute settlement mechanism that provides for diplomatic and compulsory dispute settlement procedures. As in many MEAs, the dispute settlement mechanism coexists with the institutional framework established in the agreement as part of a comprehensive implementation process.⁹² In the specific case of ICs, the practice of MEAs is

⁹¹ UNECE, Annex to Decision I/2 Review of Compliance, ECE/MP.WH/2/Add.3 (3 July 2007), para. 23(d).

⁹² For a punctual discussion on the interlinkage between non-compliance mechanisms and dispute settlement mechanisms, see Bendel (n. 53), 213-248; Philippe Sands, 'Non-Compliance and Dispute Settlement' in: Rüdiger Wolfrum et al. (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia* (Brill 2006), 356-358; Tullio Treves, 'The Settlement of Disputes and Non-Compliance Procedures' in: Tullio Treves et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009), 505-511.

clear in that the initiation of a non-compliance procedure is without prejudice to the possibility of using a dispute settlement mechanism.⁹³

Furthermore, there are significant differences between ICs and judicial and arbitral bodies, including their nature, functions and the outcome of their proceedings. In *Land and Maritime Boundary between Cameroon and Nigeria*, the ICJ held that ‘the Lake Chad Basin Commission cannot be seen as a tribunal. It renders neither arbitral awards nor judgments and is therefore neither an arbitral nor a judicial body.’⁹⁴ As such, a decision adopted under a non-compliance procedure does not constitute *res judicata*.⁹⁵ Moreover, the purpose of an IC is to assist in managing non-compliance and finding an amicable solution, not to determine state responsibility.⁹⁶

Notwithstanding the aforementioned differences, this section contends that the cooperative and facilitative nature of ICs complement the dispute settlement mechanism in the ABBNJ by preventing disputes and facilitating the implementation of judicial and arbitral decisions as this section will explain regarding three aspects. First, the role of the IC in preventing disputes among Parties through cooperative and facilitative procedures. Second, it considers the role of the decisions adopted by the IC in a judicial or arbitral proceeding. Third, it discusses the role of the IC in facilitating the implementation of judicial decisions.

1. Obligation to Cooperate to Prevent Disputes

Article 56 of the ABBNJ establishes a general obligation to cooperate with a view to prevent disputes.⁹⁷ As a preliminary remark, it should be recalled that a similar obligation to prevent disputes is enshrined in Article 28 of the 1995 Implementation Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), another implementation treaty of the LoSC. Under this provision, states are

⁹³ For example, the rules of procedure of the ICs under the Barcelona Convention and the UNECE Water Convention, are clear in this respect. See UNEP, Compliance and Reporting, Decision IG.26/1, UN Doc.UNEP/MED IG.26/22 (December 2023), para. 40; UNECE, Support to Implementation and Compliance, Decision VI/1, UN Doc. ECE/MP.WAT/37/Add.2, 2012, para. 45.

⁹⁴ ICJ, *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, judgment of 11 June 1998, ICJ Reports 1998, 275, para. 69.

⁹⁵ Fitzmaurice, ‘New Generation’ (n. 37), 60; Bendel (n. 53), 236-237.

⁹⁶ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n. 52), para. 54; see also Dissenting Opinion of Judge Tladi, para. 20.

⁹⁷ Article 56 reads as follows:

‘Parties shall cooperate in order to prevent disputes.’

under an obligation to agree on 'efficient and expeditious decision-making procedures within sub regional and regional fisheries management organizations and arrangements'.⁹⁸ Rayfuse has noted that the intention of this provisions is 'to provide a mechanism for the expeditious but also effective resolution of disputes so as to avoid undermining the conservation and sustainable use objectives of regional Fisheries Management Organizations (RFMOs)'.⁹⁹ In contrast to Article 28 of the UNFSA, Article 56 of the ABBNJ does not specify the implementation mechanisms. This raises the question of which mechanisms the parties can rely on to fulfil such obligations under the ABBNJ.

A literal interpretation of Article 56 allows to identify two meanings. First, Article 56 serves as a reminder that Parties shall fulfil with their obligations under the Agreement to achieve its object and purpose, in a spirit of cooperation. If all parties fulfil their obligations, disputes are less likely to occur. As noted, Article 56 of the Agreement may be read as a reminder for Parties to cooperate in achieving the goals of the Agreement. To that aim, the role of the IC is one of monitoring the implementation and compliance with the Agreement among Parties. In this vein, Parties are expected to cooperate among themselves and with the IC in managing a non-compliance issue for the benefit of the whole treaty system.

Secondly, Article 56 encourages the parties involved in a disagreement or non-compliance issue to cooperate in a spirit of defusing a potential legal dispute. On this point, distinguishing a difference or a non-compliance issue from a legal dispute may at times be difficult. In other treaties, a distinction is clear. For instance, the dispute settlement mechanism under the Indus Water Treaty is illustrative on this point because it distinguishes three stages of escalation of a conflict: a question between Parties is submitted to the Permanent Indus Commission; then a difference, when it is submitted to a technical expert; and then a legal dispute subject to a court

⁹⁸ 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995, 2167 UNTS 3, Article 28.

⁹⁹ Rosemary Rayfuse, 'Settling Disputes in Regional Fisheries Management Organisations: Dealing with Objections' in: Helene Ruiz Fabri, Erik Franck, Marco Benatar and Tamar Meshel (eds), *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill 2020), 240-276 (249). See also Andrew Serdy, 'Implementing Article 28 of the UN Fish Stocks Agreement: The First Review of a Conservation Measure in the South Pacific Regional Fisheries' Management Organisation', *Ocean Development and International Law* 47 (2016), 1-28; Valentin Schatz, 'Ad Hoc Experts Panels: Regional Fisheries Management Organization (RMFOs)', in: Anne Peters (ed.), *MPEPIL* (online edn, Oxford University Press 2022), para. 7.

of arbitration.¹⁰⁰ By contrast, the ABBNJ delineates between non-compliance, technical dispute and legal dispute. Nevertheless, the relevance (or irrelevance) of this distinction is to be examined once the treaty enters into force, when Parties start using the dispute settlement mechanisms and the potential IC procedures.

In the context of the ABBNJ, the obligation to cooperate to prevent disputes may be discharged through diplomatic means such as exchange of views, negotiations and even optional conciliation under Annex V of the LoSC. Similarly, the IC can offer a cooperative and conciliatory framework through which Parties can engage in cooperative procedures and reach a solution to their disagreement. In this respect, some authors have underscored the conciliatory function that ICs may play in preventing disputes.¹⁰¹ Chayes and Chayes observed that a non-compliance procedure is a mediating process which in many cases has a preventive or anticipatory value.¹⁰² That is to say, states could engage in a facilitative and cooperative procedure to manage a non-compliance issue and – perhaps – prevent a further legal dispute before a judicial or arbitral body. For instance, at the moment, there is no dispute submitted to arbitration or adjudication under the dispute settlement mechanism of the Espoo Convention.¹⁰³ Instead, most of the situations that may lead to a dispute have been referred to the IC through a submission procedure.¹⁰⁴ In fact, one should note that the technical and legal composition of the IC may be more attractive to manage potential disputes involving a high degree of scientific and technical issues than resorting to adjudication or arbitration.

¹⁰⁰ The Indus Water Treaty 1960 between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development of 19 September 1960, 419 UNTS 125, (Indus Water Treaty), Article VIII (4), Article IX. See also Court of Arbitration Under Indus Water Treaty, *Indus Waters Treaty Arbitration* (Pakistan v. India), Award on the Competence of the Court of 6 July 2023, PCA-2023-01, paras 194–195.

¹⁰¹ Laurence Boisson de Chazournes and Komlan Sangbana, 'Basin Commissions, Dispute Settlement and the Maintenance of Peace and Security – The Case of the Lake Chad Basin Commission' in: Helene Ruiz Fabri, Erik Franck, Marco Benatar and Tamar Meshel (eds), *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and The Law of the Sea* (Brill 2020, 220-239 (222-223)); Fitzmaurice, 'New Generation' (n. 37), 59-60.

¹⁰² Chayes and Handler Chayes (n. 38), 24.

¹⁰³ Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991, 1988 UNTS 309, Article 15(2).

¹⁰⁴ UNECE, Submissions overview – Implementation Committee of the Espoo Convention, available at: <<https://unece.org/submissions-overview>>, last access 4 February 2025; UNECE, Opinions of the Implementation Committee of the Espoo Convention (2001-2020), (2020). Available at: <https://unece.org/sites/default/files/2021-02/Implementation%20Committee%20opinions%20to%202020_MOP-8_2020.pdf>, last access 4 February 2025.

Nevertheless, it should be noted that the specific role of the IC in implementing Article 56 is contingent upon the procedural framework to be determined in the IC's rules of procedure, as previously discussed.

2. Value of the ICs Decisions in a Judicial or Arbitral Proceeding

A second consideration to address is the legal value of decisions or recommendations adopted by the IC in judicial or arbitral proceedings. In other words, whether and to what extent the decision of the IC that result from a non-compliance procedure have any legal effect in the course of a contentious or advisory proceeding.

As a preliminary matter, the IC is intended to produce non-binding recommendations aimed as managing a non-compliance issue, whether attributable to a Party's technical and financial capacity or to an erroneous interpretation and implementation of a treaty provision. Likewise, such recommendations or decisions do not entail a determination on state responsibility. Nevertheless, in formulating its decisions, the IC may need to engage in an interpretative exercise of the relevant provisions of the treaty, with a view to elucidate the suitable margin of conduct expected from the Party in the particular context of a non-compliance issue. Thus, the recommendations or decisions adopted by the IC can be characterised as facilitative factual and legal statements related to the interpretation and application of a treaty in a particular context. Their legal value in a judicial or arbitral proceeding may be determined in a case-by-case basis. For example, while interpreting the Agreement, a judicial or arbitral body may consider the decisions of the IC as subsequent agreement or practice among the Parties in the application of the Agreement,¹⁰⁵ or as a supplementary mean to interpret the Agreement.¹⁰⁶ As noted by the ILC, one method of identifying subsequent agreements or practice from decisions of the IC is by looking at the resolutions adopted by the conference of the parties, which may 'explicitly or implicitly' refer to pronouncements of the IC.¹⁰⁷

¹⁰⁵ Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331, Article 31 (3)(b). ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (n. 60), Conclusion 13.

¹⁰⁶ ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (n. 60), Conclusion 13, Comment (16).

¹⁰⁷ ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (n. 60), Conclusion 13, Comment (13).

In practice, the ICJ has relied on the determinations of treaty bodies established under human rights treaties to inform its judicial reasoning. In the *Diallo* case, the ICJ ascribed great weight to the interpretation of the International Covenant on Civil and Political Rights (ICCPR) adopted by the Human Rights Committee, as an independent body that was established specifically to supervise the application of the ICCPR.¹⁰⁸ Yet, the Court is also cautious when assessing such findings by assessing how the treaty body reached its conclusions or recommendations. In a recent case, the Court considered the observations of the Committee on the Elimination of Racial Discrimination,¹⁰⁹ to determine whether Russia discriminated against Crimean Tatar cultural in violation of the Committee on the Elimination of Racial Discrimination (CERD). Although the Committee recommended Russia to investigate reports on the destruction of and damage to Crimean Tatar cultural heritage and adopted measures to prevent such acts, the Court was not convinced as to the accuracy of the first-hand reports relied on by the Committee.¹¹⁰ Similarly, the Court has also disregarded the determinations of the CERD Committee when interpreting the temporal scope of the compromissory clause to ascertain its jurisdiction. The Court underscored the different nature between the CERD Committee's procedures and a judicial settlement mechanism.¹¹¹

The decisions of the IC can inform the factual background of a legal dispute before a court or tribunal. For example, the IC of the UNECE Water Convention has recognised that: 'the procedure before the Implementation Committee could provide elements of fact-finding that could later be useful in a dispute before ICJ.'¹¹² Bearing this in mind, the conduct of Parties participating in a non-compliance procedure may be used by a judicial or arbitral body in its reasoning.

Moreover, as noted, the COP of the ABBNJ can request advisory opinions from ITLOS.¹¹³ In this context, the determinations of the IC may also inform

¹⁰⁸ ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), merits, judgment of 30 November 2010, ICJ Reports 2010, 639, para. 66.

¹⁰⁹ The Committee on the Elimination of Racial Discrimination is a body established under the Convention on the Elimination of All Forms of Racial Discrimination to monitor its implementation.

¹¹⁰ ICJ, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation), merits, judgment of 31 January 2024, unreported, paras 333-334.

¹¹¹ ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (n. 52), para. 54.

¹¹² UNECE, Annex to the Report of the Implementation Committee on Its 14th Meeting, 24 May 2022, ECE/MP.WAT/IC/2022/2, 7.

¹¹³ ABBNJ, Article 47 (7).

the judicial reasoning of ITLOS in an advisory proceeding. For example, the conclusions of similar treaty bodies, such as the Human Rights Committee, has assisted the ICJ in setting points of fact and law in advisory proceedings.¹¹⁴

3. Implementation of Judicial and Arbitral Decisions Through the Committee

In certain cases, a judicial decision or an arbitral award may necessitate that the parties involved collaborate to attain a specific objective. For example, in the *Gabcikovo-Nagymaros Project* case, the ICJ invited the Parties to profit from the assistance and expertise of a third party during the bilateral negotiations, in order to give effect to the judgment of the Court.¹¹⁵ Similarly, orders of provisional measures sometimes require the Parties to cooperate and to enter into consultations.¹¹⁶ In this context, a further point that merits consideration is whether and to what extent the IC may assist a judicial or arbitral body in implementing a decision between the Parties to the dispute.

In the context of provisional measures, one party to the dispute can suggest or the Tribunal may *proprio motu* order the Parties to cooperate with each other under the coordination of a third party. In the context of the ABBNJ, the Tribunal may manage the implementation of such measure, by requesting periodical reports, for example.¹¹⁷ Or, it may rely on the IC to foster consultations and cooperative channels among Parties. For example, in the *Pulp Mills* case, request for provisional measures, the ICJ relied on the Administrative Commission of the River Uruguay as the forum to engage in consultation and cooperation procedures.¹¹⁸ Moreover, a request for provisional measures under Part IX of the ABBNJ, may rely on Article 61 of the

¹¹⁴ ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, 95, paras 123 and 126; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 136, paras 109 and 110.

¹¹⁵ ICJ, *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), judgment of 25 September 1997, ICJ Reports 1997, 7, para. 143.

¹¹⁶ See, for example: ITLOS, *MOX Plant* (Ireland v. United Kingdom), provisional measures, order of 3 December 2001, ITLOS Reports 2001, 95, para. 84 and first operative; ITLOS, *Land Reclamation in and around the Straits of Johor* (Malaysia v. Singapore), provisional measures, order of 8 October 2003, ITLOS Reports 2003, 10, first operative paragraph; ITLOS, *M/T "San Padre Pio"* (Switzerland v. Nigeria), provisional measures, order of 6 July 2019, ITLOS Reports 2018-2019, 375, para. 141.

¹¹⁷ For example, see ITLOS, *Delimitation of the Maritime Boundary in the Atlantic Ocean* (Ghana/Côte d'Ivoire), judgment of 23 September 2017, ITLOS Reports 2017, 4, 653-657.

¹¹⁸ ICJ, *Pulp Mills* (n. 45), 113, para. 82.

Agreement, which requires that, pending the settlement of a dispute, Parties ‘shall make every effort to enter into provisional arrangements of a practical nature’. This obligation can, of course, be discharged by the Parties in good faith on their own or through a monitoring procedure supervised by the judicial or arbitral body.¹¹⁹

In the context of a judgment or arbitral award on the merits, the implementation may follow a similar pattern to that of provisional measures, with the IC being integrated in the implementation of the decision. Let us think of *Land Reclamation* where ITLOS ordered Malaysia and Singapore to cooperate and start consultations and exchange information on the land reclamation works.¹²⁰ The Parties engaged in consultations and reached a settlement agreement.¹²¹ Also in other cases, the establishment of cooperative arrangements to implement certain aspects of the judgment has been suggested.¹²² In this regard, the IC can assist the respective judicial and arbitral body in fostering consultations among Parties reached the requested result.

V. Conclusion

In 1978, Jorge Castañeda¹²³ reflected on what he referred to as the ideal and rational plan for managing the living resources of the high seas. According to such a plan, a global administration should be established by relying on a complex system of institutions and mechanisms. However, he questioned whether the international community of that time was prepared for such a system and concluded that the international politics and the national interests were the main obstacles to materialise it.¹²⁴ Almost five decades later,

¹¹⁹ For example, see ITLOS, *Delimitation of the Maritime Boundary in the Atlantic Ocean* (n. 117), 4, 653-657.

¹²⁰ ITLOS, *Land Reclamation in and around the Straits of Johor* (Malaysia v. Singapore), provisional measures, order of 8 October 2003, ITLOS Reports 2003, 10, first operative paragraph.

¹²¹ LoSC Annex VII Arbitral Tribunal, *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Award on Agreed Terms (1 September 2005), 27 RIAA 133-145, paras 18-21. See also *Case concerning Land Reclamation by Singapore* (n. 121), paras 24-25.

¹²² ITLOS, *Delimitation of the Maritime Boundary in the Bay of Bengal* (Bangladesh/Myanmar), judgment of 14 March 2012, ITLOS Reports 2012, 4, para. 476.

¹²³ Jorge Castañeda was Mexican diplomat and international lawyer actively participating *inter alia* during the United Nations Third Conference on the Law of the Sea. Many of his proposals during the conference are now reflected in the current provisions on the Exclusive Economic Zone of the LoSC.

¹²⁴ Jorge Castañeda, ‘La Zona Económica Exclusiva y el Nuevo Orden Económico Internacional’, *Foro Internacional* 19 (1978), 1-16 (5-6).

the ABBNJ proposes a legal framework based on cooperation among stakeholders (including non-state actors) and an institutional framework to facilitate such cooperation in the management of biodiversity in the high seas. Thus, whether the international community is ready and willing to operate the ABBNJ system is something that only practice, implementation and compliance will tell.

In this regard, this paper has examined the potential of the Implementation and Compliance Committee envisaged in the ABBNJ as an innovative technique to operate cooperation in the realm of the LoSC. This paper has sought to reflect on the potential modalities and functions that the IC can be equipped with in its rules of procedure. The paper reflected as well on the potential interaction between the IC and the dispute settlement mechanism established in Part IX of the Agreement. Such interaction should be characterised by complementarity rather than competition. The IC, as a facilitative and cooperative framework, may be useful in the prevention of disputes. Moreover, the decisions of the IC may assist judicial and arbitral bodies in interpreting the Agreement by shedding light on potential subsequent agreement or practice among Parties, and by informing the fact-finding stages of a proceeding.

Notably, the role of the upcoming sessions of the PreCom and the first COP of the ABBNJ will be crucial in defining the nature of the IC and upon Parties to take advantage of the IC and its procedures. It should be noted, however, that even when the IC is vested with innovative non-compliance procedures, such as submission or advisory procedures, there is no guarantee that Parties to the Agreement will use them. In this regard, the role of counsels, who provide advice to the relevant parties and non-State actors on matters pertaining to the ABBNJ, is significant in highlighting the IC and non-compliance procedures as alternative venues to 'classic' inter-State dispute settlement.

Keynote

Bringing in Community Interests Under International Environmental Law: Substantive and Procedural Paths

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Introduction

Current innovations in international litigation have raised global awareness that the obligations of States are not confined to bilateral exchanges of reciprocally owed duties. Rather, certain core obligations may be owed all parties to a convention or the international community as a whole, and invoked by any member thereof. With the recent rush of cases instituted under the Genocide Convention by States far removed from the atrocities in question – and the prominent participation of third States in these proceedings – one might think of community interests as a thoroughly modern notion.

Yet this concept is not a recent international law phenomenon. Rather, its foundations were laid by the Permanent Court of International Justice (PCIJ). Indeed, the most important and well-known precedent in this respect is its very first case, *Wimbledon*.¹ Moreover, in the lesser-known *Oscar Chinn* case,² two statements were made which were of particular importance for the devel-

¹ PCIJ, *Case of the S. S. “Wimbledon”*, Series A, No. 1, judgment of 17 August 1923, 15.

² PCIJ, *Oscar Chinn*, Series A/B, No. 63, judgment of 12 December 1934, 65.

opment of the idea of a communitarian interest, i. e. those of Judges Eysinga and Schücking.³ Judge Eysinga, in particular, referred to the idea that a legal instrument – the Berlin Act – ‘[present] a case in which a large number of States, which were territorially or otherwise interested in a vast region, endowed it with a highly internationalized statute, or rather a constitution established by treaty, by means of which the interests of peace, those of “all nations” as well as those of the natives, appeared to be most satisfactorily guaranteed. Similar internationalized regimes have been established also in other parts of the world.’⁴

While international courts have been certainly pivotal to the idea of community interests, this contribution aims to show avenues alternative to judicial proceedings which could be undertaken to redress community interests. Turning a closer look at ways in which community interests may be redressed beyond court’s proceedings may have the advantage, on the one hand, not to burden a single international jurisdiction with community interest litigation and, on the other, to overcome procedural issues that would render the exercise of jurisdiction difficult in the first place. Since, from a contemporary perspective, there are very few subject-areas of international law which would be more in the centre of the community interests debate than international environmental law, this contribution will particularly focus on this branch of public international law in order to address and analyse substantive and procedural aspects of international litigation exclusively from the point of view of the redress of environmental communitarian interests. Some new avenues in this respect will be suggested.

Certain specific questions arising in this context, but addressed in the preceding contributions to this symposium, will not be discussed, such as the redress of obligations *erga omnes (partes)* in disputes concerning e. g., aggression, genocide, racial discrimination, or self-determination.⁵ This article also

³ PCIJ, *Oscar Chinn* (n. 2), Separate Opinion of Judge Schücking, 148.

⁴ PCIJ, *Oscar Chinn* (n. 2), Separate Opinion of Judge van Eysinga, 132-133 (also observing: “The General Act of Berlin does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute a *jus dispositivum*, but it provides the Congo Basin with a régime, a statute, a constitution. This régime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Powers is required. An inextricable legal angle would result if, for instance, it were held that the régime of neutralisation provided for in Article II of the General Act of Berlin might be in force for some contracting Powers while it had ceased to operate for certain others.”) See Separate Opinion of Judge van Eysinga (n. 4), 133-34.

⁵ See summary of the discussion on these topics conducted during the 2023 ASIL meeting: Benjamin Salas Kantor and Massimo Lando, ‘Intervention and Obligations erga omnes at the International Court of Justice’, Centre of International Law, National University of Singapore, 20 April 2023, <<https://cil.nus.edu.sg/blogs/intervention-and-obligations-erga-omnes-at-the-international-court-of-justice/>>, last access 19 February 2025.

does not address the interaction of community interests with substantive and certain procedural norms of international environmental law (such as the prohibition of transboundary harm, due diligence, and procedural obligations of information and cooperation), as this subject-matter has been discussed in many excellent publications.⁶

I. Community Interests before the International Court of Justice and the International Tribunal for the Law of the Sea

Reliance on obligations *erga omnes* and *erga omnes partes* in international adjudication is far from well-defined and established, and has been subject to many controversies.⁷ This section will be devoted firstly to communitarian interests based on the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), in particular Articles 48⁸ and 42 (b)(ii).⁹ There is no agreement amongst international lawyers as to the form of the application and the procedure regarding these articles in order to redress community interests. This initial analysis will be illustrated with a contentious Judgment of the International Court of Justice (ICJ),¹⁰ and an Advisory

⁶ E.g. see Jutta Brunnée, 'International Environmental Law and Community Interests. Procedural Aspects', in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 151-175.

⁷ Priya Urs, 'Obligations *erga omnes* and the Question of Standing Before the International Court of Justice', *LJIL* 34 (2021), 505-525; Yoshifumi Tanaka, 'The Legal Consequences of Obligations Erga Omnes in International Law', *NJIL* 68 (2021), 1-33.

⁸ Art. 48: 'Invocation of responsibility by a State other than an injured State. 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached. 3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.'

⁹ Art. 42b(ii): 'A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to [...] (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: [...] (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.'

¹⁰ ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), merits, judgment of 31 March 2014, ICJ Reports 2014, 226.

Opinion of the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea (ITLOS).¹¹

This section will then join substance to procedure by addressing the ongoing debate as to whether community interests before the ICJ can be effected through intervention under Articles 62¹² and 63¹³ of its Statute. The legal characteristics and rules of standing in relation to intervention (in general) and its role in the protection of community interests are very complex (if not obscure) constructs. While they have evolved through judicial practice, many questions remain open to debate and different interpretations.¹⁴

1. Community Interests Based on Responsibility of States for Internationally Wrongful Acts

In the ARSIWA, James Crawford introduced the notion of ‘collective obligations’, which were defined as applicable ‘between a group of States and have been established in some collective interest’.¹⁵ On this point, *Whaling in the Antarctic* has since come to be seen as a landmark development in the ICJ’s jurisprudence. In very broad brushstrokes, the subject matter of the case was Japanese scientific whaling, which was challenged by Australia.¹⁶ In this case, Australia did not assert any violations by Japan of the International Convention for the Regulation of Whaling (ICRW) which would cause direct injury. Japan did not challenge Australia’s standing as

¹¹ ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area*, advisory opinion of 1 February 2011, ITLOS Reports 2011, 10.

¹² Art. 62: ‘1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request.’

¹³ Art. 63: ‘1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.’

¹⁴ See on these issues the pioneering publications of Brian McGarry in ‘Obligations *Erga Omnes* (*Partes*) and the Participation of Third States in Inter-State Litigation’, *The Law and Practice of International Courts and Tribunals* 22 (2023), 273-300, and Brian McGarry, ‘A Rush to Judgment? The Wobbly Bridge from Judicial Standing to Intervention in the ICJ Proceedings’, *Quest. Int’l. L.* 100 (2023), 5-18. See also Salas Kantor and Lando (n. 5).

¹⁵ James Crawford, *The International Law Commission’s Articles on State Responsibility* (Oxford University Press 2002), 277.

¹⁶ See in depth Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge University Press 2015); Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic – The Significance and the Implications of the ICJ Judgment* (Brill 2016).

Applicant in the case.¹⁷ During the oral proceedings, Australia relied on upholding ‘its collective interest, an interest it shares with all other parties’.¹⁸

This has given rise to the presumption that the Court acknowledged that Australia had acted in the collective interest and on that basis engaged Japan’s responsibility for the breach of obligations *erga omnes partes*.¹⁹ The Court was silent on this matter. In this respect, McGarry has observed that raising or waiving objection to the Applicant’s standing is a matter of party autonomy.²⁰ By this logic, the Court was not obligated to react to Japan’s silence on this matter, and so did not make any such findings implicitly.

In the view of the present author, the *Whaling* case cannot be treated as a beginning of new era in redressing of obligations *erga omnes partes* in international environmental law. We should not forget that as a basis for the jurisdiction of the Court, Australia invoked the provisions of Article 36, paragraph 2 (the ‘Optional Clause’) of the Court’s Statute, referring to the parties’ declarations recognising the Court’s jurisdiction as compulsory. From a procedural point of view, it was the lack of objection as to the admissibility of the claim which enabled Australia to invoke Japan’s responsibility before the Court.

More explicit guidance in this domain has come from the Seabed Disputes Chamber of the ITLOS and its advisory opinion on *Activities in the Area*, which affirmed the *erga omnes* character of the obligations respecting the preservation of the environment of the high seas and the International Seabed Area.²¹ The ITLOS has adopted a very radical view that due to the *erga omnes* character of the obligation to preserve the environment, ‘[e]ach State

¹⁷ Chrisitan J. Tams, ‘Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment’, in: Malgosia Fitzmaurice and Dai Tamada (eds.), *Whaling in the Antarctic – The Significance and the Implications of the ICJ Judgment* (Brill 2016), 193, 206-209.

¹⁸ ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), oral proceedings, Verbatim Record 2013/18 of 9 July 2013, para 19.

¹⁹ Tams (n. 17), 204. See also Priya Urs, ‘Guest Post: Are States Injured by Whaling in the Antarctic?’, *Opinio Juris*, 14. August 2014, <<https://opiniojuris.org/2014/08/14/guest-post-states-injured-whaling-antarctic/>>, last access 19 February 2025.

²⁰ McGarry, ‘Obligations Erga Omnes (Partes)’ (n. 14), 296-97.

²¹ ITLOS, *Responsibilities and Obligations* (n. 11), 54, para. 180. Yoshifumi Tanaka, ‘Obligations and Liability of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011’, *NILR* (60) (2013), 205-230, 223 *et seq.* According to Tanaka, Article 48(1)(b) is designed to give effect to the famous dictum of the ICJ in the *Barcelona Traction* case (wherein the Court found that “[a]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes”). Tanaka, ‘Obligations and Liability’ (n. 21), 225.

Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area'.²² Such a statement may indicate that States which 'are not directly injured may be entitled to seek, when necessary, the cessation and the assurance of non-repetition of the wrongful act from the state responsible for the internationally wrongful act'.²³ Tanaka in principle agrees with this statement but questions the legal standing of States to obtain satisfaction as a form reparation and to apply third party countermeasures in the absence of direct injury.²⁴

2. Community Interests and Intervention in Disputes under International Environmental Law

One of the ways in which States have sought to redress collective interests is to rely on the facility of intervention under Articles 62 and 63 of the ICJ Statute. The earliest example of such a case is *Nuclear Tests*, a dispute at the interface of environmental health and a regional nuclear zone.²⁵ In this case, Fiji sought to intervene through Article 62, which requires an 'interest of a legal nature which may be affected' by the Court's decision. Despite the characterisation of both these areas (the environment and nuclear regional security) as examples of collective interest, Fiji invoked in its application a direct injury caused by radioactive fall-out.²⁶

The Applicants in the *Nuclear Tests* cases (New Zealand and Australia) had submitted a mixture of arguments, relying on direct injury but also community interests.²⁷ Both Australia and New Zealand showed clear deference to 'specific' interests (i. e. direct injury or other unique interest, as seen in Article 62 practice), while also referring to more general interests in the interpretation of treaty rules (as arise under Article 63 of the Statute).²⁸

²² ITLOS, *Responsibilities and Obligations* (n. 11), 54, para. 180.

²³ Tanaka, 'Obligations and Liability' (n. 21), 226.

²⁴ Tanaka, 'Obligations and Liability' (n. 21), 127-129.

²⁵ ICJ, *Nuclear Tests* (Australia v. France), merits, judgment of 20 December 1974, ICJ Reports 1974, 253.

²⁶ ICJ, *Nuclear Tests* (New Zealand v. France), Application for Permission to Intervene submitted by the Government of Fiji, 16 May 1973, 149 ('[...] deposited on its territory fresh fission products during the period within which France has conducted those tests. These products constitute a hazard to the health of the people of Fiji and to their environment'). McGarry, 'Obligations Erga Omnes (Partes)' (n. 14), 283.

²⁷ ICJ, *Nuclear Tests* (New Zealand v. France), ICJ Pleadings 1974, Vol. I, 14, 43; *Nuclear Tests* (New Zealand v. France), ICJ Pleadings 1974, Vol. II, 8, 49.

²⁸ McGarry, McGarry, 'Obligations Erga Omnes (Partes)' (n. 14), 283.

Australia asserted that the prohibition of nuclear testing and the duty to observe this prohibition existed at customary international law, and that this involved the same kind of the legal obligation *erga omnes* as existed in relation to the law concerning the basic rights of a human person (as the Court had framed it in *Barcelona Traction*).²⁹ New Zealand further argued that in consequence the right of States in relation to the observance of the prohibition of nuclear testing corresponds with the duty of each State not to breach the prohibition. The duty is owed by each State to all States. New Zealand argued that this duty follows from the character of obligations *erga omnes*, i. e. that its claim against France related to a right of all States – or the whole of international community – and that such a right is owed to each member of that community on a bilateral basis.³⁰

The views of the Judges in this case were very diversified, in particular concerning the question of *locus standi* before the ICJ. Judge Castro was very sceptical in relation to obligations *erga omnes* in general and standing on this basis before the Court. His view is best summed up by stating that the obligations of such a character have to be treated *cum grano salis*.³¹ Judge Berwick held a very cautious view, and approached arguments of Australia as to *locus standi* based on community interests as an aspirational rather than existing ground.³² It is worth noting that he referred, as a necessary condition of Australia's claim, to the existence of a specific legal interest and a corresponding norm of the prohibition of nuclear testing.

Dissenting Judges Oneayama, Dillard, de Arechaga and Waldock expressed a measured and similar approach to Judge Berwick. Without excluding in principle the possibility of common interest litigation, they hinged it on the existence of a substantive norm of customary international law prohibiting nuclear testing, and the existence of a corresponding legal interest.

‘With regard to the right to be free from atmospheric tests, said to be possessed by Australia in common with other States, the question of “legal interest” again appears to us to be part of the general legal merits of the case. If the materials

²⁹ ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. France), merits, judgment of 5 February 1979, ICJ Reports 1970, 3 (para. 34).

³⁰ ICJ, *Nuclear Tests* (New Zealand v. France), ICJ Reports 1974, 457. See ICJ, *Nuclear Tests* (New Zealand v. France), Memorial of New Zealand, 20.

³¹ ICJ, *Nuclear Tests* (n. 30), Dissenting Opinion of Judge de Castro, 372 (387, para. 2).

³² ‘[...] if a prohibition of the kind suggested by the Applicant were to be found to be part of the customary international law, the precise formulation of, and perhaps limitations upon, that prohibition may well bear on the question of the rights of individual States to seek to enforce it. Thus, the decision and question of the admissibility of the Applicant's claim in this respect may trench upon the merits. There is a further aspect of the possession of the requisite legal interest to maintain this basis of the Applicant's claim which has to be considered.’ ICJ, *Nuclear Tests* (n. 30), Dissenting Opinion of Judge Barwick, 391 (437-438).

adduced by Australia were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric nuclear tests, the Court would at the same time have to determine what is the character and content of that rule and, in particular, whether it confers a right on every State individually to prosecute a claim to secure respect for the rule. In short, the question of “legal interest” cannot be separated from the substantive legal issue of the existence scope of the alleged rule of customary international law. Although we recognize that the existence of a so-called *actio popularis* in international law is a matter of controversy, the observations of this Court in the *Barcelona Traction, Light and Power Company, Limited case* suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court.³³

In 1995, the question of community interests returned in the second *Nuclear Tests* case, in relation to the request of Australia to intervene on the basis of Article 62 of the ICJ Statute.³⁴ Australia in its pleadings to intervene argued that ‘[t]he legal interest of every member of the international community, even these States not bound by the Judgment are “affected” or *en cause* within the meaning of Article 62 of the Statute’.³⁵ The Federated States of Micronesia also sought to intervene under Article 62 on the basis of community interests,³⁶ as well as under Article 63 based on the Noumea Convention.³⁷

The above examples of the redress of community interests in international environmental law through intervention in ICJ cases clearly indicate the

³³ ICJ, *Nuclear Tests* (n. 30), Opinion of Judges Oneayama, Dillard, de Arechaga and Waldock, para. 117, 370.

³⁴ ICJ, Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, order of 22 September 1995.

³⁵ ICJ, Application for Permission to Intervene under Article 62 of the Statue of the Court, ICJ, *Request for an Examination* (n. 34), 20.

³⁶ ICJ, Application for Permission to Intervene under Article 62 and Declaration of Intervention under Article 63 submitted by the Government of the Federated States of Micronesia, ICJ, *Request for an Examination* (n. 34) (“The cultures, traditions and well-being of the peoples of the South Pacific States would be adversely affected by the resumption of French nuclear testing within the region in a manner incompatible with applicable legal norms. New Zealand’s request for an indication of further provisional measures is concerned to preserve, pending a decision of the Court: [...] all rights owed *erga omnes* (and thus to the Federated States of Micronesia)"); ICJ, Application for Permission to Intervene under Article 62 and Declaration of Intervention under Article 63 submitted by the Government of the Federated States of Micronesia, ICJ, *Request for an Examination* (n. 34) para. 25. The Application of the Republic of Marshall Islands was similarly phrased.

³⁷ ICJ, Application for Permission to Intervene under Article 62 and Declaration of Intervention under Article 63 submitted by the Government of the Federated States of Micronesia, ICJ, *Request for an Examination* (n. 34) para 27.

complex nature (and even to some extent confusion) of presenting a case on behalf of the whole community of States, within the legal parameters of Articles 62 and 63 of the Statute. The opinions of some of the dissenting judges in the 1974 *Nuclear Tests* cases are a very instructive example of on the one hand admitting the possibility of a legal action protecting communitarian interests, and on the other emphasising necessary conditions to do so (i. e., the substantive condition of the existence of the relevant norm in international law, combined with the procedural requirement of the existence of the legal interest). Decades later, the resurrection of these cases presaged much of the debate today regarding the difficulty of framing the protection of community interests within the strict confines of the Statute.³⁸

II. Alternative Paths and New Frontiers: Intergenerational Equity and Non-Compliance Procedures

The above considerations regarding substantive and procedural aspects of community interests under international environmental law reflect an area which is not fully developed, and which still raises more questions than answers. The issues of the global environment are at the centre of communitarian interests, but there is an unresolved question as to whether the existing international legal order is fully equipped to deal with such interests. As some authors have observed, the *locus standi* recognised by the Court as deriving from obligations *erga omnes partes* ‘cannot necessarily be taken to represent the endorsement of a broader right of standing also in respect of obligations *erga omnes* under customary international law’.³⁹ Most importantly, the *erga omnes* concept does not obliterate the consensual character of the Court’s jurisdiction.

In light of the tenuous nature of litigating community interests before the ICJ, the present section of this article suggests alternative ways to address community interests under international environmental law. As it was above

³⁸ See further McGarry, McGarry, ‘Obligations Erga Omnes (Partes)’ (n. 14), 300 (“[T]he premise of intervention in respect of interests held by all States reflects twenty-first century conceptions of international justice and accountability. Articles 62 and 63 of the ICJ Statute, however, have in general remained statutorily and doctrinally anchored in a twentieth century vision of international adjudication. While Article 63 is currently enjoying a period of relative rediscovery, it offers a fairly limited form of participation. The bolder possibilities of Article 62 intervention in public interest litigation, on the other hand, may require the third State to navigate unique conceptual and practical challenges”).

³⁹ Urs, ‘Obligations *erga omnes*’ (n. 7), 518. In relation to obligation *erga omnes partes*, the Court ‘has rejected the suggestion that a reservation to a treaty’s compromissory clause is impermissible when it comes to the enforcement of these obligations.’ Urs, ‘Obligations *erga omnes*’ (n. 7), 519.

analysed, the substantive communitarian interests redressed through intervention and obligations *erga omnes* and *erga omnes partes* are not uniformly and universally accepted, and encounter serious problems of a procedural nature. Therefore, it is submitted that there are two alternative approaches which have emerged in international environmental law, as possible different ways to accommodate such interests: intergenerational equity and non-compliance procedures. These substantive and procedural considerations are addressed in turn below.

1. Intergenerational Equity and Community Interests under International Environmental Law

In international environmental law, the principle of intergenerational equity 'implies that a relationship ('inter') exists between generations ('generational') as regards the right, correct or just handling ('equity') of planetary resources'.⁴⁰ This concept was notably formulated by Brown Weiss,⁴¹ who defined the term 'future generations' as 'all those generations that do not exist yet. The present generation refers to all those people who are living today. The present generation encompasses multiple generations among those living today, but they are treated collectively as the present generation'.⁴² Despite initial criticism of this concept,⁴³ it has gained acknowledgement and practical application.

The important feature of this concept is the role of private entities which from the very beginning, in particular at the national level, played a crucial role in bringing cases based on intergenerational equity principle. Private entities play a pivotal role in fulfilling interests of community and partaking in globalisation, therefore blurring the dividing line between public and

⁴⁰ Zena Hadjiargyrou, 'A Conceptual and Practical Evaluation of Intergenerational Equity in International Environmental Law', *International Community Law Review* (2016), 248-277 (248).

⁴¹ Edith Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment', *AJIL* 94 (1990), 198-207 (198-199); Edith Brown Weiss, 'Intergenerational Equity', in: Anne Peters (ed.), *MPEPIL* (online edn, Oxford University Press 2025).

⁴² Brown-Weiss, *Intergenerational Equity* (n. 41), para. 3.

⁴³ E.g. Vaughan Lowe ('Lowe is of the opinion that 'the principle of intergenerational equity [...] is a chimera'. He asked 'Who are the beneficiaries? What are their rights of actions? What are the duties of trustees?' He also noted that it is hard to see what legal content intergenerational equity has and takes the perceived rights of future generations to be merely metaphorical. Lowe argued that the obligations and duties of trustees cannot be enforced.') Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in: Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements* (Oxford University Press 1999), 27-28.

private, which may be conceptualised in a theory of ‘publicness’.⁴⁴ Lo Giacco defines this concept as ‘the authority to stand in the name of and for the community, including by defining community interests, rather than self- or particular interests, in a way that secures legitimacy and accountability towards the members of the community’.⁴⁵

This definition falls squarely within the concept of intergenerational equity. It was already exemplified by the first case based on this concept, *Minors Oposa*. This case was filed in the Philippines by minors against the Secretary of State for the Environment, calling for the cancellation of all timber license agreements and for the prevention of new ones. The minors claimed that they were ‘entitled to the full benefit, use and enjoyment of the natural resource treasures that is the country’s virgin tropical rainforests’. Minors were represented by Philippine Ecological Network (PEN).⁴⁶ The children claimed that they represented themselves and generations yet unborn, thereby incorporating intergenerational equity into their suit. Standing was permitted insofar as it accommodated the right to a healthful ecology, as embodied in Sections 15 and 16 of Article II of the Philippine Constitution. The Court held:

“Their personality to sue on behalf of the succeeding generations can only be based on [...] the right to a balanced and healthful ecology [...] every generation has a responsibility to the next to preserve that rhythm and harmony of nature [...] Put a little differently, the minors’ assertion of their right to a sound environment, constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.”⁴⁷

Cases asserting the principle of intergenerational equity then arose in national courts around the world. For example, the Supreme Court of Columbia observed that ‘[i]n terms of intergenerational equity, the transgression is obvious [because of] the forecast of temperature increase [...]; future generations, including children who brought this action, will be directly affected, unless we presently reduce the deforestation rate to zero’.⁴⁸ In the Netherlands, the Urgenda Foundation brought suit on behalf of present and

⁴⁴ This term was introduced by Letizia Lo Giacco, ‘Private Entities Shaping Community Interests: (Re)imagining the “Publicness” of Public International Law as an Epistemic Tool’, *Transnational Legal Theory* 14 (2023), 270-306 (274-75).

⁴⁵ Lo Giacco (n. 44), 275.

⁴⁶ *Minors Oposa v. Secretary of The Department of Environment and Natural Resources (DENR)*, Supreme Court of the Philippines, 30 July 1993, 33 ILM (1994), 173.

⁴⁷ *Minors Oposa* (n. 46).

⁴⁸ STC4360-2018 Number: 11001-22-03-000-2018-00319-01, <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf>, last access 19 February 2025 (cited in Brown Weiss, *Intergenerational Equity* (n. 41), para. 41).

future generations against the Dutch government for failing to take adequate measures to reduce emission of greenhouse gases.⁴⁹

The principle has been developed in some notable international cases as well. For example, in the aforementioned 1995 *Nuclear Tests* case, Judge Weeramantry in his Dissenting Opinion found:

“The case before the Court raises [...] the principle of intergenerational equity – an important and rapidly developing principle of international law [...] if the damage of this kind alleged had been inflicted on the environment by the people of the Stone Age, it would be with us today [...] this is an important aspect that an international tribunal cannot fail to notice. This court must regard itself as trustee of those (intergenerational rights) [...] The rights of the people of New Zealand include the rights of unborn posterity. Those are rights which a nation is entitled, and indeed obliged, to protect.”⁵⁰

In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the full Court held:

“The Court recognises that [...] the environment [...] represents [...] the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction [...] respect the environment of other States or of areas beyond national control is now part of the corpus of international law (para. 29) [...] The destructive power of nuclear weapons cannot be contained in either space or time [...] the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment [...] and to cause genetic defects and illness in future generations (para. 35) [...] it is imperative for the Court to take account of the unique characteristics of nuclear weapons [...] [and] their ability to cause damage to generations to come (para. 36).”⁵¹

The question arises whether the concept of intergenerational equity has the potential of representing interests of interests community in international judicial proceedings at least as effectively as based on *erga omnes* or *erga omnes partes* grounds. So far, the generational interests were dealt with by judicial bodies within the context of national jurisdiction (such as the *Minors Oposa* case). However, the latest developments in the 2024 *Klimaseniorinnen* case⁵² before the European Court of Human Rights (ECtHR) indicate that

⁴⁹ Brown Weiss, *Intergenerational Equity* (n. 41), para.44.

⁵⁰ ICJ, *Request for an Examination* (n. 34), dissenting opinion of Judge Weeramantry, ICJ Reports 1995, 317.

⁵¹ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226.

⁵² ECtHR (Grand Chamber), *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, judgment of 9 April 2024, no. 53600/20, para. 410.

the concept of intergenerational equity may have a potential role to play in representing of community interests, in this particular instance relating to climate change. The ECtHR stated that questions of dealing with climate change ‘inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations’.⁵³

The further ECtHR observed that

‘While the legal obligations arising for States under the Convention extend to those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party. [...] it is clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change (see paragraph 119 above) and that, at the same time, they have no possibility of participating in the relevant current decision-making processes. By their commitment to the UNFCCC, the States Parties have undertaken the obligation to protect the climate system for the benefit of present and future generations of humankind [...] This obligation must be viewed in the light of the already existing harmful impacts of climate change, as well as the urgency of the situation and the risk of irreversible harm posed by climate change. In the present context, having regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making, rendering that risk particularly serious and adding justification for the possibility of judicial review.’⁵⁴

The ECtHR also noted that

‘Climate change is a polycentric issue. Decarbonisation of the economies and ways of life can only be achieved through a comprehensive and profound transformation in various sectors. Such “green transitions” necessarily require a very complex and wide-ranging set of coordinated actions, policies and investments involving both the public and the private sectors. Individuals themselves will be called upon to assume a share of responsibilities and burdens as well. Therefore, policies to combat climate change inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations.’⁵⁵

⁵³ ECtHR, *KlimaSeniorinnen* (n. 52), para. 419.

⁵⁴ ECtHR, *KlimaSeniorinnen* (n. 52), para. 420. See also Aoife Nolan, ‘Inter-Generational Equity, Future Generations and Democracy in the European Court of Human Rights’ *KlimaSeniorinnen Decision*, EJIL:Talk!, 15 April 2024.

⁵⁵ ECtHR, *KlimaSeniorinnen* (n. 52), para. 419.

In the same case, the ECtHR has acknowledged intergenerational equity as a substantive ground for litigation and the involvement of Non-Governmental Organisations (NGOs). This can lead to true representation of the community through public/private cooperation, with civil society actors standing for community interests.⁵⁶

2. Non-Compliance Procedures and the Protection of Community Interests Beyond Judicial Mechanisms

The concept of publicness – as defined earlier – is also reflected in the development of non-compliance procedures for resolving international environmental disputes outside of the courtroom. Such procedures may provide a forum for input from civil society groups interacting with States, in a more active and efficient manner than is generally possible before traditional international courts.

Since the establishment of a Non-Compliance Committee under the Montreal Protocol in 1992, it has been a common practice of States parties to Multilateral Environmental Agreements (MEAs) to create treaty bodies, called ‘Compliance’ or ‘Implementation Committees’ (or both) to determine a State party’s compliance with its international obligations. Non-Compliance Procedures (NCPs) may be established in the treaty itself (e.g. The Paris Agreement) or on the basis of so-called ‘enabling clauses’ in MEAs, which provide for the establishment of such a procedure by a decision of the relevant Conference of Parties (COP). An example of this is found in Article 8 of the Montreal Protocol.⁵⁷ However, in a few cases such NCPs have been established without such an authorisation. For example, the NCP in the Basel Convention on Transboundary Movement of Hazardous Wastes was established without an enabling clause in the Agreement.⁵⁸

NCPs are designed to respond to a breach of environmental obligations in the multilateral (not a bilateral) context. The multilateral context is capable of accommodating the type of obligations which are of a character relevant to community interests in a truly satisfactory manner. Environmental obligations, in particular obligations relating to global issues, are not reciprocal in

⁵⁶ ECtHR, *Klimaseniorinnen* (n. 52), paras 478 ff. See, Lea Raible, ‘Priorities for Climate Litigation at the European Court of Human Rights’, EJIL: Talk!, 2 May 2024.

⁵⁷ Montreal Protocol on Substances that Deplete the Ozone Layer of 16 September 1987, 1522 UNTS 3.

⁵⁸ Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal of 22 March 1989, 1673 UNTS 126.

nature. For this reason, the classical settlement of dispute procedures as envisaged by Article 33 of the UN Charter, which are bilateral in nature, is perhaps less suitable for addressing non-compliance in a multilateral context and remedying non-compliance in respect of global issues such as climate change, the protection of biodiversity, or the ozone layer. Under the Basel Convention, for example, the mechanism's nature is described in the following terms:

‘The mechanism shall be non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of the Basel Convention. It will pay particular attention to the special needs of developing countries and countries with economies in transition, and is intended to promote cooperation between all Parties.’⁵⁹

The concept of NCPs supports the interests of all parties to MEAs. Any concerned state may report non-compliance by one of the parties, thus advancing the interests of the community. In this respect, special mention must be made in relation to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).⁶⁰ Not only does the compliance system of the Aarhus Convention provide for very wide involvement by NGOs, but also the whole ethos of this Convention is based on Article 3's general obligation ‘to establish and maintain a clear, transparent and consistent framework’ for ‘public participation’. As to the compliance system itself, NGOs can engage with the Compliance Committee at every step of the way, from the nomination of candidates to post-decision procedures.⁶¹

The input and participation of NGOs in such processes can certainly be improved.⁶² However, even in its current form, the Aarhus Convention and other non-compliance procedures advance the ‘publicness’ of multilateral dispute settlement – and the protection of community interests – through a more inclusive and arguably more legitimising procedural regime than has proven possible through non-party intervention in international adjudication.

⁵⁹ The Mechanism for Promoting Implementation and Compliance with the Basel Convention, <www.basel.int/TheConvention/ImplementationComplianceCommittee/Mandate/tabid/2296/Default.aspx>, last access 19 February 2025 (Objectives, para. 1).

⁶⁰ Aarhus Convention, signed 25 June 1998, 2161 UNTS 447.

⁶¹ Carolyn Abbot and Maria Lee, ‘NGOs Shaping Public Participation Through Law: The Aarhus Convention and Legal Mobilisation’, *J. Envtl. L.* 20 (2023), 1-22 (6).

⁶² Abbot and Lee (n. 61), 22.

Conclusions

This article has focused on the forms of redressing the environmental interests of the international community. It would appear that the obvious avenue to follow in the case of community interests is Article 48 of ARSIWA. However, the stumbling block is the indispensable institution of State consent to the jurisdiction of an international court. This article has analysed the possible avenues to seek redress for community interests through the relevant procedures of the ICJ and the ITLOS. Especially in relation to the ICJ, it has analysed legal questions and judicial practice in relation to the institution of intervention based on Articles 62 and 63 of the ICJ Statute. This premise raises very many conflicting views, some of them aspirational and not anchored in present judicial practice, which at any rate is not entirely consistent. The legal construct of Article 62, based on a legal interest, is not particularly well suited to redress general (environmental) interests of the international community.

In light of these difficulties, alternatives to the familiar legal bases and institutional frameworks of environmental protection were suggested in this article: intergenerational equity and non-compliance procedures. Intergenerational equity, a concept based on the partnership between generations, is supported and defended in judicial proceedings by NGOs on behalf of civil society. This blurs the divisive line between public and private spheres, giving effect to the idea of 'publicness' in dispute settlement. On a similar basis, non-compliance procedures such as under the Aarhus Convention are an expression of this idea, providing a forum for extensive input from NGOs interacting with States. By giving voice to intergenerational equity, it may be suggested that such mechanisms are more successful, well-tested, and non-controversial avenues for redressing community interests under international environmental law than instituting or intervening in proceedings based on *erga omnes* (*partes*) obligations.

Über jeden Zweifel erhaben – Feststellung von Völkergewohnheitsrecht in der BGH-Rechtsprechung zur funktionellen Immunität ausländischer Staatsbediensteter

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Abstract

Der 3. Strafsenat des Bundesgerichtshofs (BGH) stellte im Jahr 2021 eine völkergewohnheitsrechtliche Ausnahme von funktioneller Immunität ausländischer Staatsbediensteter bei bestimmten Kriegsverbrechen fest und weitete sie im Jahr 2024 auf alle völkerrechtlichen Verbrechen aus. Der Gesetzgeber hat diese Rechtsprechung in § 20 Abs. 2 S. 2 Gerichtsverfassungsgesetz (GVG) kodifiziert. Die zugrundeliegende Rechtsprechung gibt jedoch Anlass zu völkerrechtlichen und verfassungsrechtlichen Bedenken. Die Anwendung einer stringenten Methodik offenbart objektiv ernstzunehmende Zweifel an den vom Senat festgestellten völkergewohnheitsrechtlichen Regeln, sodass dieser die Vorlagepflicht an das Bundesverfassungsgericht (BVerfG) nach Art. 100 Abs. 2 Grundgesetz (GG) verletzte. Eine Befassung des BVerfG mit der wichtigen wie umstrittenen Frage der Immunitätsausnahmen ist weiterhin möglich und sinnvoll. Eine solche Entscheidung würde eine Heilung der defizitären völkergewohnheitsrechtlichen Begründung der BGH-Rechtsprechung und der hierauf beruhenden gesetzlichen Immunitätsausnahme ermöglichen. Die Entscheidung könnte zudem zur Legitimität der Strafverfolgung von völkerrechtlichen Verbrechen in Deutschland beitragen und deren po-

tenziellem Beitrag zur Fortentwicklung des Völkergewohnheitsrechts ein größeres Gewicht verleihen.

Keywords

Funktionelle Immunität ausländischer Staatsbediensteter – völkerrechtliche Verbrechen – Feststellung von Völkergewohnheitsrecht – Bundesgerichtshof – Normverifikationsverfahren (Art. 100 Abs. 2 GG) – Gesetz zur Fortentwicklung des Völkerstrafrechts – VStGB

I. Einleitung

Am 3. August 2024 trat das Gesetz zur Fortentwicklung des Völkerstrafrechts in Kraft,¹ durch das unter anderem § 20 Abs. 2 S. 2 GVG eingeführt wurde:

„Funktionelle Immunität hindert nicht die Erstreckung deutscher Gerichtsbarkeit auf die Verfolgung von Verbrechen nach dem Völkerstrafgesetzbuch.“²

Die Einführung dieser Norm „dient der Festschreibung der Rechtsprechung des BGH zur funktionellen Immunität“ ausländischer Staatsbediensteter.³ So erschöpft sich die Gesetzesbegründung in einer Wiedergabe der bis zu diesem Zeitpunkt veröffentlichten BGH-Rechtsprechung.⁴ Nachdem der Senat zunächst eine völkergewohnheitsrechtliche Ausnahme funktioneller Immunität⁵ bei bestimmten Kriegsverbrechen im Urteil vom 28. Januar 2021

¹ Vgl. Art. 7 des Gesetzes zur Fortentwicklung des Völkerstrafrechts, BGBl. 2024 I Nr. 255 vom 2. August 2024.

² Vgl. Art. 4 Nr. 1 des Gesetzes zur Fortentwicklung des Völkerstrafrechts, BGBl. 2024 I Nr. 255 vom 2. August 2024.

³ Gesetzentwurf der Bundesregierung zur Fortentwicklung des Völkerstrafrechts [im Folgenden: Gesetzentwurf VStGB-Reform] in der vom Rechtsausschuss geänderten Fassung (BT-Drs. 20/11661, 5. Juni 2024), 19. Der Begriff ‘Staatsbediensteter’ wird vorliegend im Sinne des Begriffs ‘State official’ des einschlägigen Projektes der Völkerrechtskommission (ILC) verwandt (Fn. 22). Der BGH nutzt insofern in der diesbezüglichen Rechtsprechung meist ‘Hoheitsträger’ oder ‘Funktionsträger’.

⁴ Gesetzentwurf VStGB-Reform (Fn. 3).

⁵ Funktionelle Immunität/Immunität *ratione materiae* bezieht sich auf die völkergewohnheitsrechtliche Immunität von amtierenden oder ehemaligen Staatsbediensteten vor strafrechtlicher Verfolgung im Ausland mit Bezug auf Handeln in offizieller Funktion (‘acts performed in an official capacity’). Hiervon zu unterscheiden ist personelle Immunität/Immunität *ratione personae*, die jedenfalls Staatsoberhäupter, Regierungschefs und Außenminister während ihrer Amtszeit bezüglich aller Handlungen genießen (Fn. 178).

festgestellt hatte, weitete er seine Rechtsprechung mit Beschluss vom 21. Februar 2024, bestätigt und konkretisiert im Beschluss vom 20. März 2024,⁶ auf alle völkerrechtlichen Verbrechen⁷ aus. Der ehemalige Generalbundesanwalt beschrieb bereits die Feststellung einer Immunitätsausnahme⁸ im Ausgangsurteil als „weltweit von fundamentaler Bedeutung“.⁹ Dem 3. Strafsenat wurde hierfür die Wahrnehmung einer „Vorreiterrolle“ der deutschen Strafjustiz bei der Fortentwicklung des Völkerstrafrechts¹⁰ attestiert. Es wird angenommen, dass diese Rechtsprechung des Senats die entsprechende Rechtsprechung in anderen Ländern beeinflussen könnte.¹¹ Ihrer gesetzlichen Festschreibung wird erwartungsgemäß ähnliche internationale Aufmerksamkeit zukommen.¹² Die Rechtsprechung des BGH gibt jedoch Anlass zu völkerrechtlichen und verfassungsrechtlichen Bedenken, denen der vorliegende Beitrag auf den Grund geht.

Im Folgenden wird zunächst ein Überblick über die Rechtsprechung des BGH zur funktionellen Immunität ausländischer Staatsbediensteter gegeben (II.). Hinsichtlich dieser Rechtsprechung werden methodische Defizite bei der Feststellung von Völkergewohnheitsrecht (III.) und ein Verstoß gegen die Vorlagepflicht an das Bundesverfassungsgericht nach Art. 100 Abs. 2 GG

⁶ Nicht Teil der Gesetzesbegründung angesichts seiner Veröffentlichung nach Abschluss des Gesetzgebungsverfahrens (vgl. BGH-Pressemitteilung Nr. 158/24 vom 5. August 2024, BGH-Entscheidungsdatenbank <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&pm_nummer=0158/24>, zuletzt besucht 11. Februar 2025).

⁷ Der Begriff ‘völkerrechtliche Verbrechen’ wird vorliegend synonym mit dem Begriff ‘Völkerstraftaten’ verwandt, vgl. Helmut Kreicker, *Völkerrechtliche Exemtionen* (Duncker & Humblot 2007), 175 f.; vgl. BGH, Beschluss vom 21. Februar 2024, AK 4/24, Rn. 53 (‘Haftfortdauerbeschluss’).

⁸ Der Begriff ‘Immunitätsausnahme’ bezieht sich vorliegend auf funktionelle Immunität, sofern nicht abweichend gekennzeichnet.

⁹ Peter Frank und Christoph Barthe, ‘Immunitätsschutz fremdstaatlicher Funktionsträger vor nationalen Gerichten’, *ZStW* 133 (2021), 235-280 (237); vgl. Christoph Safferling, ‘Fortentwicklung des Völkerstrafrechts in Deutschland’, *ZRP* 56 (2023), 122-125; Claus Kreß, ‘Deutsche Völkerstrafrechtspflege – Betrachtungen aus aktuellem Anlass’, *DRiZ* 100 (2022), 72-75 (73); Leila Sadat, ‘New Developments in State Practice on Immunity of State Officials’, *AJIL Insights* 25, 23. September 2021.

¹⁰ Vgl. Gesetzentwurf VStGB-Reform (Fn. 3), 14; Safferling, ‘Fortentwicklung’ (Fn. 9); Kai Ambos, ‘Reform des Völkerstrafrechts: überfällig, aber unvollständig’, *DRiZ* (2024), 30 f.; vgl. auch Kreß, ‘Völkerstrafrechtspflege’ (Fn. 9), 72; Isabelle Hassfurther, ‘Gelungene Änderungen und verpasste Chancen’, *Völkerrechtsblog*, 12. Juni 2024, doi: 10.59704/416a9620aade340.

¹¹ Vgl. z. B. Hague Court of Appeal, Urteil v. 7. Dezember 2021, ECLI:NL:GHDHA:2021:2374, Rn. 3.24; Tom Syring, ‘Introductory Note to Judgment on Foreign Soldiers’ Immunity for War Crimes Committed Abroad (BGH)’, *ILM* 61 (2021), 1-7 (48); Florian Schmid, ‘An Unfortunate Trend of Vagueness’, *Verfassungsblog*, 1. Februar 2024, doi: 10.59704/e967e4bea8891b3f.

¹² Vgl. z. B. ILC, Second report, Special Rapporteur Grossmann (2025), UN Dok. A/CN.4/780, Rn. 73.

festgestellt (IV.). Sodann wird die weiterhin bestehende Möglichkeit einer Entscheidung durch das Bundesverfassungsgericht erläutert (V.). Schließlich wird die Bedeutung einer solchen Entscheidung für die Legitimität der Strafverfolgung von völkerrechtlichen Verbrechen in Deutschland und für die Fortentwicklung des Völkergewohnheitsrechts beleuchtet (VI.).

II. Die Rechtsprechung des BGH zur funktionellen Immunität ausländischer Staatsbediensteter und ihre Kodifizierung

Der 3. Strafsenat des BGH entwickelte seine bisherige Rechtsprechung zu völkergewohnheitsrechtlichen Ausnahmen der funktionellen Immunität ausländischer Staatsbediensteter bei völkerrechtlichen Verbrechen maßgeblich in dem Urteil vom 28. Januar 2021, 3 StR 564/19 (im Folgenden „Immunitätsurteil“), dem Haftfortdauerbeschluss vom 21. Februar 2024, AK 4/24, (im Folgenden „Haftfortdauerbeschluss“), dem Revisionsbeschluss vom 20. März 2024, 3 StR 454/22 (im Folgenden „Revisionsbeschluss“) und dem Haftbeschwerdebeschluss vom 27. August 2024, StB 54/24 (im Folgenden „Haftbeschwerdebeschluss“).

1. Das Immunitätsurteil vom 28. Januar 2021

In dieser Entscheidung befand der BGH einen ehemaligen Oberleutnant der afghanischen Armee unter anderem wegen Kriegsverbrechen für schuldig. Literaturmeinungen verstanden die hierin getroffene Feststellung einer völkergewohnheitsrechtlichen Immunitätsausnahme auf „nachrangige“ Staatsbedienstete¹³ und auf Kriegsverbrechen der Folter und der in schwerwiegender Weise entwürdigenden oder erniedrigenden Behandlung¹⁴ beschränkt.

¹³ Vgl. Florian Jeßberger und Aziz Epik, ‘Immunität für Völkerrechtsverbrechen vor staatlichen Gerichten’, JR 2022, 10-16; Aziz Epik, ‘No Functional Immunity for Crimes Under International Law Before Foreign Domestic Courts’, JICJ 19 (2021), 1263-1281 (1276 f.); Claus Krefß, Einleitung: ‘Functional Immunity of Foreign State Officials Before National Courts: A Legal Opinion by Germany’s Federal Public Prosecutor General’, JICJ 19 (2021), 697-699 (698); Florian Schmid, Anmerkung vom 27. Mai 2024 zu BGH Beschluss vom 21. Februar 2024, AK 4/24, jurisPR-StrafR, 10/2024 Anm. 1; Kai Ambos, Anmerkung zu BGH Urteil vom 28. Januar 2021, 3 StR 564/19, Strafverteidiger 2021, 557-558.

¹⁴ Vgl. z. B. Krefß, ‘Einleitung’ (Fn. 13), 698.

2. Der Haftfortdauerbeschluss vom 21. Februar 2024

Die im Immunitätsurteil begründete Rechtsprechung zu Immunitätsausnahmen dehnte¹⁵ der 3. Strafsenat in diesem Haftfortdauerbeschluss auf alle ausländischen Hoheitsträger „unabhängig vom Status und Rang“ und mit Bezug auf alle „völkerrechtlichen Verbrechen“ aus.¹⁶ Diese Immunitätsausnahme gehöre „zum zweifelsfreien Bestand des Völkergewohnheitsrechts“.¹⁷ In dem Verfahren nahm der Senat einen dringenden Tatverdacht gegen einen beschuldigten syrischen Staatsangehörigen unter anderem wegen Verbrechen gegen die Menschlichkeit durch Folter und Versklavung an, teilweise in Tateinheit mit Kriegsverbrechen gegen Personen durch Folter.¹⁸

3. Der Revisionsbeschluss vom 20. März 2024

Der Revisionsbeschluss konkretisierte den Anwendungsbereich der völkergewohnheitsrechtlichen Immunitätsausnahme teilweise. Demnach gelte die Ausnahme von funktioneller Immunität „für Taten, deren Strafbarkeit unmittelbar im allgemeinen Völkergewohnheitsrecht verwurzelt ist“.¹⁹ Der Senat bestätigte dies bisher nur im Hinblick auf die völkerrechtlichen Verbrechen der Kriegsverbrechen und Verbrechen gegen die Menschlichkeit ausdrücklich.²⁰ Fraglich ist beispielsweise, ob der BGH auch die (bislang)²¹ vier weiteren, von der Völkerrechtskommission in einem entsprechenden Entwurfsartikel zu Ausnahmen funktioneller Immunität²² genannten Straftatbestände²³ als von der Immunitätsausnahme erfasst ansieht. Die Feststel-

¹⁵ Vgl. Stellungnahme der Bundesregierung vor dem Sechsten Ausschuss der UN-Generalversammlung vom 21. Oktober 2024, <https://www.un.org/en/ga/sixth/79/pdfs/statements/ilc/21mtg_germany_1.pdf>, zuletzt besucht 11. Februar 2025, 3 (‘the Court further extended its case law’).

¹⁶ BGH, *Haftfortdauerbeschluss* (Fn. 7), Rn. 53. Zur problematischen Frage, ob dies eine im Verhältnis zum Immunitätsurteil eigenständige völkergewohnheitsrechtliche Feststellung darstellt, s. u. III. 3.

¹⁷ BGH, *Haftfortdauerbeschluss* (Fn. 7), Rn. 53.

¹⁸ Vgl. BGH, *Haftfortdauerbeschluss* (Fn. 7), Rn. 47-51.

¹⁹ BGH, Beschluss vom 20. März 2024, 3 StR 454/22 (‘Revisionsbeschluss’), Rn. 32.

²⁰ BGH, *Revisionsbeschluss* (Fn. 19), Rn. 32.

²¹ Der aktuelle ILC-Sonderberichterstatte Grossmann schlug in seinem zweiten Bericht vor, die Verbrechen der Aggression, der Sklaverei und des Sklavenhandels in die Liste der Immunitätsausnahmen in Entwurfsartikel 7, Abs. 1 aufzunehmen, Grossmann, *Second Report* (Fn. 12), Rn. 79. Die ILC wird planmäßig während ihrer 76. Sitzungsperiode (2025) über diesen Vorschlag entscheiden.

²² ILC, ‘Immunity of State Officials from Foreign Criminal Jurisdiction’ (2022), A/77/10 [im Folgenden: Entwurfsartikel], Entwurfsartikel 7, Kapitel VI, S. 189-194, Rn. 68.

²³ D. h. Genozid, Apartheid, Folter und Verschwindenlassen.

lung des Senats mit Bezug auf eine Stellungnahme der Bundesregierung zu diesem Entwurfsartikel, er habe „bereits dargelegt, dass es der gefestigten Staatenpraxis entspricht und zum zweifelsfreien Bestand des Völkergewohnheitsrechts gehört, *in derartigen Fällen* fremdstaatliche Hoheitsträger nicht von inländischer Gerichtsbarkeit zu befreien“²⁴ ist insofern uneindeutig.

Das dem Revisionsbeschluss zugrunde liegende Verfahren betraf eine Tat, die der Senat als Handeln des syrischen Staates einstufte.²⁵ Nach der Revision lautete der Schuldspruch des Angeklagten unter anderem auf ein Verbrechen gegen die Menschlichkeit.

4. Der Haftbeschwerdebeschluss vom 27. August 2024

Dieser Haftbeschwerdebeschluss betrifft ein Ermittlungsverfahren wegen geheimdienstlicher Agententätigkeit, die in Deutschland ausgeführt wurde.²⁶ Der BGH stellte fest, dass die völkergewohnheitsrechtlichen Ausnahmen von funktioneller Immunität neben völkerrechtlichen Verbrechen auch fremdstaatliche Spionage und geheimdienstlich gesteuerte Gewaltakte auf fremdem Staatsgebiet umfassen.²⁷

Der vorliegende Beitrag unternimmt keine nähere Betrachtung letzterer Immunitätsausnahmen, sondern konzentriert die Untersuchung auf solche bei völkerrechtlichen Verbrechen. Zum einen basiert die Ausnahme für Straftaten, die auf fremdem Hoheitsgebiet begangen werden, auf einer eigenständigen völkerrechtlichen Regel.²⁸ Das Vorliegen objektiv ernstzunehmender Zweifel bezüglich dieser Regel als Voraussetzung der Vorlagepflicht wäre daher gesondert zu prüfen. Zum anderen hat das BVerfG zum Komplex fremdstaatlicher Spionage bereits entschieden.²⁹ Schließlich hat auch die gesetzliche Immunitätsausnahme in § 20 Abs. 2 S. 2 GVG keine rechtlichen

²⁴ BGH, *Revisionsbeschluss* (Fn. 19), Rn. 33 [zitiert Immunitätsurteil; Hervorhebung hinzugefügt].

²⁵ BGH, *Revisionsbeschluss* (Fn. 19), Rn. 32.

²⁶ BGH, Beschluss vom 27. August 2024, StB 54/24 (‘Haftbeschwerdebeschluss’), Rn. 29.

²⁷ BGH, *Haftbeschwerdebeschluss* (Fn. 26), Rn. 23.

²⁸ Vgl. ‘territorial (tort) exception’: Straftaten, die von ausländischen Staatsbediensteten im Hoheitsgebiet eines Forumsstaates ohne dessen Zustimmung zu ihrer Anwesenheit und Tätigkeit begangen werden. Dass Spionage unter diesen Umständen dem Grundsatz der territorialen Souveränität unterliegt und funktionelle Immunität grundsätzlich nicht besteht, hat die ILC bei der ersten Lesung ihrer Entwurfsartikel anerkannt und daher derartige Straftaten aufgrund ihrer Abweichungen nicht in die umstrittene Liste der Immunitätsausnahmen in Entwurfsartikel 7, Abs. 1 aufgenommen. ILC, ‘Immunity of State Officials’ (Fn. 22), S. 241, Rn. 27.

²⁹ BVerfGE 92, 277; vgl. BGH, Urteil v. 28. Januar 2021, 3 StR 564/19 (‘Immunitätsurteil’), Rn. 47. Es wird hier offengelassen, ob die Reichweite dieser BVerfG-Entscheidung mit derjenigen des Haftbeschwerdebeschlusses des BGH (Fn. 26) übereinstimmt.

Wirkungen für die im Haftbeschwerdebeschluss festgestellten Immunitätsausnahmen.³⁰

5. Die Kodifizierung der BGH-Rechtsprechung

Wie bereits ausgeführt soll die Einführung von § 20 Abs. 2 S. 2 GVG die BGH-Rechtsprechung zu funktioneller Immunität festschreiben.³¹ Der BGH interpretierte diese Intention des Gesetzgebers dahingehend, dass es ihm „allein darum ging, die völkergewohnheitsrechtlich anerkannte Nichtgeltung der allgemeinen Funktionsträgerimmunität bei völkerrechtlichen Verbrechen deklaratorisch festzuschreiben, ohne weitere Ausnahmen bei anderen Deliktgruppen zu negieren“.³² Die Anwendungsbereiche der vom Bundestag beschlossenen gesetzlichen Immunitätsausnahme und der BGH-Rechtsprechung sind hinsichtlich der Immunitätsausnahme bei völkerrechtlichen Verbrechen nicht zwangsläufig deckungsgleich. Während das GVG auf Verbrechen nach dem Völkerstrafgesetzbuch (VStGB) verweist, ist der Verweis des BGH auf völkerrechtliche Verbrechen nach Völkergewohnheitsrecht offen für zukünftige Entwicklungen.³³ Einen vergleichbar zukunfts-offenen Verweis auf das Völkergewohnheitsrecht enthielt auch die bisher bezüglich funktioneller Immunität einschlägige gesetzliche Regelung in § 20 Abs. 2 GVG a. F.³⁴

III. Methodische Defizite bei der Feststellung von Völkergewohnheitsrecht

Die Feststellungen des BGH zum Völkergewohnheitsrecht im Immunitätsurteil und im Haftfortdauerbeschluss genügen nicht den methodischen Anforderungen des Völkerrechts. Im Folgenden werden zunächst die wesentlichen Elemente dieser Methode dargestellt und sodann diesbezügliche Defizite in den beiden Entscheidungen des 3. Strafsenats identifiziert. Auf den Revisionsbeschluss wird an inhaltlich geeigneten Stellen, aber nicht se-

³⁰ BGH, *Haftbeschwerdebeschluss* (Fn. 26), Rn. 24.

³¹ S. o. Fn. 3.

³² BGH, *Haftbeschwerdebeschluss* (Fn. 26), Rn. 24.

³³ Zu denken wäre etwa an das Verbrechen des Verschwindenlassens, § 234b StGB.

³⁴ Vgl. auch Claus Krefß, ‘Germany and International Criminal Law: Some Additional Reflections in Light of Another Set of Current Developments’, *EJIL:Talk!*, 21. August 2024 [angesichts des bisherigen dynamischen Verweises auf das Völkerrecht und der BGH-Rechtsprechung sei ein Gesetz nicht erforderlich gewesen].

parat eingegangen, da er keine eigenständigen Ausführungen zur Feststellung von Völkergewohnheitsrecht enthält, sondern insofern auf die vorhergehenden Entscheidungen verweist.³⁵

Der Beitrag beleuchtet ausschließlich die vom BGH verwandte Methode zur Feststellung von Völkergewohnheitsrecht. Die materiell-rechtliche Frage, ob und in welchem Ausmaß Ausnahmen von funktioneller Immunität, etwa bei völkerrechtlichen Verbrechen, nach Völkergewohnheitsrecht bestehen, wird offengelassen.³⁶

1. Methode zur Feststellung von Völkergewohnheitsrecht

Die Anforderungen an die Feststellung von Völkergewohnheitsrecht sind in den Schlussfolgerungen der Völkerrechtskommission (ILC) zur Feststellung von Völkergewohnheitsrecht³⁷ reflektiert. Angesichts der Autorität dieser Anforderungen³⁸ wäre eine Abweichung von ihnen zumindest rechtfertigungsbedürftig. Die Völkerrechtspraxis, einschließlich innerstaatlicher Ge-

³⁵ Vgl. BGH, *Revisionsbeschluss* (Fn. 19), Rn. 32 f.

³⁶ Eine umfassende Beantwortung dieser Frage überstiege den Umfang des Beitrags. Es wird auf die Literatur zu diesem Thema verwiesen: Neben den in der BGH-Rechtsprechung (v. a. BGH, *Immunitätsurteil* (Fn. 29), Rn. 38; BGH, *Haftfortdauerbeschluss* (Fn. 7), Rn. 53) und unten (bei IV. 2. a)) Genannten z. B. Claus Kreß, Peter Frank und Christoph Barthe, 'Functional Immunity of Foreign State Officials Before National Courts', JICJ 19 (2021), 697-716; Claus Kreß, 'Article 98', in: Kai Ambos (Hrsg.), *Rome Statute of the International Criminal Court Commentary* (C.H. Beck 2021), 2585; Dire Tladi, 'The International Law Commission's Recent Work on Exceptions to Immunity: Charting the course for a Brave New World in International Law?', LJIL 32 (2019), 169-187; Hervé Ascensio und Béatrice Bonafé, 'L'absence d'immunité des agents de l'Etat en cas de crime international: pourquoi en débattre encore?', RGDIP 122 (2018), 821-850; Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill 2015); Joanne Foakes, *The Position of Heads of States and Senior Officials in International Law* (Oxford University Press 2014); Dapo Akande und Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', EJIL 21 (2011), 815-852; Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008).

Der Beitrag bezieht auch keine Stellung zu Immunitätsausnahmen im Zusammenhang mit Verfahren gegen Staatsbedienstete vor bzw. Kooperation mit internationalen Strafgerichten/-tribunalen.

³⁷ ILC, 'Identification of Customary International Law', (2018) A/73/10, Kapitel V, Rn. 65 f.; im Folgenden: ILC-Schlussfolgerungen, jew. m. w. N.

³⁸ Vgl. z. B. Georg Nolte, 'How to Identify Customary International Law: On the Outcome of the Work of the International Law Commission (2018)', *Japanese Yearbook of International Law* 62 (2019), 251-273 (258); ILC, Wood 'Formation and Evidence of Customary International Law' (2011) A/66/10, Annex A, 305, Rn. 4.

richte, ist sowohl Ausgangspunkt als auch Adressatin der ILC-Schlussfolgerungen.³⁹

Die konstitutiven Bestandteile der Völkerrechtsquelle des Völkergewohnheitsrechts, die Staatenpraxis und die Rechtsüberzeugung (*opinio iuris*),⁴⁰ sind wohl bekannt. Zur Feststellung des Bestehens und des Inhalts einer Regel des Völkergewohnheitsrechts gilt es daher zu ermitteln, ob eine allgemeine Praxis vorliegt, die als Recht anerkannt ist.⁴¹ Eine allgemeine Praxis setzt voraus, dass sie ausreichend weit verbreitet, repräsentativ und konsistent ist.⁴² Praxis kann eine Vielzahl von Formen annehmen⁴³ und umfasst Verhalten der drei Staatsgewalten, beispielsweise im Zusammenhang mit völkerrechtlichen Verträgen, Beschlüssen einer internationalen Organisation oder diplomatische Amtshandlungen und Korrespondenz.⁴⁴

Das Erfordernis der Anerkennung der allgemeinen Praxis als Recht (*opinio iuris*) bedeutet, dass die fragliche Praxis im Bewusstsein eines völkergewohnheitsrechtlichen Rechts oder einer Verpflichtung vorgenommen werden muss.⁴⁵ Auch die Nachweise von *opinio iuris* können eine Vielzahl von Formen annehmen,⁴⁶ zum Beispiel: Öffentliche Stellungnahmen und Veröffentlichungen, Rechtsauffassungen von Regierungen, diplomatische Korrespondenz, Entscheidungen nationaler Gerichte und Vertragsbestimmungen.⁴⁷

Der Internationale Gerichtshof (IGH) hat in dem Verfahren *Jurisdictional Immunities of the State (Deutschland/Italien)* die besondere Bedeutung folgender Formen der Nachweise von Staatenpraxis und *opinio iuris* im Kontext der Staatenimmunität hervorgehoben:

„In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other

³⁹ ILC, Wood (Fn. 38); ILC, Schlussfolgerungen (Fn. 37), General Commentary, 92, Rn. 2, 4.

⁴⁰ Vgl. Art. 38 Abs. 1 lit. b) IGH-Statut.

⁴¹ ILC, Schlussfolgerungen (Fn. 37), 2.

⁴² ILC, Schlussfolgerungen (Fn. 37), 8(1).

⁴³ ILC, Schlussfolgerungen (Fn. 37), 6(1) S. 1.

⁴⁴ Vgl. ILC, Schlussfolgerungen (Fn. 37), 6(2).

⁴⁵ ILC, Schlussfolgerungen (Fn. 37), 9(1).

⁴⁶ ILC, Schlussfolgerungen (Fn. 37), 10(1).

⁴⁷ Vgl. ILC, Schlussfolgerungen (Fn. 37), 10(2).

States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.“⁴⁸

Diese Maßstäbe sind auf die funktionelle Immunität von Staatsbediensteten übertragbar⁴⁹, die eine besondere Ausprägung der Staatenimmunität darstellt.⁵⁰ Letzteres stellte auch der BGH fest.⁵¹

Im Hinblick auf Literaturbeiträge folgt aus Art. 38 Abs. 1 lit. d) des IGH-Statuts, dass Lehrmeinungen der fähigsten Völkerrechtlerinnen und Völkerrechtler der verschiedenen Nationen als Hilfsmittel zur Feststellung von Rechtsnormen, also auch solchen des Völkergewohnheitsrechts, dienen können.⁵² Für sich genommen stellen sie jedoch keinen Nachweis von Staatenpraxis und *opinio iuris* dar. Auch Entscheidungen internationaler Gerichte können Hilfsmittel zur Feststellung völkergewohnheitsrechtlicher Regeln sein.⁵³ Ihre Bedeutung als Hilfsmittel variiert in Abhängigkeit von nachfolgender Rechtsprechung und der Qualität der völkergewohnheitsrechtlichen Begründung, für die insbesondere eine eingehende Prüfung von Nachweisen der behaupteten allgemeinen, als Recht anerkannten Praxis maßgeblich ist.⁵⁴

2. Methodische Defizite im Urteil vom 28. Januar 2021

Diesen Maßstäben werden die Feststellungen zum Völkergewohnheitsrecht in dem Immunitätsurteil⁵⁵ nicht hinreichend gerecht. Der vom Senat hierbei angelegte Prüfungsmaßstab ist unklar und die getroffenen Feststellungen weisen methodische Defizite auf.

a) Unklarer Prüfungsmaßstab

Bereits im Ausgangspunkt ist nicht eindeutig, welchen völkerrechtlichen Prüfungsmaßstab der BGH anwendet. Ein zentraler Streitpunkt ist insofern

⁴⁸ IGH, *Jurisdictional Immunities of the State (Deutschland v. Italien)*, Urteil v. 3 Februar 2012, ICJ Reports 2012, 99 (123, Rn. 55).

⁴⁹ Dem steht nicht entgegen, dass der BGH im *Immunitätsurteil* die Anwendbarkeit der Erwägungen des IGH in *Jurisdictional Immunities* (Fn. 48) bezüglich *ius cogens* verneinte (s. u. Text bei Fn. 119-122).

⁵⁰ Zu Letzterem ILC Report 2022 (Fn. 22), S. 195, Rn. 5.

⁵¹ BGH, *Immunitätsurteil* (Fn. 29), Rn. 17.

⁵² Vgl. ILC, Schlussfolgerungen (Fn. 37), 14.

⁵³ ILC, Schlussfolgerungen (Fn. 37), 13(1).

⁵⁴ Kommentierung zu ILC, Schlussfolgerungen (Fn. 37), 13, 149, Rn. 3.

⁵⁵ BGH, *Immunitätsurteil* (Fn. 29), Rn. 13-49.

die Verteilung der „Darlegungslast“⁵⁶ für den Nachweis der (Nicht-)Existenz einer völkergewohnheitsrechtlichen Immunitätsausnahme.⁵⁷ In der Literatur vertretene Ansichten halten funktionelle Immunität bei völkerrechtlichen Verbrechen wegen ihres „rationale“,⁵⁸ aufgrund von Normkonflikten⁵⁹ bzw. systematischer Gesichtspunkte⁶⁰ für *prima facie* unanwendbar. Folglich müsste die Geltung funktionaler Immunität durch eine allgemeine Staatenpraxis und *opinio iuris* nachgewiesen werden. Eine vergleichbare Position vertrat der Generalbundesanwalt (GBA) in dem Verfahren, das zu dem Immunitätsurteil führte.⁶¹ Nach anderer Ansicht gilt die aus der Staatenimmunität abgeleitete funktionelle Immunität grundsätzlich, solange keine völkergewohnheitsrechtliche *Ausnahme* nachgewiesen ist.⁶²

Der BGH verhält sich zu dieser Problematik in seiner bisherigen Rechtsprechung zu funktionaler Immunität nicht eindeutig.⁶³ Im Immunitätsurteil prüfte er eine „allgemeine Staatenpraxis“⁶⁴ und eine „allgemeine Überzeu-

⁵⁶ Vgl. ‘Verschiebung der Darlegungslast’ bei Rensmann (Thilo Rensmann, ‘Die Immunität ausländischer Amtsträger, der Bundesgerichtshof und das Vermächtnis von Nürnberg’, in: Arnd Koch et al., *50 Jahre Juristische Fakultät Augsburg* (Mohr Siebeck 2021), 513-540 (531-533)) und ‘shift in the burden of proof’ bei Strewe (vgl. Hannah Sophie Strewe, ‘Functional Immunity Before the Federal Court of Justice’, *GYIL* 64 (2021), 491-509 (503)). Der Begriff ‘Darlegungslast’ betrifft hier eine rechtliche und keine tatsächliche Frage (es gilt ‘iura novit curia’).

⁵⁷ Vgl. z. B. Chimene I. Keitner, ‘Foreign Official Immunity and the “Baseline” Problem’, *Fordham L. Rev.* 80 (2011), 605-621 (607).

⁵⁸ Vgl. Krefß, ‘Article 98’ (Fn. 36), Rn. 34; Rosanne van Alebeek, ‘Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts’, in: Tom Ruys, Nicolas Angelet und Luca Ferro, *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019), 496-524 (498-502); van Alebeek, *Immunity of States* (Fn. 36), Kapitel 3.

⁵⁹ Vgl. z. B. Akande und Shah (Fn. 36), 843.

⁶⁰ Vgl. Krefß, ‘Article 98’ (Fn. 36), Rn. 38; Ascensio und Bonafé (Fn. 36), 844; vgl. ILC, Entwurfsartikel (Fn. 22) Kommentierung zu Entwurfsartikel 7, Rn. 10; differenzierend Philippa Webb, ‘How Far Does the Systemic Approach to Immunities Take Us?’, *AJIL Unbound* 112 (2018), 16-21.

⁶¹ Frank und Barthe, ‘Immunitätsschutz’ (Fn. 9), 242 ff.: Hinsichtlich seiner sekundären Argumentationslinie zum Völkergewohnheitsrecht argumentierte der GBA, dass nicht die Frage maßgeblich sei, ob eine Ausnahme von funktionaler Immunität bei völkerrechtlichen Verbrechen völkergewohnheitsrechtlich anerkannt ist, da dies bereits ‘eindeutig geklärt’ sei (277) und entsprechendes Völkergewohnheitsrecht ‘spätestens seit Nürnberg’ bestehe (271). Vielmehr komme es darauf an, ob diese völkergewohnheitsrechtliche Regel ‘durch die innerhalb der ILC seit 2008 geführten Diskussionen und die sich daran anschließende Verbalpraxis einzelner Staaten eine Änderung dergestalt erfahren hat, dass [...] nunmehr eine funktionale Immunität zu gewähren ist’ (277 f.).

⁶² So z. B. Ingrid Wuerth, ‘Pinochet’s Legacy Reassessed’, *AJIL* 106 (2012), 731-768 (744 m. w. N.).

⁶³ So auch Claus Krefß, ‘On Functional Immunity of Foreign Officials and Crimes under International Law – The Jan. 28, 2021 Judgment of Germany’s Federal Court of Justice’, *Just Security* (31 März 2021), <<https://www.justsecurity.org/75596/on-functional-immunity-of-foreign-officials-and-crimes-under-international-law>>, zuletzt besucht 13 Februar 2025.

⁶⁴ BGH, *Immunitätsurteil* (Fn. 29), Rn. 18.

gung“⁶⁵ dahingehend, dass „nach dem Völkerrecht [...] jedenfalls die Strafverfolgung niederrangiger Hoheitsträger wegen Kriegsverbrechen oder bestimmter anderer die Weltgemeinschaft als Ganzes betreffender Delikte durch nationale Gerichte zulässig ist“.⁶⁶ Ob sich die völkergewohnheitsrechtliche Prüfung des BGH im Ausgangspunkt auf das Bestehen funktioneller Immunität bei völkerrechtlichen Verbrechen, oder auf das Vorliegen von Ausnahmen funktioneller Immunität bezieht, blieb nach dem Wortlaut im Immunitätsurteil und in den beiden nachfolgenden Entscheidungen des BGH⁶⁷ offen.

Im jüngsten Haftbeschwerdebeschluss spricht der Senat insofern eindeutiger von einer „Ausnahme“ von Immunität bei völkerrechtlichen Verbrechen.⁶⁸ Dem entspricht auch die grundsätzliche Feststellung im Immunitätsurteil, dass sich funktionelle Immunität von Staatsbediensteten als Ausfluss der Staatenimmunität ergibt, „da ein Staat regelmäßig nur durch solche handeln kann“, und „[i]m Ausgangspunkt geklärt ist, dass ein Staat angesichts der souveränen Gleichheit der Staaten zumindest in Bezug auf Hoheitsakte (*acta iure imperii*) grundsätzlich keiner fremden staatlichen Gerichtsbarkeit unterworfen ist“.⁶⁹ Demgegenüber führt der BGH keine systematischen Erwägungen an, die *prima facie* zu einem Immunitätsausschluss führen würden.⁷⁰ In dieser Hinsicht weicht der BGH von der Ansicht des GBA ab.⁷¹

⁶⁵ BGH, *Immunitätsurteil* (Fn. 29), Rn. 23.

⁶⁶ BGH, *Immunitätsurteil* (Fn. 29), Rn. 23.

⁶⁷ Im BGH, *Haftfortdauerbeschluss* (Fn. 7), Rn. 53 und BGH, *Revisionsbeschluss* (Fn. 19), Rn. 32–34) ist von ‘Begrenzung’ bzw. ‘Ausschluss’ von funktioneller Immunität bei völkerrechtlichen Verbrechen die Rede.

⁶⁸ BGH, *Haftbeschwerdebeschluss* (Fn. 26), Rn. 23 (‘allgemeine Funktionsträgerimmunität erfährt [...] bei bestimmten Delikten völkergewohnheitsrechtlich verankerte Ausnahmen. Dazu zählen [...] völkerrechtliche Verbrechen’).

⁶⁹ Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 17. Der BGH fügt an, dass ‘hier Gegenstand des Verfahrens und Bezugspunkt der etwaigen Immunität nicht das hoheitliche Handeln eines fremden, an dem Gerichtsverfahren nicht beteiligten Staates im Allgemeinen, sondern die individuelle strafrechtliche Verantwortlichkeit’ (BGH, *Immunitätsurteil*, Fn. 27) sei, ohne auszuführen, worin die Einschränkung der vorherigen Aussage bestehe. Jedenfalls bestätigte der BGH die grundsätzliche Geltung funktioneller Immunität gegenüber der Strafgerichtsbarkeit anderer Staaten im BGH, *Haftbeschwerdebeschluss* (Fn. 26), (Rn. 23: ‘Personen, die für einen Staat hoheitlich tätig werden, [kommt] grundsätzlich aus der Staatenimmunität abgeleitete und völkergewohnheitsrechtlich anerkannte (funktionelle) Immunität in Bezug auf ihr hoheitlich-staatliches Handeln gegenüber der Strafgerichtsbarkeit anderer Staaten (allgemeine Funktionsträgerimmunität) zu. [...] entscheidend ist allein, dass sich die Tätigkeit funktional als fremdstaatliches hoheitliches Handeln darstellt.’).

⁷⁰ So auch Kreß, ‘On Functional Immunity’ (Fn. 63). Vgl. u. bezüglich der Abgrenzung von Immunität zu sachnahen Regelungsgegenständen (III. 2. c).

⁷¹ Der GBA bejahte in seiner primären Argumentationslinie das Nichtbestehen von Immunität aufgrund von ‘grundlegenden, die Gesamtheit der Völkerrechtsordnung in den Blick nehmenden Erwägungen’ (242), vgl. Frank und Barthe, ‘Immunitätsschutz’ (Fn. 9), 238–242.

Die völkergewohnheitsrechtliche Prüfung des BGH im Immunitätsurteil enthält aber auch einen Anhaltspunkt dafür, dass sie sich, zumindest teilweise, auf den Nachweis des Bestehens von Immunität und nicht des Bestehens von Immunitätsausnahmen bezog. Denn die – aus anderen Gründen wenig überzeugende⁷² – Aussage des BGH zu den ILC-Arbeiten „aus jüngerer Zeit“ bezieht sich auf eine mögliche Änderung der als bestehend angenommenen völkergewohnheitsrechtlichen Immunitätsausnahme: Diese ILC-Arbeiten „ändern [...] nicht die durch einheitliche Übung und Überzeugung belegte allgemeine Regel des Völkergewohnheitsrechts, dass jedenfalls die Strafverfolgung fremder niederrangiger Hoheitsträger wegen Kriegsverbrechen oder bestimmter anderer die Völkergemeinschaft als Ganzes betreffender Delikte durch nationale Gerichte zulässig ist“.⁷³

Dieser Aussage wurde in der Literatur entnommen, dass der BGH zu einem bestimmten, wenn auch nicht genannten Zeitpunkt eine „Kristallisation“ der völkergewohnheitsrechtlichen Immunitätsausnahmen annahm und somit eine Umkehr der „Darlegungslast“ zum Tragen kommt, mit der Konsequenz, dass die Uneinheitlichkeit der Staatenpraxis und *opinio iuris* hinsichtlich Immunitätsausnahmen,⁷⁴ wie sie insbesondere im Rahmen des ILC-Projektes zum Ausdruck kam, zulasten der Feststellung des Bestehens von Immunität und nicht mehr zulasten der Feststellung von ihren Ausnahmen geht.⁷⁵

Hiergegen kann eingewandt werden, dass der völkergewohnheitsrechtlichen Prüfung des BGH im Übrigen keine Anhaltspunkte für eine derartige Differenzierung zu entnehmen sind. Falls der BGH einen „Kristallisations“-Zeitpunkt der völkergewohnheitsrechtlichen Immunitätsausnahme annahm, wäre im Interesse der Rechtssicherheit seine konkrete Benennung bedeutsam gewesen. Denn die Staatenpraxis im 20. Jahrhundert wird hinsichtlich der Feststellung von völkergewohnheitsrechtlichen Immunitätsausnahmen, auch innerhalb ihrer Befürworter, sehr unterschiedlich bewer-

⁷² S. u. bei III. 2. f).

⁷³ BGH, *Immunitätsurteil* (Fn. 29), Rn. 35.

⁷⁴ Vgl. u. (Abschnitt III. 2.; III. 3.).

⁷⁵ Vgl. Krefß, ‘On Functional Immunity’ (Fn. 63); ‘While the Court does not mention any specific date, it is very apparent from its reasoning that the Court believes that, well before the ILC began its work on immunity from foreign jurisdiction, there existed a general practice of States accepted as law in support of the Court’s main conclusion (for the same view, see [zitiert Krefß, ‘Article 98’ (Fn. 36), Rn. 65 ff.]).’ Vergleichbar mit einer Umkehr der ‘Darlegungslast’ prüft Krefß völkergewohnheitsrechtlich zunächst die Herausbildung einer Immunitätsausnahme und ab dem Jahr 1990 die Herausbildung von funktioneller Immunität, jeweils bezüglich völkerrechtlicher Verbrechen, Krefß, ‘Article 98’ (Fn. 36), Rn. 31, 53-83. Rensmann (Fn. 56), 531-533 und Stewe (Fn. 56), 499-503 stellen eine Verschiebung der Darlegungslast, bzw. Beweislastumkehr durch Umdeutung der völkergewohnheitsrechtlichen Entwicklung durch den BGH fest.

tet.⁷⁶ Dies verdeutlicht auch die Relevanz einer etwaigen Umkehr der „Darlegungslast“. Es ist nicht erkennbar, dass der BGH bei der Prüfung völkergewohnheitsrechtlicher Nachweise im Sinne einer Umkehr der „Darlegungslast“ (zeitlich) differenzierte, etwa zwischen Gerichtsentscheidungen vor und nach dem Beginn der ILC-Arbeiten. Vielmehr erstreckte der BGH seine Prüfung auf Nachweise einer Immunitätsausnahme im Zeitraum vom zweiten Weltkrieg⁷⁷ bis zum Entscheidungszeitpunkt. Insbesondere stützte der BGH die von ihm festgestellte völkergewohnheitsrechtliche Immunitätsausnahme maßgeblich auf Entscheidungen, die *nach* dem Beginn der ILC-Arbeiten ergangen sind.⁷⁸ Dies trifft auch auf die Prüfung des GBA zu.⁷⁹ Es wäre zu erwarten gewesen, dass eine etwaige Änderung des Prüfungsmaßstabs im Sinne einer Umkehr der „Darlegungslast“ im Text des Urteils deutlich zum Ausdruck kommt.

Jedenfalls würde ein derart geänderter Prüfungsmaßstab voraussetzen, dass zunächst die Kristallisation von völkergewohnheitsrechtlichen Immunitätsausnahmen hinreichend festgestellt wird. Hieran bestehen jedoch methodische Zweifel.

b) Defizitäre Feststellung von allgemeiner Praxis und *opinio iuris*

Die völkergewohnheitsrechtlichen Feststellungen im Immunitätsurteil weisen im Wesentlichen in vierfacher Hinsicht methodische Defizite auf:

Erstens wurden gängige Formen von Staatenpraxis und *opinio iuris* nicht in die Prüfung einbezogen. Insbesondere wurden innerstaatliche Gesetzgebung und staatliche Stellungnahmen vor ausländischen Gerichten nicht untersucht, denen nach der auf den vorliegenden Kontext übertragbaren

⁷⁶ Beispielsweise wird vertreten, dass die Immunitätsausnahme bereits weit vor dem Jahr 1990 völkergewohnheitsrechtlichen Status erlangt habe (Kreß, ‘Article 98’ (Fn. 36), 2620, Rn. 65), während man ‘sicherlich’ bezweifeln könne, dass die anschließende Praxis an sich eine allgemeine, als Recht anerkannte Praxis darstelle (vgl. Kreß, ‘Article 98’ (Fn. 36), 2623, Rn. 76). Nach einer weiteren Ansicht gab es 1945-1995 nur wenige Strafverfolgungen ausländischer Staatsbediensteter wegen völkerrechtlicher Verbrechen (van Alebeek, ‘Functional Immunity’ (Fn. 58), 509 f.).

⁷⁷ In der Literatur wird auch frühere Staatenpraxis herangezogen, vgl. z. B. Claus Kreß, ‘Einleitung’ (Fn. 13), 698 f. [mit Verweis auf den GBA].

⁷⁸ BGH, *Immunitätsurteil* (Fn. 29), zwei Urteile aus 2015 (Rn. 21); Urteile ‘in den letzten Jahren’ (Rn. 22); Urteile zitiert in Christoph Barthe, ‘Otto Trifiterer und Kai Ambos, The Rome Statute of the International Criminal Court: A Commentary’, JICJ 16 (2018), 663-668 (665 ff.), auf die BGH verweist, sind frühestens aus dem Jahr 2016; Urteile aus 2012 (Rn. 32); Urteile aus 2013 und 2018 (Rn. 33).

⁷⁹ Vgl. z. B. Frank und Barthe, ‘Immunitätsschutz’ (Fn. 9), 243 ff. (führt u. a. Strafverfahren ‘vor allem in den vergangenen zwei Jahrzehnten’ an, S. 250).

IGH-Rechtsprechung eine besondere Bedeutung bei der Feststellung von Völkergewohnheitsrecht zukommt.⁸⁰ Vielmehr beschränkt sich der Senat fast ausschließlich auf Gerichtsentscheidungen.⁸¹ Eine Literaturansicht begründete die Unvollständigkeit der Prüfung von Staatenpraxis und *opinio iuris* durch den BGH zudem damit, dass der geprüften Regel entgegenstehende Staatenpraxis, insbesondere Entscheidungen des Unterlassens von Strafverfolgung aufgrund funktioneller Immunität, nicht berücksichtigt wurden.⁸²

Zweitens ist die festgestellte Staatenpraxis und *opinio iuris* nicht repräsentativ. Eine „allgemeine“ Praxis im Sinne von Art. 38 Abs. 1 lit. b) des IGH Statuts muss ausreichend weit verbreitet, repräsentativ und konsistent sein.⁸³ Der BGH stellte aber ganz überwiegend auf europäische Staatenpraxis ab.

Drittens ist die vom Senat zur Unterstützung der von ihm festgestellten völkergewohnheitsrechtlichen Immunitätsausnahme für bestimmte Kriegsverbrechen genannte Staatenpraxis und *opinio iuris* teilweise nicht einschlägig oder unterstützt nicht die vom Senat angenommene völkergewohnheitsrechtliche Regel.⁸⁴ Beispielsweise differenziert der Senat bei der Prüfung von Nachweisen und Hilfsmitteln nicht konsequent zwischen den Straftatbeständen der Kriegsverbrechen, des Völkermords und der Verbrechen gegen die Menschlichkeit,⁸⁵ bzw. „bestimmter anderer die Weltgemeinschaft als Ganzes betreffender Delikte“.⁸⁶ So sind die Ausführungen zur Feststellung der völkergewohnheitsrechtlichen Regel bezüglich des Kriegsverbrechens der Folter und der in schwerwiegender Weise entwürdigenden oder erniedrigenden Behandlung mitunter auf Gerichtsentscheidungen gestützt, die keine Kriegsverbrechen zum Gegenstand hatten.⁸⁷ Eine völkergewohnheitsrechtliche Immunitätsausnahme bezüglich eines bestimmten Straftatbestands ist aber jeweils eigenständig festzustellen. Zwischen den völkerrechtlichen Verbrechen bestehen erhebliche Unterschiede hinsichtlich der jeweiligen Staatenpraxis und *opinio iuris*, sowie ihres jeweiligen völkerrechtlichen Rahmens. Während beispielsweise bezüglich der Straftatbestände des Genozids und der Kriegs-

⁸⁰ S. Fn. 48.

⁸¹ Andersartige Nachweise v. a. in BGH, *Immunitätsurteil* (Fn. 29), Rn. 24 (IMT-, IStGH-Statute, UNGA-Resolution, Field Manual).

⁸² Strewe (Fn. 56), 505 f.

⁸³ Vgl. ILC, Schlussfolgerungen (Fn. 37), 8(1).

⁸⁴ Zu Letzterem etwa die *Lozano*-Entscheidung, zitiert in BGH, *Immunitätsurteil* (Fn. 29), Rn. 31 („[A] more recent trend can be discerned, both in international law doctrine and in still a minority part of domestic jurisprudence, which is intended to dispute the wider application of the customary rule on [...] the immunity from criminal jurisdiction of the individual author, [...] if the individual is guilty of “international crimes”).“)

⁸⁵ Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 18 ff., 26 ff.

⁸⁶ Zu Letzterem BGH, *Immunitätsurteil* (Fn. 29), Rn. 23 ff.

⁸⁷ Z. B. BGH, *Immunitätsurteil* (Fn. 29), Rn. 21, 28.

verbrechen bereits nach Ende des zweiten Weltkriegs völkerrechtliche Verträge abgeschlossen wurden,⁸⁸ wurde erst im November 2024 entschieden, dass eine umfassende Konvention zu Verbrechen gegen die Menschlichkeit im Rahmen der Vereinten Nationen verhandelt wird.⁸⁹ Etwaige in völkerrechtlichen Verträgen niedergelegte Sonderregeln können für die Prüfung von Immunitätsausnahmen relevant⁹⁰ und ggf. vorrangig anzuwenden sein.⁹¹ Zwischen den von einer Immunitätsausnahme betroffenen Straftatbeständen könnte zudem angesichts spezieller Immunitätsregeln im Verhältnis von Kriegsparteien untereinander⁹² zu differenzieren sein.

Viertens führt die isolierte Betrachtung einzelner ausländischer Gerichtsentscheidungen durch den Senat zu einer verkürzten Darstellung der jeweiligen Staatenpraxis und *opinio iuris*. Stattdessen hätte die vorhandene Praxis eines bestimmten Staates möglichst umfassend berücksichtigt und in ihrer Gesamtheit beurteilt werden müssen.⁹³ Variierender Praxis eines bestimmten Staates kann den Umständen entsprechend weniger Gewicht beizumessen sein.⁹⁴ Dass die Analyse des BGH insofern unzureichend ist, zeigt sich beispielsweise mit Bezug auf die vom Senat zitierten niederlän-

⁸⁸ Z. B. wird auf die 1948 Genocide Convention und die 1949 Geneva Conventions verwiesen, vgl. Krefß, 'Article 98' (Fn. 36), 2619, Rn. 58 f.

⁸⁹ Vgl. UN, GV Resolution 79/122 v. 4. Dezember 2024, <<https://docs.un.org/en/A/RES/79/122>>, zuletzt besucht 13. Februar 2025. Verbrechen gegen die Menschlichkeit sind u. a. vorgesehen im IStGH-Statut (u. a. Art. 7) und in der 'Ljubljana-Hague-Convention' vom 26. Mai 2023 (36 Unterzeichnungen, Stand 28. November 2024), <<https://treatydatabase.Overheid.nl/en/Treaty/Details/013717>>, zuletzt abgerufen 13. Februar 2025.

⁹⁰ Vgl. z. B. Frank und Barthe, 'Immunitätsschutz' (Fn. 9), 274.

⁹¹ Der BGH ließ die (zumindest bezüglich des ersten Anklagevorwurfs relevante) Frage eines konkludenten völkervertragsrechtlichen *waiver* im Zusammenhang mit der Ratifikation der 'Antifolterkonvention' durch Afghanistan und Deutschland ausdrücklich offen angesichts des 'zweifelsfrei[en]' Bestehens der völkergewohnheitsrechtlichen Immunitätsausnahme (BGH, *Immunitätsurteil* (Fn. 29), Rn. 60). Dass diese Herangehensweise Raum für völkerrechtliche Fragen hinterlässt zeigt beispielsweise die Lesart des Immunitätsurteils von Orakhelashvili (zu der hier keine Stellung bezogen wird), Alexander Orakhelashvili, 'Is the ILC about to Endorse the Absolute Immunity of Foreign State Officials from Criminal Jurisdiction?', (9. Oktober 2024), <<https://blog.bham.ac.uk/lawresearch/2024/10/is-the-ilc-about-to-endorse-the-absolute-immunity-of-foreign-state-officials-from-criminal-jurisdiction/>>, zuletzt abgerufen 13. Februar 2025.

⁹² Vgl. bezüglich persönlicher und funktioneller Immunität Dapo Akande, ILC-Sitzung 2024, Summary record (3679th meeting), A/CN.4/SR.3679, 12 f. Keine Berücksichtigung derartiger Sonderregeln hingegen bei Benjamin Meret, 'Some States' Position on Draft Article 7 Versus the Very Same States' Positions Concerning Atrocities in Ukraine: An Inconsistent Stand?', (6. August 2024), EJIL:Talk!, 6. August 2024.

⁹³ Vgl. ILC, Schlussfolgerungen (Fn. 37), 7(1) und ihre Kommentierung, Rn. 2.

⁹⁴ ILC, Schlussfolgerungen (Fn. 37), 7(2); ihre Kommentierung geht nicht auf den insofern maßgeblichen Zeitraum ein, vgl. Rn. 4 f. In IGH, *Fisheries (Vereinigtes Königreich v. Norwegen)*, Urteil v. 19. September 1951, ICJ Reports 1951, 116 (138) wurde die Praxis mehrerer Jahrzehnte berücksichtigt.

dischen⁹⁵ Gerichtsentscheidungen, die als Nachweise für das Bestehen einer völkergewohnheitsrechtlichen Immunitätsausnahme gewertet wurden. Denn die niederländische Regierung stellte 2023⁹⁶ und 2024⁹⁷ im Hinblick auf Entwurfsartikel 7 der ILC klar, dass die niederländische Rechtsprechung mit Bezug auf Ausnahmen von funktioneller Immunität noch nicht hinreichend geklärt ist und bezog zu der völkergewohnheitsrechtlichen Rechtsnatur der in Entwurfsartikel 7 enthaltenen Regelung eine uneindeutige Stellung.⁹⁸ Im Hinblick auf die vom BGH genannte Praxis Israels⁹⁹ ist anzumerken, dass die israelische Regierung in ihren Stellungnahmen im Rechtsausschuss der Generalversammlung der Vereinten Nationen (UN) mehrfach nachdrücklich ihre Rechtsansicht zum Ausdruck gebracht hat, dass nach Völkergewohnheitsrecht keine Ausnahmen von funktioneller Immunität bei völkerrechtlichen Verbrechen gelten, beispielsweise in den Jahren 2017¹⁰⁰ und 2022¹⁰¹ bis 2024¹⁰² mit Bezug auf Entwurfsartikel 7.

c) Abweichung von der IGH-Rechtsprechung bezüglich Abgrenzung von Immunität

Der BGH verneint pauschal die Relevanz zweier IGH-Entscheidungen, obwohl diese rechtliche Erwägungen enthalten, die auf seine Feststellungen zum Völkergewohnheitsrecht übertragbar sind. Zu dieser IGH-Rechtsprechung setzt sich der BGH in Widerspruch, indem er nicht hinreichend zwischen funktioneller Immunität und anderen sachnahen Rechtsfiguren differenziert.

(i) Abgrenzung zu individueller strafrechtlicher Verantwortlichkeit

So stützt der Senat seine Feststellung einer völkergewohnheitsrechtlichen Immunitätsausnahme ohne nähere Begründung auf Ausführungen zu Nachweisen und Hilfsmitteln, die sich auf die individuelle strafrechtliche Verant-

⁹⁵ BGH, *Immunitätsurteil* (Fn. 29), Rn. 28.

⁹⁶ Niederländische Stellungnahme, 75. ILC-Sitzungsperiode (2024), <https://legal.un.org/ilc/sessions/75/pdfs/english/iso_netherlands.pdf>, 2, zuletzt besucht 13 Februar 2025.

⁹⁷ Niederländische Stellungnahme im Sechsten Ausschuss 2024, Summary record (21st meeting), A/C.6/79/SR.21 (im Erscheinen), Rn. 91.

⁹⁸ Zu Letzterem vgl. Fn. 152.

⁹⁹ *Eichmann*-Entscheidung, BGH, *Immunitätsurteil* (Fn. 29), Rn. 27.

¹⁰⁰ Israelische Stellungnahme im Sechsten Ausschuss 2017, <https://www.un.org/en/ga/sixth/h/72/pdfs/statements/ilc/israel_2.pdf>, 4, zuletzt besucht 13 Februar 2025.

¹⁰¹ UN, GV Summary record (28th meeting, 1. November 2022), A/C.6/77/SR.28, 3, Rn. 12.

¹⁰² Israelische Stellungnahme, 75. ILC-Sitzungsperiode (2024), <https://legal.un.org/ilc/sessions/75/pdfs/english/iso_israel.pdf>, zuletzt besucht 13 Februar 2025, 3, Rn. 11; Israelische Stellungnahme im Sechsten Ausschuss 2024, SR.21 (Fn. 97), Rn. 61.

wortlichkeit, aber nicht auf funktionelle Immunität beziehen.¹⁰³ Der IGH hat aber in der Rechtssache *Arrest Warrant (D. R. Kongo/Belgien)* klargestellt, dass die materiell-rechtliche Frage der strafrechtlichen Verantwortlichkeit von der prozessualen Frage der Immunität zu trennen ist:

„Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.“¹⁰⁴

Das IGH-Urteil in *Jurisdictional Immunities* legt eine Übertragung dieses Verständnisses auf funktionelle Immunität nahe.¹⁰⁵ Jedenfalls die ILC hat sich dieser Lesart eindeutig angeschlossen und zudem betont, dass diese Position der herrschenden Ansicht in der Staatenpraxis und Literatur entspricht.¹⁰⁶

Hiervon weicht eine Ansicht in der Literatur ab, wonach funktionelle Immunität nicht (ausschließlich) prozessualer, sondern (auch) materiell-rechtlicher Natur ist.¹⁰⁷ Diese Ansicht argumentiert unter anderem, dass die Rechtsprechung in *Arrest Warrant* zu Immunität *ratione personae* nicht auf Immunität *ratione materiae* übertragbar sei.¹⁰⁸

Hiermit vergleichbar hat der BGH in dem Immunitätsurteil ursprünglich im Zusammenhang mit dem *Arrest Warrant*-Urteil pauschal angenommen, dass „Konstellationen, die Staatsoberhäupter, Regierungschefs oder Außenminister betreffen [...], keine maßgeblichen Rückschlüsse auf die hier zu prüfende funktionelle Immunität eines Militärangehörigen“ zuließen, „[s]elbst wenn dabei auch Aspekte der Immunität *ratione materiae* in Rede stehen“.¹⁰⁹ Dies bezog der BGH auf die funktionelle Immunität „nachrangiger“ Hoheitsträger.¹¹⁰ Ab dem Haftfortdauerbeschluss betonte der BGH aber, dass die Immunitätsausnahmen „unabhängig vom Status und Rang des Täters“ gelten würden,¹¹¹ ohne darauf einzugehen, ob er an seiner Aussage mit Bezug auf das *Arrest Warrant*-Urteil festhalte. Jedenfalls bleibt letztlich

¹⁰³ Z. B. BGH, Immunitätsurteil (Fn. 29), Rn. 27 [zitiert *Eichmann*-Urteil], Rn. 37.

¹⁰⁴ IGH, *Arrest Warrant of 11 April 2000 (D. R. Kongo v. Belgien)*, Urteil v. 14. Februar 2002, ICJ Reports 2002, 3, Rn. 60.

¹⁰⁵ IGH, *Jurisdictional Immunities* (Fn. 48), Rn. 58 und Rn. 100.

¹⁰⁶ ILC, Entwurfsartikel (Fn. 22), 199 f., Kommentierung zu Entwurfsartikel 1, Rn. 8.

¹⁰⁷ Vgl. z. B. Krefß, ‘Article 98’ (Fn. 36), Rn. 35; van Alebeek, *Immunity of States* (Fn. 36), Kapitel 3, 114; Ascensio und Bonafé (Fn. 36), 832 ff.; vgl. Akande und Shah (Fn. 36), 817.

¹⁰⁸ Vgl. z. B. Ascensio und Bonafé (Fn. 36), 833; vgl. auch van Alebeek, ‘Functional Immunity’ (Fn. 58), 519 (bezüglich Abgrenzung von Immunität und Gerichtsbarkeit).

¹⁰⁹ BGH, *Immunitätsurteil* (Fn. 29), Rn. 40.

¹¹⁰ Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 39 f.

¹¹¹ BGH, *Haftfortdauerbeschluss* (Fn. 7), Rn. 53; BGH, *Revisionsbeschluss* (Fn. 19), Rn. 32.

im Dunkeln, mit welcher Begründung der BGH einen Gleichlauf individueller strafrechtlicher Verantwortlichkeit und funktionaler Immunität annimmt.

Die prozessuale Natur von Immunität kommt insbesondere in der Möglichkeit des *wavier* von Immunität zum Ausdruck.¹¹² Die Abgrenzung zwischen Immunität als prozessuaalem Hindernis und materiell-rechtlichen Regeln fügt sich auch im weiteren Sinne in die Rechtsprechung des IGH ein, beispielsweise zur Trennung zwischen der Rechtsnatur einer Verpflichtung und dem Umfang des Vorliegens der Gerichtsbarkeit des IGH, die erneut bestätigt wurde.¹¹³ Schließlich beruht die Gegenansicht teilweise auf dem Konzept der ausschließlichen Zurechnung der vorgeworfenen Handlung zu dem jeweiligen Staat, anstelle des Staatsbediensteten.¹¹⁴ Mit der ILC¹¹⁵ und im Einklang mit der Rechtsprechung des IGH¹¹⁶ ist im Völkerrecht aber von doppelter Zurechnung auszugehen.

(ii) Abgrenzung zu *ius cogens*

Der Senat stützt seine Feststellung einer völkergewohnheitsrechtlichen Immunitätsausnahme zudem ohne nähere Begründung auf Gerichtsentscheidungen, in denen die Strafverfolgung gegen ausländische Staatsbedienstete mit der *ius cogens* Natur der ihnen vorgeworfenen Straftaten gerechtfertigt wurde.¹¹⁷ Bezüglich eines vergleichbaren Arguments hat der IGH jedoch in dem Verfahren *Jurisdictional Immunities* mit Bezug auf Staatenimmunität festgestellt:

„This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. [...] The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining

¹¹² Vgl. ILC, Entwurfsartikel (Fn. 22), Entwurfsartikel 12.

¹¹³ Zu Letzterem IGH, *Application of ICERD (Aserbaidshan v. Armenien)*, Preliminary Objections, Urteil v. 12. November 2024, Rn. 48.

¹¹⁴ Vgl. z. B. Ascensio und Bonafé (Fn. 36), 834; van Alebeek, *Immunity of States* (Fn. 36), Kapitel 3, z. B. 106 f.; vgl. Roger O’Keefe, ‘Book Review of Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*’, LJIL 23 (2010), 955-960 (957).

¹¹⁵ ILC, Entwurfsartikel (Fn. 22), Kommentierung von Entwurfsartikel 2, Rn. 24.

¹¹⁶ Vgl. ICJ, *Application of the Genocide Convention (Bosnien und Herzegowina v. Serbien und Montenegro)*, Urteil v. 26. Februar 2007, ICJ Reports 2007, 43 (116, Rn. 173) (‘constant feature of international law’).

¹¹⁷ Z. B. *Lozano*-Entscheidung (Fn. 84), Schweizer Bundesgericht, Arrêts du Tribunal Pénal Fédéral Suisse 2012, 97 (BGH, *Immunitätsurteil* (Fn. 29), Rn. 32); vgl. auch BGH, *Immunitätsurteil* (Fn. 29), Rn. 33.

whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.“¹¹⁸

Nach dem BGH seien die in dieser IGH-Entscheidung enthaltenen „grundlegenden Erwägungen dazu, dass weder der Vorwurf schwerer Verletzungen des humanitären Völkerrechts und des Rechts im bewaffneten Konflikt noch der Verstoß gegen zwingendes Völkerrecht (ius cogens) zum Verlust der Immunität führe [...] nicht ohne Weiteres auf Strafverfahren anwendbar“.¹¹⁹ Zur Begründung verweist der BGH lediglich auf die Klarstellung des IGH, dass die Frage der Immunität von Staatsbediensteten nicht Teil des Streitgegenstands in *Jurisdictional Immunities* war.¹²⁰ Dies steht aber nicht *per se* der Übertragbarkeit des obenstehenden Rechtsverständnisses des IGH auf die Frage der funktionellen Immunität entgegen, die vielmehr wegen der prozessualen Natur beider Institute und mangels eines Normenkonfliktes¹²¹ anzunehmen ist.¹²² Zumindest begründet der BGH nicht positiv, weshalb der Fall funktioneller Immunität abweichend zu behandeln sein soll.

(iii) Abgrenzung zu Gerichtsbarkeit

Schließlich stützt der Senat seine Feststellung einer völkergewohnheitsrechtlichen Immunitätsausnahme auch auf die Würdigung von Nachweisen, wonach lediglich die Gerichtsbarkeit bejaht wurde. Teils wurde dabei Immunität nicht von dem betreffenden Gericht geprüft,¹²³ teils macht der BGH hierzu keine Angaben.¹²⁴ Der IGH hat jedoch in seinem *Arrest Warrant*-

¹¹⁸ IGH, *Jurisdictional Immunities* (Fn. 48), Rn. 93, s. auch Rn. 95.

¹¹⁹ BGH, *Immunitätsurteil* (Fn. 29), Rn. 43.

¹²⁰ BGH, *Immunitätsurteil* (Fn. 29), Rn. 43, zitiert IGH, *Jurisdictional Immunities* (Fn. 48), Rn. 91: ‘The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.’

¹²¹ Vgl. z. B. Akande und Shah (Fn. 36), 834-837.

¹²² Zu Letzterem vgl. z. B. Hazel Fox und Philippa Webb, *The Law of State Immunity* (Oxford University Press 2013), 566 f. Die Übertragbarkeit im Ergebnis bejahend auch z. B. Krefß, ‘Article 98’ (Fn. 36), Rn. 30, m. w. N. [zitiert: Pierre d’Argent und Pauline Lesaffre, in: Tom Ruys, Nicolas Angelet und Luca Ferro (Hrsg.), *Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019), 614 ff.; Jia Bingbing, in: Morten Bergsmo and Ling Yang, *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher 2012), 75-96 (82 ff.); Akande und Shah (Fn. 36), 832 ff.

¹²³ BGH, *Immunitätsurteil* (Fn. 29), Rn. 30.

¹²⁴ Vgl. BGH, *Immunitätsurteil* (Fn. 29), 19, 24.

Urteil ausdrücklich klargestellt, dass es sich bei der Gerichtsbarkeit und der staatlichen Immunität um zwei unterschiedliche Fragen handelt, die voneinander zu trennen sind:

„It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.”¹²⁵

Auch hier ist keine Begründung für einen abweichenden Ansatz im Immunitätsurteil ersichtlich.

d) Defizite in der spezifischen Feststellung von *opinio iuris*

Der Senat hat darüber hinaus nicht hinreichend dargelegt, dass die zitierte gerichtliche Praxis im Bewusstsein eines Rechts oder einer Verpflichtung vorgenommen wurde. *Opinio iuris* ist ein eigenständiges konstitutives Element des Völkergewohnheitsrechts, das neben bloßer Praxis gesondert festzustellen ist.¹²⁶ Anders als der Senat meint¹²⁷ ist es daher durchaus erheblich, wenn ein Gericht bei seiner Entscheidung nicht explizit die Immunität ausländischer Staatsbediensteter erörtert hat.¹²⁸ Dies ist bei mehreren der vom Senat zitierten Entscheidungen der Fall.¹²⁹ Ein Nachweis von *opinio iuris* liegt hingegen vor, wenn in einem Urteil zum Ausdruck kommt, dass das Ergebnis (etwa eine Immunitätsausnahme) nach dem Völkergewohnheitsrecht vorgeschrieben oder zulässig ist.¹³⁰

¹²⁵ IGH, *Arrest Warrant* (Fn. 104), Rn. 59.

¹²⁶ Vgl. ILC, Schlussfolgerungen (Fn. 37), Schlussfolgerung 9, Schlussfolgerung 2 und deren Kommentierung, Rn. 4; ILC, Schlussfolgerung 3 Abs. 2 und dessen Kommentierung, Rn. 8.

¹²⁷ Vgl. z. B. BGH, *Immunitätsurteil* (Fn. 29), Rn. 27 ff.

¹²⁸ Vgl. Rensmann (Fn. 56), 534-536; Strewe (Fn. 56), 500-503; Wuerth (Fn. 62), 760 ('at best, only weak state practice and provide little basis for inferring *opinio juris*').

¹²⁹ BGH, *Immunitätsurteil* (Fn. 29), Rn. 27 ff.; z. B. Belgischer Kassationshof, *H. S. A. et al.*, V. S. A. et al., ILM 42 (2003), 596-506 (BGH, *Immunitätsurteil* (Fn. 29), Rn. 29).

¹³⁰ Vgl. Nolte (Fn. 38), 260: 'a judgment of a national court on the issue of immunity of a foreign State official may serve as practice, but may also express that the result is mandated or permitted under customary international law – and thus, from a different perspective, serve as evidence of acceptance as law as well'.

e) Unzureichende Analyse staatlicher Stellungnahmen zu den ILC-Arbeiten

Den staatlichen Stellungnahmen im Rechtsausschuss der UN-Generalversammlung mit Bezug auf die einschlägige Arbeit der Völkerrechtskommission kommt im Einklang mit der übertragbaren IGH-Rechtsprechung in *Jurisdictional Immunities* eine besondere Bedeutung zu.¹³¹ Die staatlichen Stellungnahmen sind auch für die Arbeit der ILC von fundamentaler Bedeutung.¹³²

Der 3. Strafsenat hat die Bedeutung dieser staatlichen Stellungnahmen in seinem Immunitätsurteil¹³³ zwar grundsätzlich erkannt, sie aber nicht hinreichend gewürdigt. So vermittelt der BGH ein unzureichendes Bild davon, dass Immunitätsausnahmen in den staatlichen Stellungnahmen zur ILC-Arbeit seit Langem umstritten sind.

(i) Die umstrittene Arbeit der ILC zu Ausnahmen von funktioneller Immunität

Seit die ILC im Jahr 2008 ihre vertiefte Bearbeitung des Projektes zu „Immunity of State officials from foreign criminal jurisdiction“ begann, war die Frage völkergewohnheitsrechtlicher Immunitätsausnahmen unter den ILC-Mitgliedern und Staaten strittig.¹³⁴ Einen vorläufigen Höhepunkt erreichte die Debatte im Jahr 2017 anlässlich der vorläufigen Annahme von Entwurfsartikel 7 in erster Lesung, der sich mit Ausnahmen funktioneller Immunität von Staatsbediensteten befasst.¹³⁵ Die Umstrittenheit von Entwurfsartikel 7 führte zu seiner kontroversen¹³⁶ vorläufigen Annahme durch

¹³¹ S. o. bei Fn. 48.

¹³² Vgl. ILC Statut (v. a. Art. 3, Kapitel 2). Der Erfolg der Entwurfsartikel (ggf. in Form eines Vertragsentwurfs) hängt von den Staaten ab. Vor diesem Hintergrund erscheint der Vorschlag in der Literatur wenig zielführend, die ILC solle sich in ihrer Arbeit zu Entwurfsartikel 7 weniger von den Positionen der Staaten leiten lassen (vgl. Joana de Andrade Pacheco, ‘Where Do States Stand on Official Immunity Under International Law?’ (19. April 2024), <<https://www.justsecurity.org/94830/where-do-states-stand-on-official-immunity-under-international-law/>>, zuletzt besucht 13. Februar 2025).

¹³³ Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 36 f.

¹³⁴ Michael Wood, ‘Lessons from the ILC’s Work on “Immunity of State Officials”: Meland Schill Lecture, 21 November 2017’, Max Planck UNYB 22 (2019), 34-69 (52).

¹³⁵ Entwurfsartikel 7 Abs. 1 lautet: ‘Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance’.

¹³⁶ Vgl. Isabel Walther, The Current Work of the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction – Comments on the Procedural Safeguards Provisionally Adopted in 2021 (April 13, 2022), KFG Research Group ‘The International Rule of Law – Rise or Decline?’, Working Paper Series No. 54, 7 ff. verfügbar unter SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4052724.

die außergewöhnliche Methode der Abstimmung anstelle des etablierten Konsensprinzips.¹³⁷ Bedingung hierfür war außerdem die Aufnahme verfahrensrechtlicher Sicherungsmaßnahmen.¹³⁸ Diese Sicherungsmaßnahmen sollen als Schutz gegen Missbrauch und Politisierung von Strafverfahren gegen ausländische Staatsbedienstete, insbesondere bei Anwendung von Ausnahmen funktioneller Immunität nach Entwurfsartikel 7 dienen.¹³⁹

Bei der Annahme der Entwurfsartikel im Jahr 2022 in erster Lesung blieb diese Vorschrift unverändert.¹⁴⁰ Auch wenn keine erneute Abstimmung erfolgte, hielten die Kontroversen um Entwurfsartikel 7 an.¹⁴¹ Die zweite Lesung dieser Vorschrift ist für die Sitzungsperiode der ILC im Jahr 2025 vorgesehen.¹⁴² Ob Entwurfsartikel 7 eine Kodifizierung von Völker(gewohnheits)recht oder einen Entwurf für die progressive Weiterentwicklung des Völkerrechts darstellen soll, hat die ILC bislang offengelassen.¹⁴³ Für Letzteres spricht die Begründung des Vorschlags von Entwurfsartikel 7 in der Kommentierung mit einem „Trend“¹⁴⁴ in der Staatenpraxis.

In den Stellungnahmen der Staaten im Rechtsausschuss der Generalversammlung kommt bis heute zum Ausdruck, dass die in dieser Vorschrift vorgesehenen Ausnahmen von funktioneller Immunität in der internationalen Staatengemeinschaft hoch umstritten sind. Eine Auswertung in der Literatur der schriftlichen Stellungnahmen zu den ILC-Entwurfsartikeln in der Fassung der ersten Lesung kam zu dem Ergebnis, dass zehn Staaten die Regelung in Entwurfsartikel 7 zu Immunitätsausnahmen mangels ausreichender Staatenpraxis und *opinio iuris* nicht als Ausdruck des geltenden Völkergewohnheitsrechts eingestuft hätten, während elf Staaten dies zumindest teilweise¹⁴⁵ bejaht hätten.¹⁴⁶ Richtigerweise sind aus der zweiten Gruppe drei Stellungnahmen auszunehmen, die nicht ausdrücklich auf Völkergewohnheitsrecht eingehen.¹⁴⁷ Auffallend ist, dass die zweite Gruppe ausschließlich

¹³⁷ Wood, *Lessons* (Fn. 134), 54 f.

¹³⁸ Wood, *Lessons* (Fn. 134), 54 f.

¹³⁹ Vgl. Walther (Fn. 136), 9. Vgl. ILC, Entwurfsartikel (Fn. 22), Entwurfsartikel 8-18, S. 189-194, Rn. 68.

¹⁴⁰ Vgl. ILC, Entwurfsartikel (Fn. 22), S. 189-194, Rn. 68.

¹⁴¹ Michael Wood, „The ILC’s First Reading Draft Articles on “Immunity of State Officials from Foreign Criminal Jurisdiction” (2022)“, *Max Planck UNYB* 26 (2023), 717-746 (729-734).

¹⁴² Vgl. First Report, Special Rapporteur Grossmann, A/CN.4/775, Rn. 12. Die zweite Lesung bezüglich Entwurfsartikel 1, 3, 4 und 5 [6] erfolgte 2024, vgl. ILC, Summary Record (3698th Meeting), A/CN.4/SR.3698, 9.

¹⁴³ Vgl. ILC, Entwurfsartikel (Fn. 22), S. 197, Rn. 12.

¹⁴⁴ ILC, Entwurfsartikel (Fn. 22), S. 197, Rn. 9.

¹⁴⁵ Zumind. bzgl. Genozid, Verbrechen gegen die Menschlichkeit und Kriegsverbrechen.

¹⁴⁶ Pacheco (Fn. 132).

¹⁴⁷ Dies betrifft die Stellungnahmen von Estland, der Tschechischen Republik und Polen, in denen andere Argumente für die Unterstützung der Regelung in Entwurfsartikel 7 maßgebend sind.

aus europäischen Ländern (einschließlich der Ukraine) besteht,¹⁴⁸ während in der ersten Gruppe nur ein europäischer Staat vertreten ist.¹⁴⁹

Aus der Debatte im Sechsten Ausschuss im Jahr 2024¹⁵⁰ ergab sich ein noch deutlicheres Bild. 13 Staaten¹⁵¹ zufolge reflektiere Entwurfsartikel 7 nicht das geltende Völkergewohnheitsrecht, einschließlich der nunmehr erneut geäußerten Position Chinas. Dagegen haben zwei Stellungnahmen mehr oder weniger deutlich zum Ausdruck gebracht, dass nach Völkergewohnheitsrecht keine funktionelle Immunität bei bestimmten völkerrechtlichen Verbrechen gelte.¹⁵²

¹⁴⁸ Pacheco (Fn. 132) nennt Österreich, die Tschechische Republik, Irland, Estland, Liechtenstein, Litauen, Luxemburg, Polen, Rumänien, Spanien, Ukraine.

¹⁴⁹ Pacheco (Fn. 132) nennt Australien, Brasilien, Frankreich, Iran, Israel, Japan, Singapur, Russland, Vereinigte Arabische Emirate, Vereinigte Staaten.

¹⁵⁰ Die bisher vorliegenden, zur 76. Sitzungsperiode der ILC (2025) eingereichten Stellungnahmen (von Deutschland, Israel und Kolumbien [Stand: 19. März 2025]) wurden ebenfalls berücksichtigt.

¹⁵¹ Algerien (Summary record (20th meeting), UN Dok. A/C.6/79/SR.20 (im Erscheinen), Rn. 100), Australien (SR.21 (Fn. 97), Rn. 109), Brasilien (Summary record (20th meeting), UN Dok. A/C.6/79/SR.20 (im Erscheinen), Rn. 69), Belarus (Summary record (20th meeting), UN Dok. A/C.6/79/SR.20 (im Erscheinen), Rn. 115), China (SR.21, Fn. 97, Rn. 9), Eritrea (Summary record (22nd meeting), UN Dok. A/C.6/79/SR.22 (im Erscheinen), Rn. 53), Indien (Summary record (24th meeting), UN Dok. A/C.6/79/SR.24 (im Erscheinen), Rn. 5), Iran (Summary record (23rd meeting), UN Dok. A/C.6/79/SR.23 (im Erscheinen), Rn. 17), Israel (SR.21, (Fn. 97), Rn. 61), Japan (Summary record (22nd meeting), UN Dok. A/C.6/79/SR.22 (im Erscheinen), Rn. 12), Kamerun (Summary record (22nd meeting), UN Dok. A/C.6/79/SR.22, (im Erscheinen), Rn. 111), Russland (Summary record (24th meeting), UN Dok. A/C.6/79/SR.24 (im Erscheinen), Rn. 27), USA (Summary record (23rd meeting), UN Dok. A/C.6/79/SR.23 (im Erscheinen), Rn. 3).

Zwei weitere Stellungnahmen können so verstanden werden, dass sie von dem Nichtbestehen von Immunitätsausnahmen nach geltendem Völkerrecht ausgehen: Ägypten, Stellungnahme, 3 f., <https://www.un.org/en/ga/sixth/79/pdfs/statements/ilc/22mtg_egypt_1.pdf>, zuletzt besucht 13. Februar 2025; vgl. auch Summary record (22nd meeting), UN Dok. A/C.6/79/SR.22 (im Erscheinen), Rn. 79-80; Marokko, Summary record (23rd meeting), UN Dok. A/C.6/79/SR.23 (im Erscheinen), Rn. 25-28.

¹⁵² Estonia (SR.24 (Fn. 151), Rn. 69: 'In principle, her delegation believed that that provision [draft article 6] reflected customary international law. However, it also believed that not every act performed in an official capacity by a State official was covered by immunity *ratione materiae*. Notably, such immunity did not apply to the most serious international crimes of concern to the international community as a whole.');

Palästina (SR.22 (Fn. 151), Rn. 65: 'As a matter of customary international law, State officials did not enjoy functional immunity for international crimes under international law.').

Einem weiteren Staat zufolge sei völkerrechtliche Immunität nicht automatisch anwendbar: Niederländische Stellungnahme im Sechsten Ausschuss (Fn. 97) Rn. 91: 'under international law as it stands, when it comes to the exercise of foreign criminal jurisdiction, functional immunity does not automatically apply to international crimes'; die niederländische schriftliche Stellungnahme zur 75. ILC-Sitzungsperiode (Fn. 96) enthielt den zusätzlichen Satz: 'There is a trend towards recognition of exceptions to immunity *ratione materiae* at international and national levels.' (auf diese Stellungnahme wurde in der niederländischen Stellungnahme im Sechsten Ausschuss 2024 hingewiesen).

Während zwei Staaten¹⁵³ die sich verändernde Entwicklung des Völkerrechts zu Immunitätsausnahmen betonten, befürworteten sechs weitere Staaten eine Hinzufügung des Verbrechens der Aggression zu Entwurfsartikel 7 ohne sich zu dem völkergewohnheitsrechtlichen Gehalt von Letzterem zu äußern.¹⁵⁴

(ii) Grundsätze der Auswertung staatlicher Stellungnahmen zur ILC-Arbeit

Bei der Auswertung staatlicher Stellungnahmen im Rechtsausschuss der Generalversammlung im Rahmen der Feststellung von Völkergewohnheitsrecht kommt es maßgeblich darauf an, inwiefern eine Stellungnahme einen Ausdruck von Staatenpraxis und *opinio iuris* darstellt. Außerhalb dessen ist auch ein etwaiges (rechtspolitisches) „eindeutiges Bekenntnis“ zu einer Einschränkung der Immunität¹⁵⁵ bei der Feststellung von Völkergewohnheitsrecht unerheblich. Diese Maßstäbe sind auch bezüglich der Äußerung des BGH im Revisionsbeschluss, wonach sich „die ganz überwiegende Mehrzahl der europäischen und weitere Staaten deutlich entschiedener zu dem Immunitätsausschluss bekannt haben“,¹⁵⁶ zu beachten.

Hervorzuheben ist, dass eine isolierte Betrachtung gewisser staatlicher Stellungnahmen zu den Arbeiten der ILC, etwa beschränkt auf ein bestimmtes Jahr, ein verfälschtes Bild ergeben kann. Denn aus verschiedenen Gründen¹⁵⁷ geben Staaten nicht jedes Jahr eine Stellungnahme im Rechtsausschuss zu jedem Projekt auf der Agenda der ILC ab. Beispielsweise reichten 39 Staaten zur 75. Sitzungsperiode der ILC (2024) eine schriftliche Stellungnahme zu den Entwurfsartikeln in der Fassung der ersten Lesung ein.¹⁵⁸ Es

¹⁵³ Slowakei: ‘the current international law does favour the tendency that immunities from foreign criminal jurisdiction are sensible to the most serious crimes under international law’, s. S. 3 der abgegebenen Stellungnahme, <https://www.un.org/en/ga/sixth/79/pdfs/statements/ilc/20mtg_slovakia_1.pdf>, zuletzt besucht 13. Februar 2025 (die Zusammenfassung der UN gibt die Aussage etwas verändert wieder, vgl. SR.20 (Fn. 151), Rn. 142); Sri Lanka (Summary record (25th meeting), UN Dok. A/C.6/79/SR.25 (im Erscheinen), Rn. 46: ‘recognized the evolving nature of international law in relation to draft article 7’).

¹⁵⁴ Kroatien (SR.21 (Fn. 97), Rn. 116), Liechtenstein (SR.22 (Fn. 151), Rn. 95), Mexiko (SR.20 (Fn. 151), Rn. 121), Portugal (SR.21 (Fn. 97), Rn. 84), Tschechische Republik (SR.21 (Fn. 97), Rn. 103), Österreich (SR.20 (Fn. 151), Rn. 95).

¹⁵⁵ Vgl. Ambos, ‘Reform des Völkerstrafrechts’ (Fn. 10), 33, Fn. 48; Kai Ambos, ‘Zum Regierungsentwurf über eine Reform des Völkerstrafrechts’, Völkerrechtsblog, 5. Januar 2024, doi: 10.59704/9203f7c696bf2dc2.

¹⁵⁶ BGH, *Revisionsbeschluss* (Fn. 19), Rn. 33 [zitiert: ‘vgl. Ambos, ‘Reform des Völkerstrafrechts’ (Fn. 10), 30, 33; Claus Kreß, FAZ vom 6. November 2023, 8; Svenja Raube, ‘Das Gesetz zur Fortentwicklung des Völkerstrafrechts’, Kriminalpolitische Zeitschrift 2024, 216-221 (216).

¹⁵⁷ Beispielsweise Kapazität oder Warten auf ein späteres Arbeitsstadium. Vgl. auch Danae Azaria, ‘Codification by Interpretation’: The International Law Commission as an Interpreter of International Law”, *EJIL* 31 (2020), 171-200 (191).

¹⁵⁸ Link zu den Stellungnahmen: <https://legal.un.org/ilc/guide/4_2.shtml#govcoms>, zuletzt besucht 13. Februar 2025.

haben sich allerdings in der Vergangenheit deutlich mehr Staaten zu Entwurfsartikel 7 im Sechsten Ausschuss geäußert. So gaben beispielsweise 20 Staaten im Jahr 2017 eine relevante Stellungnahme ab, die zur 75. Sitzungsperiode keine schriftlichen Stellungnahmen eingereicht hatten. Von diesen wurde mehr oder weniger deutlich die Position geäußert, dass die Regelung in Entwurfsartikel 7 das bestehende Völkergewohnheitsrecht widerspiegeln (drei Staaten),¹⁵⁹ dass dies nicht der Fall sei (fünf Staaten),¹⁶⁰ und neun Staaten¹⁶¹ äußerten eine unklare oder unsichere Haltung hinsichtlich des rechtlichen Gehalts dieser Vorschrift.

(iii) Unzureichende Würdigung im Immunitätsurteil

Der BGH hat die staatlichen Stellungnahmen nicht hinreichend gewürdigt.¹⁶² So bezog sich der Senat lediglich auf einen Teil der Analyse der staatlichen Stellungnahmen im Sechsten Ausschuss im Jahr 2017 durch die ehemalige ILC-Sonderberichterstellerin Escobar Hernández.¹⁶³ Im Grundsatz zutreffend folgert der Senat, dass „die Mehrheit der sich äussernden Staaten eine funktionelle Immunität selbst bei Kriegsverbrechen für gegeben erachtet“.¹⁶⁴ Daher überrascht die anschließende pauschale Feststellung, dass „dies bei näherer Betrachtung nicht allgemein der Fall“ sei.¹⁶⁵ Zur Begründung wird lediglich „beispielhaft“ die Stellungnahme von Deutschland im Sechsten Ausschuss im Jahr 2017 interpretiert. Die Feststellung einer völkergewohnheitsrechtlichen Regel durch den Senat erforderte aber eine möglichst umfassende Analyse der im Sechsten Ausschuss abgegebenen Stellungnahmen. Dem werden die Feststellungen des Senats in zweierlei Hinsicht nicht gerecht.

¹⁵⁹ Italien, Slowakei, Vietnam.

¹⁶⁰ Belarus, China, Indonesien, Sri Lanka, Thailand.

¹⁶¹ Chile, Cuba, El Salvador, Griechenland, Indien, Peru, Slowenien, Südafrika, Ungarn.

¹⁶² Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 36 f.

¹⁶³ BGH, *Immunitätsurteil* (Fn. 29), Rn. 36; eingehendere Analyse der Stellungnahmen: Janina Barkholdt, Julian Kulaga, ‘Analytical Presentation of the Comments and Observations by States on Draft Article 7, paragraph 1, of the ILC Draft Articles on Immunity of State Officials from foreign criminal jurisdiction, United Nations General Assembly, Sixth Committee, 2017’ (May 16, 2018) KFG Research Group ‘The International Rule of Law – Rise or Decline?’ Working Paper Series No. 14, verfügbar unter SSRN: Barkholdt, Janina and Kulaga, Julian, Analytical Presentation of the Comments and Observations by States on Draft Article 7, Paragraph 1, of the ILC Draft Articles on Immunity of State Officials From Foreign Criminal Jurisdiction, United Nations General Assembly, Sixth Committee, 2017 (May 2018). KFG Working Paper Series No. 14, Berlin Potsdam Research Group ‘The International Rule of Law – Rise or Decline?’, verfügbar unter: <<https://ssrn.com/abstract=3172104>> oder <<http://dx.doi.org/10.2139/ssrn.3172104>>.

¹⁶⁴ BGH, *Immunitätsurteil* (Fn. 29), Rn. 37.

¹⁶⁵ So auch Stewre (Fn. 56), 505.

Erstens ist die Analyse des Senats beschränkt auf die Stellungnahmen im Jahr 2017 und nimmt keine Gesamtbetrachtung der Stellungnahmen im Laufe der Zeit, insbesondere in den letzten Jahren, vor. Das isolierte Herausgreifen einzelner Stellungnahmen kann das Gesamtbild der Stellungnahmen im Laufe der Jahre verfälschen. Die Bedeutung einer solchen Gesamtbetrachtung der Stellungnahmen eines Staates wird beispielsweise mit Bezug auf die Position der deutschen Bundesregierung durch den Senat illustriert. Deren selektive Darstellung durch den BGH wurde zu Recht kritisiert.¹⁶⁶ So steht auch die entsprechende Schlussfolgerung des Senats¹⁶⁷ im Kontrast zur schriftlichen Stellungnahme der deutschen Bundesregierung an die Völkerrechtskommission aus dem November 2023. Diese stellte im Hinblick auf Entwurfsartikel 7 klar:

„Germany is therefore of the view that one might speak of a norm of customary international law ‚in status nascendi‘. Germany discerns a trend towards the acceptance of exceptions from immunity *ratione materiae* when it comes to the most serious crimes under international law.“¹⁶⁸

Von einem derartigen „Trend“ auszugehen bedeutet gerade nicht die Annahme des völkergewohnheitsrechtlichen Status der entsprechenden Regelung.¹⁶⁹ Dieses Verständnis der Stellungnahme erkannte der BGH denn auch in seinem Revisionsbeschluss dem Grunde nach an,¹⁷⁰ nachdem er im Haftfortdauerbeschluss nicht auf sie eingegangen war.

¹⁶⁶ Strewe (Fn. 56), 504 f. U. a. ist die Einordnung der Zitate des Bundespräsidenten und des Außenministers, die nicht ausdrücklich auf Immunität eingehen, als Nachweise von einer weit verstandenen *opinio iuris* nicht überzeugend. Hierfür müsste hinreichend bestimmt zum Ausdruck kommen, dass ein Staat eine Praxis aus einem Gefühl des Rechts oder der Verpflichtung heraus durchführt. Selbst wenn man aus den Reden die implizite Aussage herauslesen wollte, dass Deutschland nach dem Völkerrecht zur Ausübung des Weltrechtsprinzips in den genannten Strafverfahren berechtigt war, beträfe das nicht die von der Frage der Gerichtsbarkeit zu trennende Frage (s. o. III. 2. c) (iii)) der Immunität. Einen spezielleren Nachweis hätte beispielsweise die Stellungnahme der Bundesregierung zum ILC-Bericht im Jahr 2019 dargestellt (<<https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/germany2.pdf>>, z. B. S. 4, zuletzt besucht 13. Februar 2025).

¹⁶⁷ BGH, *Immunitätsurteil* (Fn. 29), Rn. 37 (‘Angesichts solcher Vorbehalte kann aus der Ablehnung des Entwurfs nicht der Schluss gezogen werden, aus Sicht Deutschlands sei keine der in ihm enthaltenen Regelungen völkergewohnheitsrechtlich anerkannt, zumal bereits die im Vorjahr abgegebene Stellungnahme Ausnahmen von der Immunität in festumrissenen Fällen befürwortete.’).

¹⁶⁸ Deutsche Stellungnahme, 11/2023, <https://legal.un.org/ilc/sessions/75/pdfs/english/iso_germany.pdf>, zuletzt besucht 13. Februar 2025.

¹⁶⁹ Das Den Haager Gericht *Rechtbank* (29. Januar 2020, ECLI:NL:RBDHA:2020:667 Rn. 4.43) lehnte aus diesem Grund die völkergewohnheitsrechtliche Natur der Regelung in ILC-Entwurfsartikel 7(1) zu Immunitätsausnahmen ab.

¹⁷⁰ BGH, *Revisionsbeschluss* (Fn. 19), Rn. 33 (‘Der Text bringt zum Ausdruck, eine solche Immunitätsbegrenzung sei allenfalls im Entstehen begriffenes Völkergewohnheitsrecht (‘customary international law “in statu [...] nascendi”’) beziehungsweise es sei ein auf deren Akzeptanz hindeutender Trend erkennbar’); vgl. u. IV. 2. b).

Zweitens ist die Analyse einzelner staatlicher Stellungnahmen durch den Senat beschränkt auf die Position der deutschen Bundesregierung, während die Stellungnahmen anderer Staaten nicht genauer untersucht werden. In diesem Zusammenhang ist zu betonen, dass die Position der deutschen Bundesregierung lediglich im Hinblick auf die Frage der verfassungsrechtlichen Vorlagepflicht eine etwaige besondere Bedeutung erlangen kann, nicht jedoch bei der Feststellung von Völkergewohnheitsrecht im Vergleich zu den Positionen der Regierungen anderer Staaten.¹⁷¹ Eine insofern missverständliche Aussage des Senatspräsidenten in der mündlichen Begründung des Immunitätsurteils¹⁷² wurde nicht in die schriftliche Urteilsbegründung übernommen.

f) Unzureichende Auseinandersetzung mit den ILC-Arbeiten

Ferner sind die Auseinandersetzungen mit den einschlägigen Arbeiten der ILC im Immunitäts-Urteil unzureichend. Zum einen hat der Senat deren möglichen Wirkungen irreführend dargestellt. Arbeitsergebnisse der ILC können als Hilfsmittel zur Feststellung von völkerrechtlichen Rechtsnormen dienen. Dabei kann der Feststellung einer völkergewohnheitsrechtlichen Regel durch die ILC im Einklang mit der Rechtsprechung des IGH und des BVerfG ein besonderes Gewicht zukommen.¹⁷³ Die ILC-Arbeiten als solche können aber nicht eine Regel des Völkergewohnheitsrechts ändern, wie der Senat suggeriert.¹⁷⁴ Vielmehr bedarf es dafür einer allgemeinen, als Recht anerkannten Übung im Sinne von Art. 38 Abs. 1 lit. b) des IGH-Statuts.

Aus diesem Grund ist auch die Feststellung des Senats irreführend, wonach sich aus den ILC-Arbeiten „gegenwärtig zumindest eine funktionelle Immunität auch bei Kriegsverbrechen gewährende völkerrechtliche Regel nicht herleiten“ ließe.¹⁷⁵ Denn im Rahmen der Feststellung von Völkergewohnheitsrecht ist nicht maßgeblich, dass eine Vorschrift durch die ILC angenommen wurde, sondern inwieweit eine derartige Vorschrift geltendes

¹⁷¹ Vgl. z. B. *Rechtbank* (Fn. 169), Rn. 4.48.

¹⁷² Der Senats-Präsident führte bezüglich der Feststellung von Völkergewohnheitsrecht anhand staatlicher Stellungnahmen zur ILC-Arbeit aus: ‘Von besonderer Bedeutung für die deutsche Justiz ist dabei naturgemäß die in diesem Zusammenhang zu Tage getretene Haltung Deutschlands, die an dem einen oder anderen Punkt vertiefter Betrachtung bedarf.’ <<https://www.youtube.com/watch?v=cjp38aSF104>>, (Min. 24:29), zuletzt besucht 13. Februar 2025.

¹⁷³ ILC, Schlussfolgerungen (Fn. 37), 142, Fn. 739 m. w. N.; vgl. BVerfGE 117, 141, 161.

¹⁷⁴ Zu Letzterem BGH, *Immunitätsurteil* (Fn. 29), Rn. 35 (die ILC-Arbeiten ‘ändern daher nicht die durch einheitliche Übung und Überzeugung belegte allgemeine Regel des Völkergewohnheitsrechts’).

¹⁷⁵ Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 35.

Völkergewohnheitsrecht reflektiert. Aus Entwurfsartikel 5,¹⁷⁶ der inhaltlich bei Erlass des Urteils bereits vorübergehend beschlossen war,¹⁷⁷ ergibt sich die Grundregel, dass Staatsbedienstete in Bezug auf Handeln in offizieller Funktion funktionelle Immunität von strafrechtlicher Verfolgung im Ausland genießen.¹⁷⁸ Dass diese Grundregel weitgehend unumstritten ist belegen die Stellungnahmen von Staaten, die zur Sitzungsperiode der ILC im Jahr 2024 in Bezug auf den Text der ersten Lesung abgegeben wurden. Von 16 in Bezug auf Entwurfsartikel 5 eingegangenen Stellungnahmen äußerte kein Staat Zweifel an dem Regelungsgehalt der Vorschrift und mehrere Staaten bestätigten seinen völkergewohnheitsrechtlichen Charakter.¹⁷⁹ Aus der Debatte im Sechsten Ausschuss im Jahr 2024 ergab sich ein vergleichbares Bild.¹⁸⁰ Hingegen ist der völkergewohnheitsrechtliche Charakter der in Entwurfsartikel 7 vorgesehenen Ausnahmen funktioneller Immunität innerhalb der internationalen Staatengemeinschaft weiterhin hoch umstritten.¹⁸¹

Im Ergebnis stützt der Senat die Annahme einer völkergewohnheitsrechtlichen Regel in seinem Immunitätsurteil auf keine hinreichenden Feststellungen von Staatenpraxis und *opinio iuris* und genügt somit nicht den völkerrechtlichen Anforderungen an die Methode zur Feststellung von Völkergewohnheitsrecht.

3. Methodische Defizite im Beschluss vom 21. Februar 2024

Die Maßstäbe zur Feststellung von Völkergewohnheitsrecht sind auch an den Haftfortdauerbeschluss anzulegen, da er eine gegenüber dem Immunitätsurteil eigenständige Feststellung einer solchen Regel enthält. So bezog sich die ausdrückliche Feststellung einer völkergewohnheitsrechtlichen Immunitätsausnahme im Immunitätsurteil nur auf bestimmte Kriegsverbrechen,

¹⁷⁶ i. S. d. Entwurfsartikels 5 [6] in der vorläufigen Fassung der zweiten Lesung, vgl. o. (Fn. 142) und ILC, A/CN.4/L.1001 (23.7.2024). Dieser stellt eine inhaltlich im wesentlichen unveränderte Zusammenführung der Entwurfsartikel 5 und 6 in der Fassung der ersten Lesung dar, vgl. ILC, Report of the Chairperson of the Drafting Committee, 30. Juli 2024, 12-15 <https://legal.un.org/docs/?path=../ilc/documentation/english/statements/2024_dc_chair_state_ment_iso.pdf&lang=E>, zuletzt besucht 13. Februar 2025.

¹⁷⁷ Die vorübergehende Annahme der Entwurfsartikel 5 und 6 a. F. durch die ILC erfolgte in den Jahren 2014 und 2016, vgl. ILC Report 2014, A/69/10, Kapitel IX, Rn. 129 und ILC Report 2016, A/71/10, Kapitel XI, Rn. 194.

¹⁷⁸ Vgl. ILC, A/CN.4/L.1001 (23.7.2024).

¹⁷⁹ Vgl. ILC, First Report (Fn. 142), Rn. 129.

¹⁸⁰ Drei Staaten bestätigten den völkergewohnheitsrechtlichen Charakter von Entwurfsartikel 5 n. F., während kein Staat die gegenteilige Auffassung vertrat: Brasilien (SR.20 (Fn. 151), Rn. 68), Slowakei (SR.20 (Fn. 151), Rn. 138), Tschechische Republik (SR.21 (Fn. 97), Rn. 102).

¹⁸¹ S. o. III. 2. e) (i).

während sie im Haftfortdauerbeschluss auf alle „völkerrechtlichen Verbrechen“ ausgeweitet wurde.¹⁸²

Zu einem anderen Ergebnis könnte man gelangen, wenn man die Übertragbarkeit der völkergewohnheitsrechtlichen Feststellung im Immunitätsurteil auf weitere völkerrechtliche Verbrechen bejahte,¹⁸³ da sich die zur Begründung dieser Feststellung herangezogenen Nachweise teilweise auf weitere völkerrechtliche Verbrechen beziehen. Letzteres ist für sich genommen im Hinblick auf die Methode zur Feststellung von Völkergewohnheitsrecht problematisch.¹⁸⁴ Zudem sprechen für die Begrenzung der Feststellung einer völkergewohnheitsrechtlichen Immunitätsausnahme im Urteil vom 28. Januar 2021 dessen Wortlaut,¹⁸⁵ der begrenzte Tatvorwurf¹⁸⁶ und die im Immunitätsurteil ausgeübte gerichtliche Zurückhaltung.¹⁸⁷ Dieses Verständnis wird auch durch den Wortlaut der drei nachfolgenden BGH-Entscheidungen unterstützt, deren jeweilige Zitate des Immunitätsurteils ausdrücklich auf dessen auf Kriegsverbrechen eingeschränkten Anwendungsbereich hinweisen.¹⁸⁸

Auf dieser Grundlage wurde der BGH im Haftfortdauerbeschluss den Maßstäben zur Feststellung von Völkergewohnheitsrecht nicht gerecht. Denn der 3. Strafsenat hat es versäumt, hinreichende Nachweise für die von ihm festgestellte völkergewohnheitsrechtliche Regel zu erbringen, wonach eine Ausnahme von funktioneller Immunität ausländischer Staatsbediensteter bei völkerrechtlichen Verbrechen insgesamt besteht. Vielmehr beschränken sich die genannten Quellen (neben dem Verweis auf das Immunitätsurteil) auf drei Gerichtsentscheidungen, darunter zwei Entscheidungen internationaler Straftribunale, sowie fast ausschließlich deutschsprachige Literaturbeiträge.¹⁸⁹

¹⁸² S. o. II. 1.; II. 2.

¹⁸³ Jeßberger und Epik (Fn. 13); Claus Krefß, 'Kriegsverbrechen durch Hoheitsträger – Grenzen völkerrechtlicher Immunität', NJW 74 (2021), 1326-1335 (1335); vgl. Florian Schmid, 'Untersuchungshaft: Dringender Tatverdacht auf Völkerstraftaten in Damaskus/Syrien', jurisPR-StrafR, 10/2024 Anm. 1, 27. Mai 2024.

¹⁸⁴ S. o. III. 2. b).

¹⁸⁵ Vgl. z. B. BGH, *Immunitätsurteil* (Fn. 29), Rn. 11, 13, 16, 50.

¹⁸⁶ Jeßberger und Epik (Fn. 13); vgl. Kai Ambos, 'Verfahrenshindernis funktioneller Immunität bei Kriegsverbrechen; Folter', StV 41 (2021), 549-558 (557 f.).

¹⁸⁷ Zu Letzterem vgl. Claus Krefß, 'Germany and International Criminal Law: Some Additional Reflections in Light of Another Set of Current Developments', EJIL:Talk!, 12. März 2024; Krefß, 'On Functional Immunity' (Fn. 63).

¹⁸⁸ BGH, *Haftfortdauerbeschluss* (Fn. 7), Rn. 53 ('in Bezug auf Kriegsverbrechen gegen Personen durch nachrangige Hoheitsträger'); BGH, *Revisionsbeschluss* (Fn. 19), Rn. 32 ('für Kriegsverbrechen'); BGH, *Haftbeschwerdebeschluss* (Fn. 26), Rn. 23 ('zu Kriegsverbrechen').

¹⁸⁹ BGH, *Haftfortdauerbeschluss* (Fn. 7), Rn. 53.

a) Defizitäre Feststellung von allgemeiner Praxis und *opinio iuris*

Die knappen Ausführungen des Senats zum Völkergewohnheitsrecht stellen keine hinreichende Feststellung von allgemeiner Praxis und *opinio iuris* dar. Der Senat unterscheidet bei seiner Feststellung schon nicht zwischen den beiden konstitutiven Bestandteilen des Völkergewohnheitsrechts. Aus den vom IGH als besonders wichtig eingestuften Formen der Nachweise¹⁹⁰ hat der Senat lediglich das *Eichmann*-Urteil des israelischen Supreme Court als Nachweis genannt.

Es ist jedoch fraglich, inwieweit die sowohl im Immunitätsurteil¹⁹¹ als auch im Haftfortdauerbeschluss zitierte Passage¹⁹² aus dem *Eichmann*-Urteil als Nachweis oder Hilfsmittel zur Feststellung der völkergewohnheitsrechtlichen Regel dienen kann. Der Senat wies in seinem Immunitätsurteil zu Recht darauf hin, dass der Oberste Gerichtshof von Israel nicht explizit die Immunität ausländischer Hoheitsträger, sondern die „act of state doctrine“ erörtert hat.¹⁹³ Aus diesem Grund wird diese Entscheidung nach einer Literaturansicht nicht als Nachweis von Praxis und *opinio iuris* bezüglich funktioneller Immunität angesehen.¹⁹⁴ Es wurde in der Literatur aber auch darauf hingewiesen, dass der Begriff „act of state doctrine“ in der Praxis mit unterschiedlichen Bedeutungen verwandt wurde.¹⁹⁵ Das Bundesverfassungsgericht unterschied zwischen den beiden Rechtsfiguren der funktionellen Immunität und der „act of state doctrine“ in seiner Rechtsprechung, die im Immunitätsurteil des BGH zitiert wurde.¹⁹⁶ So lehnte das Bundesverfassungsgericht eine funktionelle Immunität der ehemaligen Inhaber hoher Regierungsämter und Mitglieder eines Verfassungsorgans der DDR ab, da „eine Immunität die Existenz des Staates, dem der Betreffende angehört, nicht überdauert“. Zu der ebenfalls, in Anlehnung an anglo-amerikanische Rechtsvorstellungen gerügten „act of state doctrine“ stellte das Bundesverfassungsgericht dabei fest, dass sie „nicht als allgemeine Regel des Völkerrechts i. S. des Art. 25 GG angesehen werden“ kann, „da sie jedenfalls außerhalb des anglo-amerikanischen Rechtskreises nicht anerkannt ist“.¹⁹⁷

Der 3. Strafsenat stützte die Feststellung, dass die Immunitätsausnahme bei völkerrechtlichen Verbrechen „zum zweifelsfreien Bestand des Völkerge-

¹⁹⁰ S. Fn. 48.

¹⁹¹ BGH, *Immunitätsurteil* (Fn. 29), Rn. 27.

¹⁹² Israel Supreme Court, 29.5.1962 [*Eichmann*], *International Law Reports* 36 [1968], 277, 308 ff.

¹⁹³ BGH, *Immunitätsurteil* (Fn. 29), Rn. 27.

¹⁹⁴ Wuerth (Fn. 62), Fn. 167.

¹⁹⁵ Vgl. Kreicker (Fn. 7), 298-307.

¹⁹⁶ Zu Letzterem BGH, *Immunitätsurteil* (Fn. 29), Rn. 27.

¹⁹⁷ BVerfG, NJW 50 (1997), 929-933 (929 f., m. w. N).

wohnheitsrechts“ gehöre, außerdem auf zwei Urteile internationaler Straftribunale. Als Entscheidungen internationaler Tribunale kommen sie nicht selbst als Nachweise, sondern als Hilfsmittel zur Feststellung von Völkergewohnheitsrecht in Betracht,¹⁹⁸ deren Bedeutung maßgeblich von der in ihnen enthaltenen Prüfung von Nachweisen abhängt.¹⁹⁹ Die beiden zitierten Passagen des *Blaškić*-Urteils der Appeals Chamber des Internationalen Strafgerichtshofs für das ehemalige Jugoslawien (IStGHJ)²⁰⁰ und des *IMT*-Urteils vom 1. Oktober 1946²⁰¹ weisen jedoch keine Nachweise von Staatenpraxis oder *opinio iuris* auf, welche die vom Senat angenommene völkergewohnheitsrechtliche Regel stützen würden. Das Bundesverfassungsgericht betonte mit Bezug auf ausländische Gerichtsentscheidungen, dass sie „keine allgemeine Regel des Völkerrechts statuieren“ können, wenn sie sich nicht „auf eine allgemeine Überzeugung einer Mehrheit der Staaten“ stützen.²⁰² Die genannte Rechtsprechung des Bundesverfassungsgerichts hat der Senat in dem Immunitätsurteil gesehen,²⁰³ aber weder dort, noch in dem Haftfortdauerbeschluss konsequent beherzigt. Darüber hinaus wird vertreten, dass der IStGHJ in seiner späteren Rechtsprechung seine Feststellungen von Ausnahmen funktioneller Immunität auf internationale Gerichtsbarkeit beschränkt und im Hinblick auf innerstaatliche Gerichtsbarkeit explizit offengelassen hat.²⁰⁴

b) Unterlassene Analyse staatlicher Stellungnahmen zu den ILC-Arbeiten

Indem die seit dem Immunitätsurteil vorgenommenen ILC-Arbeiten und insbesondere die hierauf bezogenen staatlichen Stellungnahmen in dem Haftfortdauerbeschluss vom 21. Februar 2024 keine Erwähnung finden, wurden einschlägige Nachweise von besonderem Gewicht nicht in die Analyse zur Feststellung von Völkergewohnheitsrecht einbezogen.

¹⁹⁸ Fn. 53.

¹⁹⁹ Fn. 54.

²⁰⁰ IStGHJ [Appeals Chamber], *Blaškić v. Prosecutor*, Urteil v. 29. Oktober 1997 – IT-95-14-AR 108, Rn. 41.

²⁰¹ IMT, 1.10.1946, <www.legal-tools.org/doc/45f18e>, 56 zuletzt abgerufen 13. Februar 2025.

²⁰² BVerfG, NJW 73 (2020), 3647-3649 (Rn. 30).

²⁰³ Sie wird stattdessen i. R. d. Vorlagepflicht herangezogen, BGH, *Immunitätsurteil* (Fn. 29), Rn. 59; s. IV. 2. a).

²⁰⁴ *Rechtbank* (Fn. 169), Rn. 4.34 m. w. N.; vgl. Fifth Report, ILC Special Rapporteur Escobar Hernández, Rn. 99 m. w. N. Eine andere Ansicht sieht das *Blaškić*-Urteil des IStGHJ als Argument für eine völkergewohnheitsrechtliche Immunitätsausnahme bei völkerrechtlichen Verbrechen an, vgl. z. B. Kreß, ‘Article 98’ (Fn. 36), 2601, 2606, 2622.

In dem darauffolgenden Revisionsbeschluss vom 20. März 2024 ging der Senat zwar auf die Stellungnahme der Bundesregierung aus dem November 2023 zum Arbeitsergebnis der ersten Lesung der ILC ein und nannte indirekt entsprechende Stellungnahmen anderer Staaten. Der Senat setzt sich mit diesen allerdings nicht hinreichend und nicht zum Zwecke der Feststellung von Völkergewohnheitsrecht auseinander.²⁰⁵ Vielmehr dienen die Ausführungen im Wesentlichen der Verneinung der Vorlagepflicht nach Art. 100 Abs. 2 GG.²⁰⁶

Im Ergebnis ist festzuhalten, dass eine methodisch stringente Herangehensweise zu einem weniger klaren Ergebnis hinsichtlich des einschlägigen Völkergewohnheitsrechts führt als in den beiden Entscheidungen des 3. Strafsenats angenommen. Vielmehr hätte der Senat ernstzunehmende Zweifel an den von ihm festgestellten völkergewohnheitsrechtlichen Regeln annehmen müssen.

IV. Verstoß gegen die Vorlagepflicht nach Art. 100 Abs. 2 GG

Der 3. Strafsenat des BGH hat in dem Immunitätsurteil, dem Haftfortdauerbeschluss und dem Revisionsbeschluss gegen seine verfassungsrechtliche Vorlagepflicht an das Bundesverfassungsgericht nach Art. 100 Abs. 2 GG verstoßen.²⁰⁷ Dieser Abschnitt geht nicht durchgängig spezifisch auf den Haftfortdauerbeschluss und den Revisionsbeschluss ein. Während im Haftfortdauerbeschluss die Vorlagepflicht nicht thematisiert wurde, äußerte sich der Senat im Revisionsbeschluss zwar zur Vorlagepflicht, beschränkte seine Ausführungen jedoch auf eine Auseinandersetzung mit einer Stellungnahme der Bundesregierung aus dem November 2023.²⁰⁸ Die entsprechenden Erwägungen zum Verstoß gegen die Vorlagepflicht im Immunitätsurteil sind der Sache nach auf den Haftfortdauerbeschluss und den Revisionsbeschluss übertragbar.

1. Maßstab der Vorlagepflicht

Nach Art. 100 Abs. 2 GG hat ein Gericht die Entscheidung des Bundesverfassungsgerichts einzuholen, wenn in einem Rechtsstreite „zweifelhaft“

²⁰⁵ S. o. bei Fn. 156.

²⁰⁶ Vgl. BGH, *Revisionsbeschluss* (Fn. 19), Rn. 33. S. u. IV. 2. b).

²⁰⁷ So auch bezüglich des Urteils vom 28.1.2021, Rensmann (Fn. 56), 528-537 und Strewé (Fn. 56), 507 f.

²⁰⁸ BGH, *Revisionsbeschluss* (Fn. 19), Rn. 33; s. u. IV. 2. b).

ist, „ob eine Regel des Völkerrechtes Bestandteil des Bundesrechtes ist und ob sie unmittelbar Rechte und Pflichten für den Einzelnen erzeugt (Artikel 25)“. Die Vorlagepflicht kann sich auch auf den Regelungsgehalt oder Anwendungsbereich einer allgemeinen Regel des Völkerrechts beziehen.²⁰⁹ Nicht nur bei verfahrensabschließenden Entscheidungen, sondern auch bei prozessualen Maßnahmen wie Beweisbeschlüssen²¹⁰ ist eine Vorlage grundsätzlich zulässig.²¹¹ Die Gefahr einer von der Entscheidung ausgehenden Völkerrechtsverletzung²¹² ist angesichts der Inhaftierung eines (ehemaligen) ausländischen Staatsbediensteten, der potenziell aufgrund von funktioneller Immunität von der Strafverfolgung in Deutschland befreit ist, unzweifelhaft gegeben.²¹³

In seinem Immunitätsurteil ging der 3. Strafsenat im Grundsatz von zutreffenden Maßstäben der Vorlagepflicht aus, wie sie aus der Rechtsprechung des Bundesverfassungsgerichts folgen.²¹⁴ Danach besteht diese, „wenn das erkennende Gericht bei der Prüfung der Frage, ob und mit welcher Tragweite eine allgemeine Regel des Völkerrechts gilt, auf ernstzunehmende Zweifel stößt, mag das Gericht selbst auch keine Zweifel haben. Nicht das erkennende Gericht, sondern nur das Bundesverfassungsgericht hat die Befugnis, vorhandene Zweifel selbst aufzuklären.“²¹⁵ Ernstzunehmende Zweifel liegen vor, wenn „weder auszuschließen noch offenkundig“ oder nicht eindeutig ist, ob und mit welcher Tragweite eine entsprechende allgemeine Regel des Völkerrechts gilt.²¹⁶ Dabei stellen „Meinungsverschiedenheiten“ Anzeichen mangelnder Eindeutigkeit dar.²¹⁷ Ernstzunehmende Zweifel sind insbesondere in folgenden Fallgruppen anzunehmen: Wenn das Gericht von der Meinung eines Verfassungsorgans, von den Entscheidungen hoher deutscher, ausländischer oder internationaler Gerichte oder von den Lehren anerkannter Autorinnen und Autoren der Völkerrechtswissenschaft abweiche. Sie sind auch zu bejahen, wenn es keine einschlägige höchstrichterliche Rechtsprechung zu den vorgelegten

²⁰⁹ Hans-Georg Dederer, ‘Art. 100 GG’ in: Günter Dürig, Roman Herzog und Rupert Scholz (Hrsg.), GG (105. EL August 2024, C. H. Beck), Rn. 300.

²¹⁰ Vgl. BVerfGE 46, 342 (360); vgl. auch BVerfGE 64, 1 (14).

²¹¹ Dederer (Fn. 209), Rn. 314.

²¹² Vgl. BVerfGE 46, 342 (360).

²¹³ Maßgeblich für eine Immunitätsverletzung ist ein zwingender, rechtliche Verpflichtungen auferlegender Akt der Staatsgewalt, vgl. IGH, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. Frankreich)*, Urteil v. 4. Juni 2008, ICJ Reports 2008, 177, Rn. 170 f.; Walther (Fn. 136), 16 f.

²¹⁴ Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 54 f. m. w. N.

²¹⁵ BGH, *Immunitätsurteil* (Fn. 29), Rn. 54.

²¹⁶ Vgl. BVerfGE 64, 1, juris Rn. 58.

²¹⁷ BVerfG, BVerfGE 64, 1, Rn. 55 f.

Fragen gibt und die Judikatur internationaler Gerichte dazu nicht in entscheidender Weise Stellung nimmt.²¹⁸

2. Vorliegen objektiv ernstzunehmender Zweifel

Anhand dieser Maßstäbe lagen objektiv ernstzunehmende Zweifel an dem Bestehen der vom Senat festgestellten völkergewohnheitsrechtlichen Regeln von Ausnahmen funktioneller Immunität ausländischer Staatsbediensteter bei völkerrechtlichen Verbrechen vor.²¹⁹ Dies ergibt sich bereits aus dem Vorstehenden.²²⁰ Darüber hinaus sind mehrere der Fallgruppen aus der Rechtsprechung des Bundesverfassungsgerichts gegeben, die jeweils für sich genommen das Vorliegen objektiv ernstzunehmender Zweifel indizieren, wie im Folgenden dargelegt wird. Das Vorliegen solcher Zweifel wird durch Anhaltspunkte in der jüngeren Rechtsprechung des EGMR unterstrichen.²²¹

a) Abweichung von völkerrechtswissenschaftlicher Literatur

Der Senat ist mit seiner Annahme von Ausnahmen funktioneller Immunität ausländischer Staatsbediensteter bei völkerrechtlichen Verbrechen von den Lehren anerkannter Autorinnen und Autoren der Völkerrechtswissenschaft abgewichen.

Zur Unterstützung der völkergewohnheitsrechtlichen Immunitätsausnahme zitiert der Haftfortdauerbeschluss Literaturbeiträge von insgesamt zehn Autoren, die bis auf eine Ausnahme ihren Hintergrund in der deutschsprachigen Rechtswissenschaft und -praxis haben. Zwei der zitierten Beiträge²²² stammen von einem Mitunterzeichner des Beschlusses. Dies stellt keinen

²¹⁸ Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 54 f. m. w. N.

²¹⁹ So auch bezüglich des Immunitätsurteils Rensmann (Fn. 56), 530 und Strewe (Fn. 56), 508.

²²⁰ S. o. III.

²²¹ S. u. IV. 2. d).

²²² Helmut Kreicker, 'Völkerrechtliche Immunitäten und die Ahndung von Menschenrechtsverletzungen: Tendenzen einer Schwächung des nationalen Strafrechts', JR 2015, 298-305 (299 ff.); Kreicker (Fn. 7), 175 ff. In Letzterem wurde zur Bedeutung der Vorlagepflicht und zu ihrer mitunter unzureichenden Befolgung in der Rechtspraxis ausgeführt (S. 1307): 'Bedenkt man, daß die Reichweite der völkergewohnheitsrechtlichen Immunitäten keinesfalls als vollständig geklärt angesehen werden kann, dürfte in den meisten Fällen, in denen die Frage des Vorliegens einer völkergewohnheitsrechtlichen Exemption im Raum steht, eine Vorlage an das BVerfG geboten sein. In der Rechtspraxis der Strafgerichte ist diese Vorlagepflicht allerdings nicht immer beachtet worden. Generell sind die Gerichte überaus zurückhaltend, wenn es um Vorlagen an das BVerfG nach Art. 100 GG geht.'

repräsentativen Ausschnitt der völkerrechtlichen Literatur dar, in welcher die Frage der Immunitätsausnahmen kontrovers diskutiert wird. So gibt es zahlreiche Literaturmeinungen in der internationalen²²³ und deutschsprachigen²²⁴ Literatur, welche die völkergewohnheitsrechtliche Basis von Entwurfsartikel 7 ganz oder teilweise in Frage stellen.²²⁵ Auch die einschlägige Arbeit der ILC und ihrer Mitglieder, einschließlich der Äußerungen im Rahmen der Abstimmung zur vorläufigen Annahme von Entwurfsartikel 7,²²⁶ ist in diese Analyse einzustellen. Der Senat nannte in seinem Immunitätsurteil sechs weitere völkerrechtswissenschaftliche Beiträge, die „Bedenken“ hinsichtlich der Ausnahme von funktioneller Immunität bei völkerrechtlichen Verbre-

²²³ Z. B. Wood, ‘Draft Articles’ (Fn. 141); Wood, ‘Lessons’ (Fn. 134); Qinmin Shen, ‘Methodological Flaws in the ILC’s Study on Exceptions to Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction’, *AJIL* 112 (2018), 9-15; Mathias Forteau, ‘Immunities and International Crimes Before the ILC: Looking for Innovative Solutions’, *AJIL* 112 (2018), 22-26; vgl. Rosanne van Alebeek, ‘The “International Crime” Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?’, *AJIL* 112 (2018), 27-32; Roger O’Keefe, ‘An “International Crime” Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: not Currently, not Likely’, *AJIL Unbound* 109 (2015), 167-172; vgl. Strewé (Fn. 56).

²²⁴ Immunitätsausnahme bei völkerrechtlichen Verbrechen ablehnend: z. B. Christian Appelbaum, *Einschränkungen der Staatenimmunität in Fällen schwerer Menschenrechtsverletzungen* (Duncker & Humblot 2007); die Kontroverse bzgl. völkergewohnheitsrechtlicher Immunitätsausnahmen bei völkerrechtlichen Verbrechen erläuternd und i. E. offenlassend: Volker Epping, in: Knut Ipsen, *Völkerrecht* (8. Aufl., C. H. Beck 2024), Rn. 289-296; Julia Gebhard, ‘Die strafrechtliche Immunität von Amtsträgern’, in: Hans-Heiner Kühne, Robert Esser und Marc Gerding (Hrsg.), *Völkerstrafrecht* (Julius Jonscher Verlag 2007), 175-195; Rudolf Geiger, *Staatsrecht III: Bezüge des Grundgesetzes zum Völker- und Europarecht* (7. Aufl., C. H. Beck 2018), 306 f.; Matthias Herdegen, *Völkerrecht*, (22. Aufl., C. H. Beck 2023), § 37, Rn. 7; Alexander Proelß (Hrsg.), *Völkerrecht* (9. Aufl., DeGruyter 2024), 230-232, Rn. 54-57; Bernhard Kempen, Christian Hillgruber und Christoph Grabenwarter, *Völkerrecht*, (3. Aufl., Vahlen 2021), § 32, Rn. 32 f.; Tina Swantje Roeder, ‘Grundzüge der Staatenimmunität’, *JuS* 2005, 215-219; Christoph Safferling, *Internationales Strafrecht* (Springer 2011), § 5, Rn. 61; Kirsten Schmalenbach, ‘Immunität von Staatsoberhäuptern und anderen Staatsorganen’, *ZÖR* 61 (2006), 397-432; Theodor Schweisfurth, *Völkerrecht* (Mohr Siebeck 2006), 112-116; Torsten Stein, Christian von Buttlar und Markus Kotzur, *Völkerrecht* (15. Aufl., Vahlen 2024), § 42, Rn. 13-15; Wolfgang Weiß, ‘Völkerstrafrecht zwischen Weltprinzip und Immunität’, *JZ* 57 (2002), 696-704 (774); vgl. Markus Krajewski, *Völkerrecht* (3. Aufl., Nomos 2023), 178, Rn. 33 f.; Rensmann (Fn. 56), 513.

²²⁵ Es gibt auch nicht-deutschsprachige Literatur, welche die Annahme einer Ausnahme von funktioneller Immunität für völkerrechtliche Verbrechen stützt, die aber nicht vom BGH zitiert wurde, z. B. Tladi (Fn. 36); Ascensio und Bonafé (Fn. 36); Akande und Shah (Fn. 36); Kreß, ‘Article 98’ (Fn. 36), 2601 f., Fn. 82 m. w. N. Rensmann (Fn. 56), 536 f. führt aus zu der Immunitätsausnahmen bejahenden Literatur im Verhältnis zu dem traditionell-positivistischen Ansatz des BGH.

²²⁶ Vgl. z. B. Erklärungen von ILC-Mitgliedern zu ihrem Abstimmungsverhalten bei der ILC-Sitzung 2017, s. <https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr3378.pdf>, zuletzt besucht 13. Februar 2025.

chen äußerten.²²⁷ Die Gesamtschau dieser Literaturansichten zeigt, dass es sich bei ihnen nicht um „vereinzelte Stimmen im völkerrechtlichen Schrifttum“,²²⁸ bzw. „einzelne [...] in der Völkerrechtswissenschaft geäußerte [...] abweichende [...] Ansichten“ handelt, ungeachtet derer „keine durch das Bundesverfassungsgericht zu klärenden Zweifel“ bestünden,²²⁹ wie der Senat in seinem Immunitätsurteil meint.²³⁰

Der Verweis des Senats auf den Beschluss des Bundesverfassungsgerichts vom 6. Mai 2020²³¹ „zur Unbeachtlichkeit“ der abweichenden Literaturansichten²³² ist nicht überzeugend. Die entsprechende Feststellung des Bundesverfassungsgerichts hinsichtlich der dort genannten Gegenansichten in der Literatur, wonach diese „nicht auf eine allgemeine Überzeugung einer Mehrheit der Staaten“ gestützt seien, bezog sich auf die Feststellung einer völkergewohnheitsrechtlichen Regel. Die Zuständigkeit für die Verifikation derartiger Normen ist aber gerade beim Bundesverfassungsgericht konzentriert.²³³ Dieser aus dem Beschluss des Bundesverfassungsgerichts hervorgehende Maßstab kann nicht gleichsam für das Bestehen ernsthafter Zweifel anhand von Literaturansichten als *Voraussetzung* der Vorlage an das Bundesverfassungsgericht gelten. Jedenfalls greift die pauschale Einschätzung des Senats, wonach die von seiner Ansicht abweichenden Literaturstimmen „nicht auf eine allgemeine Überzeugung einer Mehrheit der Staaten oder entsprechende Praxis“ gestützt seien,²³⁴ zu kurz.

b) Abweichung von der Meinung eines Verfassungsorgans

Ernstzunehmende Zweifel an der vom 3. Strafsenat angenommenen völkergewohnheitsrechtlichen Regel bestanden auch, weil er insofern von der Meinung eines Verfassungsorgans, namentlich der Bundesregierung, ab-

²²⁷ BGH, *Immunitätsurteil* (Fn. 29), Rn. 38 [zitiert: s. beispielsweise Fox und Webb, (Fn. 122), 570 ff.; Harmen van der Wilt, ‘Immunities and the International Criminal Court’, in: Tom Ruys, Nicolas Angelet und Luca Ferro, *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019), 595-613 (605); Wuerth (Fn. 62), 731; Huikang Huang, ‘On Immunity of State Officials from Foreign Criminal Jurisdiction’, *Chinese Journal of International Law* 13 (2014), 1-11; Sean Murphy, ‘Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?’, *AJIL Unbound* 112 (2018), 4-8; vgl. auch van Alebeek, ‘Functional Immunity’ (Fn. 58), 517 f.; d’Argent und Lesaffre (Fn. 122), 614’].

²²⁸ BGH, *Immunitätsurteil* (Fn. 29), Rn. 56.

²²⁹ BGH, *Immunitätsurteil* (Fn. 29), Rn. 59.

²³⁰ Vgl. Rensmann (Fn. 56), 536 f.

²³¹ BVerfG, NJW 73 (2020), 3647-3649, (Rn. 30).

²³² Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 59.

²³³ Dederer (Fn. 209), Rn. 270.

²³⁴ BGH, *Immunitätsurteil* (Fn. 29), Rn. 38.

wich.²³⁵ Diese Abweichung erkannte der Senat im Revisionsbeschluss mit Bezug auf die Stellungnahme der Bundesregierung aus dem November 2023 auch dem Grunde nach an.²³⁶ Daher überrascht die Schlussfolgerung des Senats, dass diese Stellungnahme „keinen Anlass [gibt], eine Entscheidung des Bundesverfassungsgerichts einzuholen (Art. 100 Abs. 2 GG)“.

Die diesbezügliche Argumentation des Senats bleibt vage. Im Wesentlichen nimmt der Senat Bezug auf die Aussage in der Stellungnahme der Bundesregierung, wonach sein Immunitätsurteil von „erheblicher Tragweite“ für die Position der Bundesregierung mit Bezug auf die Frage von Immunitätsausnahmen bei völkerrechtlichen Verbrechen sei.²³⁷ Hinsichtlich dieser Aussage ist aber zu beachten, dass die Bundesregierung in der Stellungnahme, wie auch der Senat in seinem Revisionsbeschluss,²³⁸ wohl davon ausging, dass sich die Feststellung einer Ausnahme funktioneller Immunität in dem Immunitätsurteil nur auf (bestimmte) Kriegsverbrechen bezieht.²³⁹ Ein breiteres Verständnis der Aussage, wie es der Senat suggeriert, erscheint in der Gesamtschau der Stellungnahme nicht widerspruchsfrei. Somit wich der Senat jedenfalls durch die Feststellung von über das Immunitätsurteil hinausgehenden Ausnahmen von funktioneller Immunität in dem Haftfortdauerbeschluss und dem Revisionsbeschluss von der Rechtsauffassung der Bundesregierung ab, wie sie in der Stellungnahme aus dem November 2023 zum Ausdruck kam.

Diese Rechtsauffassung der Bundesregierung bleibt auch angesichts ihrer beiden nachfolgenden Stellungnahmen aus dem Oktober und November 2024 bestehen. In diesen erfolgte im Wesentlichen ein „Update“ zu den oben genannten²⁴⁰ Entwicklungen in der Rechtslage in Deutschland.²⁴¹ In den Stellungnahmen wurde geschlussfolgert, dass die hieraus hervorgehenden Ausnahmen von funktioneller Immunität klar im deutschen Recht anerkannt sind.²⁴² Zum geltenden Völker(gewohnheits)recht bezüglich Immunitätsausnahmen wurde hingegen keine Aussage getroffen.

²³⁵ Vgl. o. III. 2. e) (iii).

²³⁶ BGH, *Revisionsbeschluss* (Fn. 19), Rn. 33 (Fn. 170).

²³⁷ BGH, *Revisionsbeschluss* (Fn. 19), Rn. 33. Vgl. deutsche Stellungnahme (Fn. 168), Rn. 9 (‘The judgment by the Federal Court of Justice [...] has a significant bearing also on the German government’s position on the present topic.’).

²³⁸ BGH, *Revisionsbeschluss* (Fn. 19), Rn. 32.

²³⁹ Vgl. Deutsche Stellungnahme (Fn. 168), Rn. 8.

²⁴⁰ S. II.

²⁴¹ Vgl. Deutsche Stellungnahme vom 21. Oktober 2024, <https://www.un.org/en/ga/sixth/79/pdfs/statements/ilc/21mtg_germany_1.pdf>, 3, zuletzt abgerufen 13. Februar 2025 und aus dem November 2024 <https://legal.un.org/ilc/sessions/76/pdfs/english/iso_germany.pdf>, Rn. 4, zuletzt abgerufen 13. Februar 2025.

²⁴² Deutsche Stellungnahme (Fn. 241): ‘German law therefore clearly recognizes the existence of exceptions to the principle of functional immunity.’ (S. 4 der Stellungnahme vom 21. Oktober 2024; Rn. 8 der Stellungnahme aus dem November 2024).

c) Keine einschlägige Rechtsprechung des Bundesverfassungsgerichts

Der Senat stellte in dem Urteil zutreffend fest, dass das Bundesverfassungsgericht zur funktionellen Immunität ausländischer Staatsbediensteter in Strafverfahren noch keine Entscheidung getroffen hat.²⁴³ Es erscheint daher widersprüchlich, dass sich der Senat bei der Verneinung der Vorlagepflicht maßgeblich auf einen Beschluss des Bundesverfassungsgerichts vom 18. August 2020²⁴⁴ beruft.²⁴⁵ Laut dem Senat habe das Bundesverfassungsgericht in diesem Beschluss, der zwar nicht die hier maßgebliche Rechtsfrage, aber einen „vergleichbaren Sachverhalt“ betroffen habe, die einschlägige Gerichtszuständigkeit nach dem Weltrechtsprinzip genannt, ohne sich mit der „Problematik der Immunität“ auseinanderzusetzen.²⁴⁶ Es bestand in diesem Eilrechtsschutzverfahren aber auch kein Anlass für das Bundesverfassungsgericht, sich zur Frage der funktionellen Immunität ausländischer Staatsbediensteter zu äußern. Denn es betraf die Klärung einer Frage der Medienöffentlichkeit als Ausfluss des Rechts auf gleichberechtigte reelle Teilhabe an den Berichterstattungsmöglichkeiten zu gerichtlichen Verfahren (Art. 3 Abs. 1 i. V. m. 5 Abs. 1 S. 2 GG). Im Rahmen dieser Prüfung wurde die Art der Gerichtszuständigkeit lediglich als Argument zur Begründung einer erhöhten öffentlichen Aufmerksamkeit im Ausland an einem inländischen Strafverfahren genannt, nicht jedoch dem Grunde nach geprüft. Schließlich ist an das *Arrest Warrant*-Urteil des IGH zu erinnern, wonach die Rechtsfragen der Gerichtsbarkeit und der staatlichen Immunität zu trennen sind.²⁴⁷

d) Keine eindeutige Rechtsprechung internationaler Gerichte

Auch die Judikatur internationaler Gerichte nimmt nicht in entscheidender Weise zur Frage der Ausnahmen von funktioneller Immunität bei völkerrechtlichen Verbrechen Stellung. Der IGH hat in dem *Arrest Warrant*-Urteil festgestellt, dass ehemalige Außenminister keine (funktionelle) Immunität für während ihrer Amtszeit vorgenommene Handlungen genießen, wenn sie das Kriterium „in a private capacity“ erfüllen.²⁴⁸ In der Literatur wurde diese

²⁴³ BGH, *Immunitätsurteil* (Fn. 29), Rn. 45.

²⁴⁴ BVerfG, NJW 73 (2020), 3166-3168 (Rn. 11).

²⁴⁵ Vgl. auch Andreas Paulus, 'Völkerrechtsfreundlichkeit in der Rechtsprechung des Bundesverfassungsgerichts', ZaöRV 83 (2023), 869-891, in Fn. 87 auf S. 888 ('unzutreffende [...] Heranziehung' des BVerfG-Beschlusses durch den BGH).

²⁴⁶ BGH, *Immunitätsurteil* (Fn. 29), Rn. 58.

²⁴⁷ S. o. bei Fn. 125.

²⁴⁸ IGH, *Arrest Warrant* (Fn. 104), 25 f., Rn. 61 ('a court of one State may try a former Minister for Foreign Affairs of another State [...] in respect of acts committed during that period of office in a private capacity').

Stelle als mehrdeutig angesehen. Nach einem weiten Verständnis schließt die Aussage Ausnahmen von funktioneller Immunität bei völkerrechtlichen Verbrechen aus.²⁴⁹ Dagegen wurde jedoch auch angeführt, dass die Auflistung von Strafverfolgungsmöglichkeiten eines ehemaligen Außenministers im *Arrest Warrant*-Urteil nicht abschließend sei.²⁵⁰ Zum anderen sei unklar, ob Verhalten eines Staatsbediensteten, das nach Völkerrecht strafbar ist, per Definition Handeln „in privater Funktion“ darstellt und daher nicht „in offizieller Funktion“ erfolgen kann, was die Voraussetzung von funktioneller Immunität ist.²⁵¹ Letztere Frage ist umstritten.²⁵² Zu dieser Frage bezog der ehemalige Generalbundesanwalt in dem Verfahren des Immunitätsurteils nicht Stellung.²⁵³ Der 3. Strafsenat ging, ohne sich in dieser Frage ausdrücklich zu positionieren, in diesem Urteil davon aus, dass die dort maßgeblichen Kriegsverbrechen Taten eines Hoheitsträgers „in Ausübung seiner hoheitlichen Tätigkeit“ darstellten.²⁵⁴

Auch im Übrigen liegt keine eindeutige Judikatur internationaler Gerichte vor. Der IGH stellte in seiner Entscheidung in der Rechtssache *Jurisdictional Immunities* fest, dass die Frage des Bestands und Umfangs der Immunität von Staatsbediensteten nicht Teil des Streitgegenstands war.²⁵⁵ Der BGH führte im Immunitätsurteil aus, der IStGH habe „sich nicht dazu geäußert, ob für Kriegsverbrechen vor nationalen Gerichten funktionelle Immunität bestehe“.²⁵⁶ Zu der umstrittenen Aussagekraft der Rechtsprechung des IStGHJ in dieser Frage wurde bereits ausgeführt.²⁵⁷

Der EGMR verneinte eine Ausnahme von funktioneller Immunität in Strafverfahren mit Bezug auf den Straftatbestand der Folter in seinem Urteil vom 15. Oktober 2024 in der Rechtssache *Sassi und Benchellali/Frankreich*.²⁵⁸ In dem

²⁴⁹ Vgl. Krefß, ‘Article 98’ (Fn. 36), 2603, Rn. 26 (unterschiedliche Lesarten erläuternd).

²⁵⁰ Vgl. Tladi (Fn. 36), 181.

²⁵¹ Krefß, ‘Article 98’ (Fn. 36), Rn. 26.

²⁵² Vgl. ILC Kommentierung von Entwurfsartikel 7, ILC Bericht 2022, A/77/10, Kapitel VI, 236 f., Rn. 14 (dort i. E. offengelassen).

²⁵³ Vgl. Frank und Barthe, ‘Immunitätsschutz’ (Fn. 9).

²⁵⁴ Vgl. z. B. 1. Leitsatz.

²⁵⁵ S. o. Fn. 120.

²⁵⁶ BGH, *Immunitätsurteil* (Fn. 29), Rn. 25.

²⁵⁷ S. o. bei Fn. 200, 204.

²⁵⁸ EGMR, Urt. v. 15. Oktober 2024 – 35884/21, 35886/21 – ECLI:2024:1015DEC003588421.

Dem steht nicht entgegen, dass die Strafverfahren durch Nebenklageverfahren (*partie civile*) nach Art. 85 ff. der französischen Strafprozessordnung (*Code de procédure pénale*) eingeleitet worden waren und der EGMR die zivilrechtliche Ausprägung von Art. 6 Abs. 1 EMRK für einschlägig hielt. Denn die Nebenklageverfahren waren auf die Ausübung von Strafgerichtsbarkeit gegenüber ausländischen Staatsbediensteten gerichtet, die den Verfahrensgegenstand in dem Verfahren *Sassi und Benchellali v. Frankreich* darstellte, vgl. Rn. 4-26, 41-46, 54; ebenso in *M.M. v. Frankreich*, Urt. v. 16. April 2024 – 13303/21 – ECLI:CE:ECHR:2024:0416DEC001330321, z. B. Rn. 64-69.

zugrundeliegenden französischen Verfahren hatte zuvor der *Cour de Cassation* am 13. Januar 2021 ebenso entschieden.²⁵⁹ In dem Verfahren wurden ehemalige US-amerikanische Staatsbedienstete, einschließlich George W. Bush und Donald Rumsfeld, aufgrund ihrer funktionellen Immunität nicht für Vorwürfe der Folter im US-Gefangenenlager in Guantánamo Bay in Frankreich strafrechtlich verfolgt. Da dies im Einklang mit geltendem Völkerrecht geschehen sei, lehnte der EGMR eine Verletzung von Art. 6 Abs. 1 EMRK ab. Dabei bezog sich der EGMR auf seine in der Rechtssache *Al-Adsani/Vereinigtes Königreich*²⁶⁰ begründete Rechtsprechung, in der er völkerrechtliche Ausnahmen von der Immunität *ratione materiae* eines Staates und seiner Bediensteter²⁶¹ in Zivilverfahren, unabhängig von der Schwere oder besonderen völkerrechtlichen (*ius cogens*) Natur der Tatvorwürfe, abgelehnt hatte.²⁶² Der BGH hatte die Relevanz der *Al-Adsani*-Rechtsprechung in seinem Immunitätsurteil hingegen verneint,²⁶³ da sie Immunität in Zivilverfahren und nicht Strafverfahren betreffe.²⁶⁴ Dementsprechend betonte auch die Bundesregierung, dass die im deutschen Recht anerkannten Ausnahmen von funktioneller Immunität nur auf Strafgerichtsbarkeit und nicht auf Zivilgerichtsbarkeit anwendbar seien.²⁶⁵

²⁵⁹ Cour de Cassation, Urt. v. 13. Januar 2021, ECLI:FR:CCASS:2021:CR00042, Rn. 24-30 ('La coutume internationale s'oppose à ce que les agents d'un Etat, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, puissent faire l'objet de poursuites, pour des actes entrant dans cette catégorie [actes relevant de l'exercice de la souveraineté d'un Etat], devant les juridictions pénales d'un État étranger. Il appartient à la communauté internationale de fixer les éventuelles limites de ce principe, lorsqu'il peut être confronté à d'autres valeurs reconnues par cette communauté, et notamment celle de la prohibition de la torture. En l'état du droit international, les crimes dénoncés, quelle qu'en soit la gravité, ne relèvent pas des exceptions au principe de l'immunité de juridiction.', Rn. 25-27).

²⁶⁰ Urt. v. 21. November 2001 – 35763/97 – ECLI:CE:ECHR:2001:1121JUD003576397, Rn. 66.

²⁶¹ Letztere betrachtet der EGMR als Teil der Immunität des Staates, vgl. z. B. *Jones et al. v. Vereinigtes Königreich*, Urt. v. 14. Januar 2014 – 34356/06, 40528/06 – ECLI:CE:ECHR:2014:0114JUD003435606, Rn. 200. Die rechtliche Würdigung des EGMR unterscheidet nicht immer zwischen beiden Aspekten, vgl. z. B. *Sassi und Benchellali v. Frankreich* (Fn. 258), Rn. 53, 61 f.; *M.M. v. Frankreich* (Fn. 258), Rn. 77, 86 f.

²⁶² *Sassi und Benchellali v. Frankreich* (Fn. 258), Rn. 53, 61. Siehe auch *M.M. v. Frankreich* (Fn. 258), Rn. 77, 86; *J.C. et al. v. Belgien*, Urt. v. 12. Oktober 2021 – 11625/17 – ECLI:CE:ECHR:2021:1012JUD001162517, Rn. 64. Die Feststellungen des EGMR in *Sassi und Benchellali v. Frankreich* und *M.M. v. Frankreich* unterscheiden nicht wesentlich zwischen Immunität in Zivil- und Strafverfahren, vgl. *Sassi und Benchellali v. Frankreich* (Fn. 258), Rn. 53, 61 f.; *M.M. v. Frankreich* (Fn. 258), Rn. 77, 86 f. In *Jones et al. v. Vereinigtes Königreich* hatte der EGMR angemerkt, dass eine parallele Betrachtung von Immunität *ratione materiae* vor Zivil- und Strafgerichtsbarkeit angesichts der Möglichkeit der Geltendmachung zivilrechtlicher Schadensersatzansprüche im Rahmen von Strafverfahren naheliegend sei, vgl. *Jones et al. v. Vereinigtes Königreich* (Fn. 261), Rn. 212.

²⁶³ Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 42.

²⁶⁴ Vgl. BGH, *Immunitätsurteil* (Fn. 29), Rn. 17, 39, 41-44.

²⁶⁵ Stellungnahmen aus dem November 2024 (Fn. 241), Rn. 9, und vom 21. Oktober 2024 (Fn. 241), S. 4.

Nach einer Literaturansicht stellte der EGMR in *Sassi und Benchellali/Frankreich* zudem fest, dass Entwurfsartikel 7 der ILC zu Ausnahmen von funktioneller Immunität kein geltendes Völker(gewohnheits)recht reflektiere.²⁶⁶ Denn der EGMR begründete sein Festhalten an der *Al-Adsani*-Rechtsprechung damit, dass sich die maßgebliche Völkerrechtslage seit dem Jahr 2012, insbesondere im Lichte der ILC-Arbeiten, nicht geändert habe.²⁶⁷ Die Beschwerdeführer hatten dieses vom EGMR abgelehnte Argument unter anderem darauf gestützt, dass sich aus den ILC-Arbeiten zur ersten Lesung von Entwurfsartikel 7 die Herauskristallisierung einer auf *ius cogens* bezogenen Immunitätsausnahme ableiten lasse.²⁶⁸

Jedenfalls bietet die Entscheidung in *Sassi und Benchellali/Frankreich* Anhaltspunkte dafür, dass der EGMR in künftiger Rechtsprechung völkerrechtliche Ausnahmen von funktioneller Immunität in Strafverfahren bei völkerrechtlichen Verbrechen, wie sie in der BGH-Rechtsprechung festgestellt wurden, ablehnen könnte.²⁶⁹

Schließlich wird das Bestehen der Vorlagepflicht dadurch unterstrichen, dass dem Immunitätsurteil des BGH bezüglich der festgestellten Immunitätsausnahme eine „Vorreiterrolle“ auf internationaler Ebene zugeschrieben wird.²⁷⁰

3. Kein Vertretbarkeitsspielraum bei der Würdigung ernstzunehmender Zweifel

Im Einklang mit der ständigen Rechtsprechung des Bundesverfassungsgerichts kam dem Senat kein Vertretbarkeitsspielraum bei der Würdigung objektiv ernstzunehmender Zweifel zu. Das Bundesverfassungsgericht stützt die Ablehnung des Vertretbarkeitsspielraums auf die besondere völker- und verfassungsrechtliche Bedeutung des Normverifikationsverfahrens:

²⁶⁶ Tal Mimran, ‘Immunity of State Officials from Criminal Jurisdiction: The Debate Continues’, EJIL:Talk!, 5. Februar 2025, <<https://www.ejiltalk.org/immunity-of-state-officials-from-criminal-jurisdiction-the-debate-continues/>>, zuletzt besucht 16. März 2025.

²⁶⁷ *Sassi und Benchellali v. Frankreich* (Fn. 258), Rn. 61, vgl. auch Rn. 53.

²⁶⁸ *Sassi und Benchellali v. Frankreich* (Fn. 258), Rn. 39.

²⁶⁹ Mit Bezug auf Zivilverfahren verneinte der EGMR Ausnahmen von funktioneller Immunität bei den Tatvorwürfen der Verbrechen gegen die Menschlichkeit und des Genozids, *J.C. et al. v. Belgien* (Fn. 262) [zitiert *Kalogeropoulou et al. v. Griechenland und Deutschland*, Urt. v. 12. Dezember 2002 – 59021/00 – ECLI:CE:ECHR:2002:1212DEC005902100; *Stichting Mothers of Srebrenica et al. v. Niederlande*, Urt. v. 11.6.2013 – 65542/12 – ECLI:CE:ECHR:2013:0611DEC006554212 mit Bezug auf Immunität der UN].

²⁷⁰ S. Fn. 10.

„Es ist der primäre Zweck des Verifikationsverfahrens, Verletzungen des Völkerrechts, die in der fehlerhaften Anwendung oder Nichtbeachtung völkerrechtlicher Normen durch deutsche Gerichte liegen und eine völkerrechtliche Verantwortlichkeit Deutschlands begründen können, nach Möglichkeit zu verhindern und zu beseitigen. Darüber hinaus soll das Verfahren auch die staatenübergreifende Einheitlichkeit und Verlässlichkeit der Völkerrechtsregeln sichern; es ist insofern ein Element der Völkerrechtsoffenheit des Grundgesetzes. Das BVerfG stellt sich damit mittelbar in den Dienst der Durchsetzung des Völkerrechts und vermindert dadurch das Risiko der Nichtbefolgung internationalen Rechts. Deshalb hat das Fachgericht in diesem Verfahren keinen Vertretbarkeitsspielraum bei der Würdigung objektiv ernst zu nehmender Zweifel. Für lediglich rechtsirrtümliche Verstöße gegen die Vorlagepflicht, die nicht Art. 101 I 2 GG verletzen, bleibt hiernach nur ein gering bemessener Raum.“²⁷¹

Auf diese Rechtsprechung des BVerfG geht eine abweichende Literaturansicht nicht ein. Diese Ansicht nimmt vielmehr an, dass dem BGH bei seinem Immunitätsurteil ein „Spielraum des Vertretbaren“ bei der Beantwortung der Frage zugekommen sei, ob den „gewiss“ bestehenden Zweifeln „ein i. S. v. Art. 100 II GG ernst zu nehmendes Ausmaß zu bescheinigen war“, ohne verfassungsrechtliche Gründe zu nennen.²⁷²

4. Vorlagepflicht bezüglich der Frage der Immunitätsprüfung von Amts wegen

Ein Verstoß gegen die Vorlagepflicht aus Art. 100 Abs. 2 GG ergibt sich auch mit Bezug auf die Feststellung des 3. Strafsenats im Immunitätsurteil, es sei über das Vorliegen funktioneller Immunität ausländischer Hoheitsträger „zu entscheiden, obwohl sie im vorliegenden Verfahren nicht geltend gemacht worden ist“.²⁷³ Der Senat führt zur Begründung lediglich an, dass die Grenzen der deutschen Gerichtsbarkeit als allgemeine Verfahrensvoraussetzung „als Rechtsfragen in jeder Lage des Verfahrens von Amts wegen zu prüfen und zu berücksichtigen“ seien, ohne erkennbare Prüfung der relevanten völkerrechtlichen Maßstäbe.²⁷⁴ Dabei verkennt der Senat, dass es sich um eine entscheidungserhebliche Frage des Völkergewohnheitsrechts²⁷⁵ handelt,

²⁷¹ BVerfG, NJW 57 (2004), 141-146 (142 m. w. N.); s. auch BVerfG, NJW 51 (1998), 50-57 (51).

²⁷² Krefß, 'Kriegsverbrechen' (Fn. 183), 1335; zustimmend Gerhard Werle, Anmerkung zum BGH-Urteil v. 28.1.2021, JZ 76 (2021), 732-736 (734). Einen Vertretbarkeitsspielraum bejaht auch Epik (Fn. 13), 1279.

²⁷³ BGH, *Immunitätsurteil* (Fn. 29), Rn. 12.

²⁷⁴ BGH, *Immunitätsurteil* (Fn. 29), Rn. 12.

²⁷⁵ Vgl. Rensmann (Fn. 56), 527.

an deren Bestand objektiv ernstzunehmende Zweifel bestehen. Diese Zweifel ergeben sich insbesondere aus der Abweichung des Senats von einer Entscheidung des IGH, sowie von völkerrechtlichen Literaturansichten.

So entschied der IGH in dem Verfahren *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Dschibuti/Frankreich)*, dass die strafrechtliche Verfolgung zweier dschibutischer Staatsbediensteter in Frankreich nicht die völkergewohnheitsrechtliche funktionelle Immunität von Dschibuti verletzte mit der Begründung, dass sich Dschibuti nicht auf die Immunität der beiden Staatsbediensteten berufen hatte.²⁷⁶ Diese Entscheidung des IGH interpretierten Mitglieder der Völkerrechtskommission,²⁷⁷ insbesondere ihre ersten beiden Sonderberichterstatter zum Thema der Immunität von Staatsbediensteten,²⁷⁸ und Autorinnen und Autoren der Völkerrechtswissenschaft²⁷⁹ dahingehend, dass funktionelle Immunität ausländischer Staatsbediensteter nicht von Amts wegen von den innerstaatlichen Strafverfolgungsbehörden und der Justiz zu prüfen ist. Eine völkerrechtliche Prüfungspflicht besteht demnach nur, wenn sich der Staat, dessen Bedienstete gehandelt haben, gegenüber dem „Forum-Staat“ auf funktionelle Immunität beruft.²⁸⁰ In Abwesenheit dieser „Einrede“ der Immunität kann keine Völkerrechtsverletzung darin bestehen, dass die funktionelle Immunität nicht im Strafverfahren geprüft wird. Somit verstieß der BGH gegen seine Vorlagepflicht indem er verkannte, dass diese Rechtsfrage durch eine Regel des Völker(gewohnheits)rechts determiniert sein kann, an deren Bestand objektiv ernstzunehmende Zweifel bestehen.

²⁷⁶ IGH, *Mutual Assistance* (Fn. 213), Rn. 196.

²⁷⁷ Vgl. ILC Report 2019, A/74/10, 321, Rn. 163.

²⁷⁸ ILC, Third report, Special Rapporteur Roman Kolodkin (2011), A/CN.4/646, Rn. 17, 61 (f); ILC, Seventh report, Special Rapporteur Escobar Hernández (2019), UN Dok. A/CN.4/729, Rn. 52.

²⁷⁹ Vgl. Rensmann (Fn. 56) 527, 538 f.; Strewe (Fn. 56) 500; van Alebeek, 'Functional Immunity' (Fn. 58) 502; Pierre d'Argent 'Immunity of State Officials and the Obligation to Prosecute' in: Anne Peters et al. (Hrsg.), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015), 244-266 (249); Heike Krieger, 'Between Evolution and Stagnation Immunities in a Globalized World', *GoJIL* 177 (2014), (177-216), 215 f.; Foakes (Fn. 36), 173; Wuerth (Fn. 62), 745; Robert Cryer und Ioannis Kalpouzos, 'International Court of Justice, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) Judgment of 4 June 2008', *ICLQ* 59 (2010), 193-205 (204); Rebecca Zaman, 'Playing the Ace? Jus Cogens Crimes and Functional Immunity in National Courts', *Australian International Law Journal* 17 (2010), 53-87 (81); vgl. auch Gionata Piero Buzzini, 'Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the Djibouti v. France Case', *LJIL* 22 (2009), 455, 472.

²⁸⁰ Vgl. z. B. Kolodkin, Third report (Fn. 278), Rn. 17; 61(f); Escobar Hernández, Seventh report (Fn. 278), Rn. 52.

V. Mögliche Entscheidung des Bundesverfassungsgerichts

Eine Entscheidung des Bundesverfassungsgerichts zur Frage völkergewohnheitsrechtlicher Ausnahmen funktioneller Immunität bei völkerrechtlichen Verbrechen ist weiterhin möglich. Hierfür ist durch die gesetzliche Immunitätsausnahme ein weiterer potenzieller Anknüpfungspunkt entstanden. Wahrscheinlicher sind aber ein Normverifikationsverfahren nach richterlicher Vorlage gemäß Art. 100 Abs. 2 GG oder ein Verfassungsbeschwerdeverfahren aufgrund des Unterlassens einer derartigen Vorlage, insbesondere angesichts der geringeren Zulässigkeitsanforderungen dieser beiden Verfahrensarten.

1. Entscheidung bezüglich der Vorlagepflicht nach Art. 100 Abs. 2 GG

Angesichts der dargestellten Verstöße des 3. Strafsenats gegen seine Vorlagepflicht²⁸¹ erscheint es unwahrscheinlich, dass dieser für Staatsschutz- und Völkerstrafsachen zuständige Senat zukünftig seiner insoweit bestehenden Vorlagepflicht nachkommen wird. Eine Entscheidung des Bundesverfassungsgerichts ist dennoch durch die Vorlage eines Fachgerichts oder eine Verfassungsbeschwerde möglich. Es wird hier angenommen, dass die Fachgerichte angesichts objektiv ernstzunehmender Zweifel an völkergewohnheitsrechtlichen Ausnahmen funktioneller Immunität weiterhin der Vorlagepflicht nach Art. 100 Abs. 2 GG unterliegen. Dies hat sich durch die entsprechende BGH-Rechtsprechung und deren nun erfolgte gesetzliche Festschreibung nicht geändert.²⁸² Die Frage des Bestehens einer derartigen völkergewohnheitsrechtlichen Regel erfüllt auch angesichts der gesetzlichen Immunitätsausnahme das ungeschriebene Tatbestandsmerkmal²⁸³ der Entscheidungs-

²⁸¹ S. o. IV.

²⁸² Zwar wird vertreten, dass 'zwischenzeitlich ergangene höchstrichterliche Entscheidungen früheren Zweifeln die Grundlage entziehen' könnten (Dederer (Fn. 209), Rn. 305). Die zitierte Entscheidung BGHZ 155, 279 bezog sich jedoch auf Urteile des Obersten Sondergerichts Griechenlands und des EGMR, die nicht mit der BGH-Rechtsprechung vergleichbar sind, die ihrerseits unter Verstoß gegen die Vorlagepflicht erging. Dass das *mangelnde* Vorliegen einschlägiger höchstrichterlicher Rechtsprechung das Vorliegen der Vorlagepflicht (mit-)begründen kann (BVerfG, Beschl. v. 8. Mai 2007, 2 BvM 1/03, Rn. 25), bedeutet nicht zwingend, dass das *Vorliegen* einschlägiger höchstrichterlicher Rechtsprechung der Vorlagepflicht entgegensteht, die sich auch aus weiteren Fallgruppen ergeben kann (vgl. o. IV. 1). So ließ das BVerfG offen, ob Fachgerichte von anderen Gerichten abwichen, da aus anderen Gründen hinreichende Zweifel vorlagen (BVerfG, Beschl. v. 12. April 1983, Rn. 57).

²⁸³ Vgl. Dederer (Fn. 209), Rn. 308 ff.

erheblichkeit. Denn die gesetzliche Immunitätsausnahme würde im Fall des Konflikts mit einer völkergewohnheitsrechtlichen funktionellen Immunität als entgegenstehendes innerstaatliches Recht zurücktreten.²⁸⁴

Verstößt ein Gericht gegen die Vorlagepflicht nach Art. 100 Abs. 2 GG, kann im Wege der Verfassungsbeschwerde Rechtsschutz durch das Bundesverfassungsgericht ersucht werden. Denn ein derartiger Verstoß verletzt nach ständiger Rechtsprechung des Bundesverfassungsgerichts regelmäßig das grundrechtsgleiche Recht auf den gesetzlichen Richter.²⁸⁵ Zur Begründung hebt das Bundesverfassungsgericht die verfassungsrechtliche und völkerrechtliche Bedeutung des Normverifikationsverfahrens hervor.²⁸⁶ Die Beurteilung, ob eine gerichtliche Entscheidung auf einem Verstoß gegen die Vorlagepflicht beruht²⁸⁷ und eine Entscheidung somit das Recht auf den gesetzlichen Richter verletzt, setzt die Klärung der im konkreten Fall zweifelhaften völkergewohnheitsrechtlichen Regel voraus. Dies liegt in der alleinigen Zuständigkeit des Bundesverfassungsgerichts.²⁸⁸ Bezüglich der vorliegend untersuchten BGH-Entscheidungen wäre etwa kein Beruhen gegeben, wenn völkergewohnheitsrechtliche Immunitätsausnahmen für die dort betroffenen völkerrechtlichen Verbrechen anzunehmen sind.

Eine Befassung des Bundesverfassungsgerichts mit der Frage völkergewohnheitsrechtlicher Ausnahmen von funktioneller Immunität im Normverifikationsverfahren hätte Vorteile gegenüber einem Verfassungsbeschwerdeverfahren. Diese bestehen insbesondere in den Äußerungs- und Beteiligungsrechten von Bundestag, Bundesrat und der Bundesregierung im Normverifikationsverfahren nach § 83 Abs. 2 Bundesverfassungsgerichtsgesetz (BVerfGG), sowie der Gesetzeskraft der Entscheidung nach §§ 31 Abs. 2 S. 1, 13 Nr. 12 BVerfGG,²⁸⁹ deren Bedeutung das Bundesverfassungsgericht in seiner Rechtsprechung betonte:

„Das Verifikationsverfahren nach Art. 100 Abs. 2 GG ersetzt im Ergebnis das Gesetzgebungsverfahren [...] Im Hinblick auf die Eingliederung der Bundesrepublik in die Völkergemeinschaft ist es nicht minder wichtig, daß die an der Pflege

²⁸⁴ Vgl. Matthias Herdegen, 'Art. 25 GG', in: Günter Dürig, Roman Herzog und Rupert Scholz (Hrsg.): GG (105. EL August 2024, C. H. Beck 2024), Rn. 89.

²⁸⁵ BVerfG, NJW 57 (2004), 141-146 (142); BVerfG, NJW 51 (1998), 50-57 (51).

²⁸⁶ BVerfG, NJW 57 (2004), 141-146 (142); BVerfG, NJW 51 (1998), 50-57 (51).

²⁸⁷ Vgl. z. B. BVerfG, NJW 57 (2004), 141-146 (143); Martin Kment, 'Art. 101 GG', in: Hans Jarass und Bodo Pieroth (Hrsg.), GG (18. Aufl., C. H. Beck 2024), Rn. 20. Kritisch gegenüber dem Beruhens-Erfordernis: Klaus Schlaich und Stefan Koriath, *Das Bundesverfassungsgericht* (13. Aufl., C. H. Beck 2025), Rn. 433.

²⁸⁸ S. o. IV. 1.

²⁸⁹ Die Gesetzeskraft gilt auch im Verfassungsbeschwerdeverfahren, wenn ein Gesetz als mit dem Grundgesetz (un)vereinbar oder für nichtig erklärt wird, § 31 Abs. 2 S. 2 BVerfGG, vgl. u. bei Fn. 299.

der auswärtigen Beziehungen beteiligten Verfassungsorgane die Möglichkeit haben, ihre Auffassung darzulegen, damit die Gerichte die bestehenden allgemeinen Regeln des Völkerrechts nicht verkennen.“²⁹⁰

Es ist nicht erkennbar, dass ein vergleichbar strukturiertes und transparentes Konsultationsverfahren zum geltenden Völkergewohnheitsrecht unter Einbezug der genannten Verfassungsorgane im Gesetzgebungsverfahren vor Annahme der gesetzlichen Immunitätsausnahme stattfand. Denn diese Vorschrift wurde dem Gesetzentwurf nachträglich zur Festschreibung der BGH-Rechtsprechung hinzugefügt, nachdem der BGH seine Rechtsprechung im Haftfortdauerbeschluss vom 21. Februar 2024 ausgeweitet hatte.²⁹¹ Gegenstand der öffentlichen Anhörung mit Sachverständigen im Rechtsausschuss am 31. Januar 2024 war somit nur das Immunitätsurteil, nicht aber die nachfolgende BGH-Rechtsprechung zur funktionellen Immunität. In dieser Anhörung äußerten sich zwei Sachverständige zum Immunitätsurteil des BGH.²⁹² In der Plenardebatte erfolgte keine Auseinandersetzung mit dem völkergewohnheitsrechtlichen Gehalt der Immunitätsausnahme oder der diesbezüglichen BGH-Rechtsprechung.²⁹³

In einem Normverifikationsverfahren des Bundesverfassungsgerichts könnte ein eingehendes Konsultationsverfahren zum einschlägigen Völkergewohnheitsrecht, insbesondere mit den an der Pflege der auswärtigen Beziehungen beteiligten Verfassungsorganen, nachgeholt werden.

2. Entscheidung zur Vereinbarkeit der gesetzlichen Immunitätsausnahme mit Völkergewohnheitsrecht

Grundsätzlich kommt auch eine Entscheidung des Bundesverfassungsgerichts zur Vereinbarkeit der gesetzlichen Immunitätsausnahme mit Völkergewohnheitsrecht in Betracht. Angesichts der bestehenden Zweifel an völkergewohnheitsrechtlichen Regeln zu Immunitätsausnahmen könnte die gesetz-

²⁹⁰ BVerfGE 23, 288, Rn. 117.

²⁹¹ Immunitätsausnahmen wurden weder im BMJ-Eckpunktepapier noch im Gesetzentwurf der Bundesregierung erwähnt, vgl. Gesetzentwurf VStGB-Reform (Fn. 3); BMJ, Eckpunkte VStGB-Reform, 23. Februar 2023, <https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/Eckpunkte/230223_Eckpunkte_VStGB.pdf?__blob=publicationFile&v=2>, zuletzt besucht 14. Februar 2025.

²⁹² Vgl. Änderungsantrag CDU/CSU-Fraktion (BT-Drs. 20/11668); s. auch Ambos, Stellungnahme im Rechtsausschuss (29. Januar 2024) <<https://www.bundestag.de/resource/blob/988088/9578598fa0a5d366cec729b87a33b820/Stellungnahme-Ambos.pdf>>, zuletzt besucht 14. Februar 2025.

²⁹³ Vgl. Plenarprotokoll 20/172, 172. Sitzung, 6. Juni 2024, S. 22257-22265.

liche Immunitätsausnahme (teilweise) gegen Völkergewohnheitsrecht verstoßen. Dies würde einen seltenen Fall²⁹⁴ der unmittelbaren Wirkung einer Völkerrechtsnorm und einer damit kollidierenden innerstaatlichen Norm darstellen, die nicht über eine völkerrechtsfreundliche bzw. -konforme Auslegung einfachen Rechts vermieden werden kann.

Es ist umstritten, ob das Bundesverfassungsgericht im Wege der konkreten Normenkontrolle nach Art. 100 Abs. 1 S. 1 Alt. 2 GG über die Vereinbarkeit einfachen Bundesrechts mit Völkergewohnheitsrecht entscheiden kann. Dies hängt insbesondere von der problematischen Frage ab, ob der maßgebliche Prüfungsmaßstab, eine Verletzung des Grundgesetzes, das Völkergewohnheitsrecht als allgemeine Regel des Völkerrechts i. S. d. Art. 25 GG umfasst.²⁹⁵ Jedenfalls ist jedoch von einem Vorrang des Normverifikationsverfahrens nach Art. 100 Abs. 2 GG auszugehen, wenn die Voraussetzungen des Art. 25 S. 1 GG zweifelhaft sind.²⁹⁶ Dies ist hier der Fall, da objektiv ernstzunehmende Zweifel an der Existenz bzw. Reichweite funktioneller Immunität nach Völkergewohnheitsrecht bestehen. Es wird auch diskutiert, ob eine prozessuale Verbindung der Frage nach Existenz bzw. Inhalt einer Völkerrechtsnorm mit der Frage nach der Vereinbarkeit im Verfahren nach Art. 100 Abs. 2 GG aus Gründen der Prozessökonomie zulässig ist.²⁹⁷

Auch die Zulässigkeit einer Rechtssatzverfassungsbeschwerde wäre im konkreten Fall fraglich und unterliegt jedenfalls höheren Anforderungen²⁹⁸ als die bereits dargestellte Urteilsverfassungsbeschwerde. Letztere kann sich grundsätzlich (mittelbar) auch auf die Verfassungswidrigkeit einer in der Entscheidung für verfassungsmäßig gehaltenen und deshalb angewandten Norm stützen, woraufhin das Bundesverfassungsgericht die Norm für verfassungswidrig erklären könnte.²⁹⁹ Grundsätzlich kann eine den Einzelnen belastende gerichtliche Entscheidung, die auf einer mit dem allgemeinen Völkerrecht unvereinbaren Anwendung einer Vorschrift des innerstaatlichen Rechts be-

²⁹⁴ Vgl. Marco Meyer und Charlotte von Fallois, 'Das Völkerrechtsverifikationsverfahren nach Art. 100 II GG im Überblick', JuS 59 (2019), 1066-1070 (1069).

²⁹⁵ Bejahend z. B. Karl-Georg Meyer, 'Art. 100 GG', in: Ingo von Münch und Philip Kunig (Hrsg.), *GG* (7. Aufl. C. H. Beck 2021), Rn. 86; Schlaich und Koriouth, (Fn. 287), Rn. 415; Kment (Fn. 287), Rn. 31 m. w. N. A. A. Dederer (Fn. 209), Rn. 287.

²⁹⁶ Meyer (Fn. 295), Rn. 86.

²⁹⁷ I. d. S. Klaus Stern, 'Art. 100 GG', in: Wolfgang Kahl, Christian Waldhoff und Christian Walter (Hrsg.), *Bonner Kommentar zum GG* (18. EL 1967, C. F. Müller 1967), Rn. 221 ff.; vgl. Meyer und von Fallois (Fn. 294), 1069; krit. Dederer (Fn. 209), Rn. 288; Schlaich und Koriouth (Fn. 287), Rn. 417.

²⁹⁸ U. a. strenge Prüfung des Betroffenseins (Schlaich und Koriouth (Fn. 287), Rn. 536, 585 f.) und des Subsidiaritäts-Grundsatzes (Schlaich und Koriouth (Fn. 287), Rn. 587 ff.).

²⁹⁹ Vgl. Schlaich und Koriouth (Fn. 287), Rn. 292, 752.

ruht, gegen das Recht der freien Entfaltung der Persönlichkeit und den Anspruch auf Gleichbehandlung verstoßen.³⁰⁰

Unabhängig von der Frage der Zulässigkeit einer abstrakten Normenkontrolle nach Art. 93 Abs. 1 Nr. 2 GG³⁰¹ erscheint ein derartiger Antrag durch die Bundesregierung oder ein Viertel der Mitglieder des Bundestages schon aus Gründen der politischen Opportunität³⁰² fernliegend.

VI. Bedeutung einer Entscheidung durch das Bundesverfassungsgericht

Eine völker- und verfassungsrechtskonforme Entscheidung des Bundesverfassungsgerichts zu der wichtigen und umstrittenen Frage der Immunitätsausnahmen würde eine Heilung der defizitären völkergewohnheitsrechtlichen Begründung der BGH-Rechtsprechung und der hierauf verweisenden gesetzlichen Immunitätsausnahme bewirken. Dies könnte zur Legitimität der Strafverfolgung von völkerrechtlichen Verbrechen in Deutschland beitragen (1.) und ihrem potenziellen Beitrag zur Fortentwicklung des Völkergewohnheitsrechts ein größeres Gewicht verleihen. Jedenfalls vermag eine Entscheidung des Bundesverfassungsgerichts durch klärende Feststellungen zur Rechtslage nach dem Völkergewohnheitsrecht der Fortentwicklung desselben im weiteren Sinne zu dienen (2.). Somit ist die Bedeutung einer Entscheidung unabhängig davon gegeben, ob das BVerfG zu dem gleichen völkergewohnheitsrechtlichen Ergebnis käme wie der BGH, also ob bzw. inwieweit es völkergewohnheitsrechtliche Ausnahmen von funktioneller Immunität feststellen würde.³⁰³

1. Beitrag zur Legitimität völkerstrafrechtlicher Verfahren

Die Dominanz von europäischen Ländern bei der Strafverfolgung von völkerrechtlichen Verbrechen auf Grundlage des Weltrechtsprinzips ist den

³⁰⁰ Vgl. BVerfGE 112, 1 (22), Rn. 65-70.

³⁰¹ Vgl. o. zur problematischen Frage bzgl. Art. 100 Abs. 1 GG, ob der Prüfungsmaßstab der Grundgesetz-Verletzung allgemeine Regeln des Völkerrechts umfasst (Fn. 295). Dies wird bzgl. der abstrakten Normenkontrolle z. B. bejaht von Karl-Georg Meyer, 'Art. 93 GG', in: Ingo von Münch und Philip Kunig (Hrsg.), *GG* (7. Aufl. C. H. Beck 2021), Rn. 70a.

³⁰² Vgl. Schlaich und Korioth (Fn. 287), Rn. 359.

³⁰³ Zu dieser Möglichkeit, s. o. Fn. 287. Das Bundesverfassungsgericht wird jedenfalls eine Prüfung des Völkergewohnheitsrechts vornehmen und kann die diesbezüglichen Feststellungen veröffentlichen (vgl. z. B. BVerfG, Beschl. v. 5.11.2003 – 2 BvR 1243/03).

Vorwürfen des Eurozentrismus und der Doppelstandards ausgesetzt.³⁰⁴ Selbst wenn man annähme, dass die entsprechende europäische Praxis ein regionales oder in sonstiger Hinsicht partikulares Völkergewohnheitsrecht darstellte,³⁰⁵ könnte dieses nur zu Lasten der „teilnehmenden“ Staaten Rechtswirkungen entfalten.³⁰⁶ Beispielsweise bezog sich das Fallaufkommen von Strafverfolgung nach dem VStGB in Deutschland bis zum Jahr 2023 auf Verbrechen in Afghanistan, der Demokratischen Republik Kongo, Gambia, dem Irak, Libyen, Pakistan, Ruanda, Sri Lanka und Syrien.³⁰⁷ Auch gegen die als selektiv wahrgenommene Verfolgung von völkerrechtlichen Verbrechen in Deutschland wurde der Vorwurf der Doppelstandards erhoben,³⁰⁸ was die Legitimität der Verfolgung von völkerrechtlichen Verbrechen in Deutschland gefährde.³⁰⁹

Zu diesen Vorwürfen trägt die Intransparenz der Entscheidung über ein Absehen von der Verfolgung bei völkerrechtlichen Verbrechen durch die Bundesregierung und den GBA bei.³¹⁰ Die maßgeblichen Vorschriften, § 153f Strafprozessordnung (StPO) und § 147 Nr. 1 GVG, blieben bislang vom Gesetzgeber unangetastet.³¹¹ So wird die Auflösung des externen, ministeriellen Weisungsrechts bei völkerrechtlichen Verbrechen gefordert,³¹² „um unnö-

³⁰⁴ Vgl. Brianne McGonigle Leyh, 'Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes', *International Journal of Transitional Justice* 16 (2022), 363-379 (375 f.). Unabhängig von der Stichhaltigkeit dieser Vorwürfe, zu der hier keine Stellung bezogen werden soll, sind sie eine politische Realität (vgl. Robert Stendel, 'The Council of Europe as a Preferable and Viable Partner to Ukraine for Prosecuting the Crime of Aggression', *VerfassungsBlog*, 28. Oktober 2024, doi: 10.59704/29e9a885a0aaeb31 [zitiert: Patryk Labuda 'Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law's Selectivity in the Wake of the 2022 Ukraine Invasion', *LJIL* 36 (2023) 1095-1116].

³⁰⁵ Vgl. ILC, *Schlussfolgerungen* (Fn. 37), 16(2); Robert Stendel und Anne Peters, 'Ein Sondertribunal zur Aggression gegen die Ukraine? Ja.' *Vereinte Nationen* 2/2023, 74 (wonach 'sich in Europa eine regionale Immunitätsausnahme für das Verbrechen der Aggression herauszubilden scheint').

³⁰⁶ Vgl. Kommentierung zu ILC, *Schlussfolgerungen* (Fn. 37), 16, 155, Rn. 3.

³⁰⁷ Safferling, 'Fortentwicklung' (Fn. 9).

³⁰⁸ Arne Bardelle, 'Der kurze Atem der deutschen Strafverfolgungsbehörden: Regimeverbrechen in Belarus', *Völkerrechtsblog*, 13. Mai 2024, doi: 10.17176/20240513-185149-0; Ignaz Szlacheta, 'Auch gegen befreundete Staaten muss ermittelt werden' (1. März 2024), <<https://magazin.zenith.me/de/politik/interview-mit-voelkerrechtsanwalt-patrick-kroker>>, zuletzt besucht 14. Februar 2025.

³⁰⁹ Hassfurther (Fn. 10).

³¹⁰ Hassfurther (Fn. 10).

³¹¹ Hassfurther (Fn. 10), wonach der BMJ-Referentenentwurf eines Gesetzesentwurfs zur Erhöhung der Transparenz von Weisungen gegenüber der Staatsanwaltschaft (26. März 2024) unzureichend sei.

³¹² Julia Geneuss, *Rechtsausschuss-Stellungnahme VStGB-Reform* (31. Januar 2024), Zusammenfassung, S. 9; Ambos, 'Reform des Völkerstrafrechts' (Fn. 9), 31; Krefß, 'Völkerstrafrechtspflege' (Fn. 10), 75.

tiges Misstrauen hinsichtlich politischer Einflussnahme zu vermeiden“.³¹³ Angesichts des potenziell weitreichenden und gerichtlich nicht voll überprüf-
baren Verfolgungsermessens³¹⁴ lässt es sich schwer nachverfolgen, inwiefern
Entscheidungen in diesem Zusammenhang von dem völkergewohnheits-
rechtlichen Grundsatz der souveränen Gleichheit der Staaten geleitet sind.³¹⁵
Kontroverse Entscheidungen des GBA gegen die Einleitung eines Ermitt-
lungsverfahrens unter Ausübung seines Verfolgungsermessens betrafen bei-
spielsweise die Strafanzeigen gegen Donald Rumsfeld und andere wegen Vor-
würfen der Folter in Abu Ghraib und Guantanamo,³¹⁶ gegen den ehemaligen
usbekischen Innenminister Zokirjon Almatov wegen Vorwürfen der Verbrechen
gegen die Menschlichkeit und Folter³¹⁷ sowie gegen hochrangige Mit-
glieder des belarussischen Sicherheitsapparats unter anderem wegen Vorwürfen
der Folter.³¹⁸

Die Strafverfolgungspraxis des GBA außerhalb seines Verfolgungsermes-
sens nach § 153f StPO, also unter Geltung des Legalitätsprinzips,³¹⁹ dürfte
einfacher nachzuverfolgen sein. Dies ist beispielsweise unter bestimmten
Bedingungen³²⁰ der Fall bei Anwesenheit eines Beschuldigten in Deutsch-
land, etwa zu einer medizinischen Behandlung wie im Fall von Herrn Alma-
tov.³²¹ In derartigen Fällen dürfte sich die allgemein zu erwartende Entwick-
lung manifestieren, wonach die Strafverfolgungspraxis des GBA nach dem
Weltrechtsprinzip, insbesondere angesichts der von ihm angenommenen Im-
munitätsausnahmen bei völkerrechtlichen Verbrechen,³²² zukünftig mit er-
höhter Aufmerksamkeit verfolgt werden wird. Unter anderem könnte die
Frage relevant werden, ob der GBA unter Umständen zur Aufnahme von

³¹³ Geneuss (Fn. 312).

³¹⁴ Vgl. § 172 Abs. 2 S. 3 StPO; ECCHR, Stellungnahme zum Referentenentwurf VStGB-
Reform, August 2023, 16 ff. m. w. N.

³¹⁵ Vgl. Hassfurter (Fn. 10) zur mangelnden Überprüfbarkeit '[i]nwiefern Völkerstrafrecht
tatsächlich unterschiedslos und frei von politischen Erwägungen angewendet wird'; ECCHR,
(Fn. 314), 23 f. weist auf das Risiko (des Anscheins) der Politisierung von Einstellungsentscheidungen
und die Bedeutung von deren Transparenz für die Legitimität der Strafverfolgung bei
völkerrechtlichen Verbrechen hin.

³¹⁶ Vgl. Wolfgang Kaleck, 'Syrian Torture Investigations in Germany and Beyond – Breathing
New Life into Universal Jurisdiction in Europe?', JICJ 16 (2018), 165-191 (177); Herbert
Diemer, '§ 153f StPO' in: Christoph Barthe und Jan Gericke (Hrsg.), *Karlsruher Kommentar
zur StPO*, (9. Aufl., C. H. Beck 2023), Rn. 7.

³¹⁷ Salvatore Zappalà, 'The German Federal Prosecutor's Decision not to Prosecute a
Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?', JICJ 4 (2006), 602-
622.

³¹⁸ Zu Letzterem Bardelle (Fn. 308).

³¹⁹ Julia Geneuss, *Völkerrechtsverbrechen und Verfolgungsermessens* (Nomos 2013), 336.

³²⁰ Vgl. arg. e contr. § 153 f. Abs. 2 S. 2 StPO.

³²¹ Zu Letzterem Zappalà (Fn. 316).

³²² Vgl. Frank und Barthe, 'Immunitätsschutz' (Fn. 9), 235.

Strafverfolgung nach deutschem Recht oder Völkerrecht verpflichtet ist.³²³ Diese erhöhte Aufmerksamkeit ist nicht zuletzt auf aktuelle Vorwürfe völkerrechtlicher Verbrechen im Nahen Osten³²⁴ und das Verfahren Nicaraguas gegen Deutschland in der Rechtssache „*Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory*“ vor dem IGH³²⁵ zurückzuführen. In diesem Verfahren hat Nicaragua unter anderem die Feststellung völkerrechtswidrigen Verhaltens durch Deutschland beantragt, angesichts der behaupteten Weigerung, Personen der Strafverfolgung zuzuführen, denen schwere völkerrechtliche Verbrechen, einschließlich Kriegsverbrechen und Apartheid, vorgeworfen werden.³²⁶

Eine positive Feststellung des Bundesverfassungsgerichts zu völkergewohnheitsrechtlichen Ausnahmen von der funktionellen Immunität bei völkerrechtlichen Verbrechen würde zur Legitimität der innerstaatlichen Verfolgung von völkerrechtlichen Verbrechen beitragen. Denn das Völkergewohnheitsrecht schafft insofern einen Ausgleich zwischen der Verfolgungspflicht von völkerrechtlichen Verbrechen und dem Grundsatz der souveränen Gleichheit, dem die funktionelle Immunität ausländischer Staatsbediensteter dient.³²⁷ Eine Feststellung des geltenden Völkergewohnheitsrechts durch das Bundesverfassungsgericht mit entsprechender Bindungswirkung könnte die defizitäre völkergewohnheitsrechtliche Begründung der BGH-Rechtsprechung und der hierauf verweisenden gesetzlichen Immunitätsausnahme überwinden.³²⁸

2. Beitrag zur Fortentwicklung des Völkergewohnheitsrechts

Unabhängig davon, ob bzw. inwieweit das Bundesverfassungsgericht völkergewohnheitsrechtliche Ausnahmen von funktioneller Immunität feststellen würde, könnte seine Entscheidung zur Fortentwicklung des Völkergewohnheitsrechts beitragen. Der hier verwandte weite Begriff der „Fortentwicklung“ umfasst auch die weitere Klärung des Bestands und Umfangs einer

³²³ Diese Frage wird hier offengelassen.

³²⁴ Vgl. z. B. ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024), <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>>, zuletzt besucht 14. Februar 2025.

³²⁵ Vgl. Nicaragua, *Application Instituting Proceedings* (1. März 2024), 28 f., Rn. 67; vgl. auch IGH, Order (Provisional Measures), 30. April 2024, *Separate Opinion Sebutinde*, 8 f., Rn. 22.

³²⁶ Nicaragua (Fn. 325).

³²⁷ Zu Letzterem vgl. z. B. IStGHJ, *Blaškić* (Fn. 200), Rn. 41.

³²⁸ S. o. III.

völkergewohnheitsrechtlichen Regel und diesbezüglicher Nachweise. Eine Entscheidung des BVerfG könnte in mehrerlei Hinsicht diese Funktion erfüllen, insbesondere im hierfür prädestinierten Normverifikationsverfahren. Die Entscheidung kann zunächst selbst einen Nachweis von Praxis und *opinio iuris* darstellen. Zudem kann die Entscheidung, bei entsprechender Begründung, als Hilfsmittel zur Feststellung von Völkergewohnheitsrecht dienen.³²⁹ Insofern könnte insbesondere eine Klärung völkergewohnheitsrechtlicher Nachweise bewirkt werden, unter anderem der Praxis und *opinio iuris* verschiedener Akteure in Deutschland, einschließlich des Bundestags und der Bundesregierung.

Darüber hinaus kann sich eine Entscheidung des BVerfG auch auf den Beitrag zur Fortentwicklung des Völkergewohnheitsrechts der Strafverfolgung von völkerrechtlichen Verbrechen in Deutschland³³⁰ auswirken. Im Falle der Annahme von Immunitätsausnahmen durch das BVerfG könnte diesem Beitrag aus mehreren Gründen ein größeres Gewicht zukommen.

Zum einen könnte in einem Verfahren vor dem BVerfG eine Klärung der *opinio iuris* des Bundestags und der Bundesregierung erfolgen. Ihnen kommen im Normverifikationsverfahren Äußerungs- und Beteiligungsrechte zu.³³¹ Innerstaatliche Gesetzgebung, die zwar meist das Ergebnis politischer Entscheidungen ist, kann insbesondere dann als Nachweis von derartiger *opinio iuris* geeignet sein, wenn angegeben wurde (etwa bei Verabschiedung der Rechtsvorschrift), dass sie nach dem Völkergewohnheitsrecht vorgeschrieben ist oder dieser Wirkung verleiht.³³² Die Begründung der gesetzlichen Immunitätsausnahme beschränkt sich jedoch auf einen Verweis auf die ihrerseits defizitär begründete Rechtsprechung des BGH zur funktionellen Immunität, deren „Festschreibung“ sie dienen soll.³³³ Diese Klärung der *opinio iuris* könnte auch dazu beitragen, dass die innerstaatliche Annahme von Immunitätsausnahmen nicht als bloße Anwendung einfachen innerstaatlichen Rechts missverstanden wird. Zudem böte sich eine Gelegenheit zur Klärung der Rechtsauffassung der Bundesregierung³³⁴ angesichts ihrer Stellungnahmen in der Vergangenheit, die in der Sache von der BGH-Rechtsprechung, die nun gesetzlich festgeschrieben wurde, abwichen.³³⁵

Zum anderen wird Entscheidungen höherer Gerichte als Nachweis von Staatenpraxis regelmäßig mehr Gewicht bei der Feststellung einer völkerge-

³²⁹ Vgl. Kommentierung zu ILC, Schlussfolgerungen (Fn. 37), 13, Rn. 1.

³³⁰ Den potenziellen Beitrag des GBA betont Kreß, 'Einleitung' (Fn. 13), 698.

³³¹ S. o. V. 1.

³³² Kommentierung zu ILC, Schlussfolgerungen (Fn. 37), 10, 104, Rn. 5.

³³³ S. o. Fn. 3.

³³⁴ Rensmann (Fn. 56), 539, vgl. Strewe (Fn. 56), 508 f. bzgl. *Immunitätsurteil*.

³³⁵ Zu Letzterem s. o. IV. 2. b).

wohnheitsrechtlichen Regel beigemessen.³³⁶ Der potenzielle Beitrag der völkerstrafrechtlichen Praxis in Deutschland zur Fortentwicklung des Völkergewohnheitsrechts würde schließlich auch durch die Vereinheitlichung der staatlichen Praxis und *opinio iuris* ein größeres Gewicht erhalten können. So kann die bisherige Praxis nur begrenzt zur Bildung von Völkergewohnheitsrecht beitragen, da variierender Praxis eines Staates den Umständen entsprechend weniger Gewicht beizumessen sein kann.³³⁷ Dies ist etwa der Fall, wenn die Praxis in der Gesamtschau widersprüchlich ist, also die Praxis verschiedener Staatsorgane hinsichtlich der gleichen völkergewohnheitsrechtlichen Frage abweicht, oder die Praxis eines Staatsorgans im Laufe der Zeit variiert.³³⁸ Für beides liegen mit Bezug auf Deutschland Anhaltspunkte vor. Unter anderem hatte der GBA im Jahr 2005 von der Einleitung eines Ermittlungsverfahrens gegen Jiang Zemin, den ehemaligen Staatspräsidenten der Volksrepublik China, abgesehen, da eine „allgemeine völkerrechtliche Regel, die im internationalen Recht fest verankert ist, besagt, dass amtierende und ehemalige Regierungschefs und Staatsoberhäupter jedenfalls für Handlungen während ihrer Amtszeit Immunität von der Gerichtsbarkeit fremder Staaten genießen“.³³⁹ Im Immunitätsurteil merkte der BGH zwar an, dass sich aus dieser GBA-Entscheidung „keine maßgeblichen Rückschlüsse“ für die funktionelle Immunität von „niederrangigen“ Staatsbediensteten ergäben.³⁴⁰ Es ist jedoch offen, ob der BGH an dieser Aussage festhielt, da er letzteres Kriterium in der nachfolgenden Rechtsprechung aufgegeben hat.³⁴¹ Jedenfalls scheint der BGH nicht dem GBA³⁴² darin gefolgt zu sein, dass die *Jiang Zemin*-Entscheidung auf einer missverständlichen Formulierung im *Arrest Warrant*-Urteil des IGH beruht haben könnte.³⁴³

Neben einer Entscheidung des Bundesverfassungsgerichts wäre zur Fortentwicklung des Völkergewohnheitsrechts bezüglich Immunitätsausnahmen bei völkerrechtlichen Verbrechen auch entsprechende, international repräsentative Staatenpraxis begrüßenswert.³⁴⁴ Gleiches gilt für die Legitimität der

³³⁶ Vgl. ILC, Schlussfolgerungen (Fn. 37), 134, Rn. 6.

³³⁷ Vgl. ILC, Schlussfolgerungen (Fn. 37), 7(2).

³³⁸ Kommentierung zu ILC, Schlussfolgerungen (Fn. 37), 7(2), 135, Rn. 4.

³³⁹ GBA-Schreiben v. 24. Juni 2005, Az. 3 ARP 654/03-2.

³⁴⁰ BGH, *Immunitätsurteil* (Fn. 29), Rn. 40.

³⁴¹ Vgl. o. Text bei Fn. 109 ff.

³⁴² Frank und Barthe, 'Immunitätsschutz' (Fn. 9) 261 (es handele sich bei der Entscheidung bezüglich Jiang Zemin um eine von 'singuläre[n] Entscheidungen nationaler Strafverfolgungsbehörden, die – zum Teil unter Hinweis auf die missverständliche Formulierung in Randnummer 61 des Urteils des IGH im *Haftbefehl*-Fall – eine Immunität auch bei einem Verdacht von Völkerrechtsverbrechen zugunsten fremdstaatlicher *vormaliger* Staatsoberhäupter, Regierungschefs oder sonstiger Kabinettsmitglieder bejaht haben').

³⁴³ Vgl. o. IV. 2. d).

³⁴⁴ Vgl. Syring (Fn. 11), 485.

vielfach betonten internationalen „Vorreiterrolle“ der deutschen Strafjustiz bei der Verfolgung von völkerrechtlichen Verbrechen mit Bezug auf ausländische Staatsbedienstete. Jedenfalls sollte den staatlichen Akteuren in Deutschland viel daran gelegen sein, dass keine Zweifel an ihrem strikten und ernsthaften Streben nach Einhaltung des Völkerrechts bestehen.

VII. Ergebnis

Der 3. Strafsenat des BGH stellte im Jahr 2021 eine völkergewohnheitsrechtliche Ausnahme von funktioneller Immunität ausländischer Staatsbediensteter bei bestimmten Kriegsverbrechen fest und weitete sie in dem Haftfortdauerbeschluss vom 21. Februar 2024, bestätigt und konkretisiert in dem Revisionsbeschluss vom 20. März 2024, auf alle ausländischen Hoheitsträger unabhängig von ihrem Status und Rang und mit Bezug auf alle völkerrechtlichen Verbrechen aus. Der Gesetzgeber hat diese Rechtsprechung in § 20 Abs. 2 S. 2 GVG kodifiziert, der am 3. August 2024 in Kraft trat. Es wird angenommen, dass diese Rechtsprechung des BGH, dem insofern eine internationale „Vorreiterrolle“ zugeschrieben wird, die entsprechende Rechtsprechung in anderen Ländern beeinflussen könnte. Der gesetzlichen Festbeschreibung dieser Rechtsprechung wird erwartungsgemäß ähnliche internationale Aufmerksamkeit zukommen.

Die kodifizierte BGH-Rechtsprechung gibt jedoch Anlass zu völkerrechtlichen und verfassungsrechtlichen Bedenken. Angesichts objektiv ernstzunehmender Zweifel an den vom Senat festgestellten völkergewohnheitsrechtlichen Regeln – bei einer methodisch stringenten Anwendung der völkerrechtlichen Maßstäbe hieran – verletzte er in seinen Entscheidungen zu Immunitätsausnahmen bei völkerrechtlichen Verbrechen die Vorlagepflicht an das BVerfG nach Art. 100 Abs. 2 GG. Eine Befassung des BVerfG mit dieser wichtigen wie umstrittenen völkergewohnheitsrechtlichen Frage der Ausnahmen von funktioneller Immunität ist weiterhin möglich und sinnvoll. In Betracht kommt insbesondere ein Normverifikationsverfahren nach richterlicher Vorlage gemäß Art. 100 Abs. 2 GG oder ein Verfassungsbeschwerdeverfahren aufgrund des Unterlassens einer derartigen Vorlage. Eine solche Entscheidung des Bundesverfassungsgerichts würde eine Heilung der defizitären völkergewohnheitsrechtlichen Begründung der BGH-Rechtsprechung und der hierauf verweisenden gesetzlichen Immunitätsausnahme ermöglichen. Die Entscheidung könnte zudem zur Legitimität der Strafverfolgung von völkerrechtlichen Verbrechen in Deutschland beitragen und deren potenziellem Beitrag zur Fortentwicklung des Völkergewohnheitsrechts ein größeres Gewicht verleihen.

Summary: Beyond Any Doubt – Identification of Customary International Law in the Case Law of the Federal Court of Justice on Functional Immunity of Foreign State Officials

The Federal Court of Justice (FCJ) identified an exception to functional immunity for certain war crimes under customary international law in 2021 and extended it to all crimes under international law in 2024. The German legislator codified this case law in sec. 20(2), second sentence of the Courts Constitution Act (GVG). However, this case law raises international and constitutional law concerns. Applying a stringent methodology reveals objectively serious doubts about the identified customary rules. Therefore, the FCJ violated its constitutional obligation of referral to the Federal Constitutional Court (FCC) under art. 100(2) of the Basic Law (GG) in these decisions. A decision by the FCC on the controversial immunity exceptions may remedy the deficient customary international law reasoning of the FCJ's jurisprudence and its statutory codification. This could enhance the legitimacy of the prosecution of crimes under international law in Germany and its potential contribution to the development of customary international law.

Keywords

Functional immunity for crimes under international law – identification of customary international law – Federal Court of Justice referral to the Federal Constitutional Court

Smart Sanctions gegen russische Oligarchen – weder smart noch rechtmäßig!

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Abstract

Nach dem russischen Angriff auf die Ukraine wurden ungefähr 2200 Personen von der EU mit sogenannten „smart sanctions“, also personenbezogenen Sanktionen, belegt. Zu den sanktionierten Personen gehören auch systemferne Wirtschaftseliten, die an dem Angriff und Krieg in der Ukraine nicht zurechenbar beteiligt sind; ihr in der Europäischen Union (EU) befindliches Eigentum wurde eingefroren und die Ein- und Durchreise durch EU-Staaten wurde ihnen untersagt. Der Artikel fokussiert sich auf das Einfrieren des in der EU befindlichen Eigentums. Schon die Auslegung von Art. 215 Abs. 2 Vertrag über die Arbeitsweise der Europäischen Union (AEUV) wirft wegen der sehr unklaren Voraussetzungen einer Sanktionierung natürlicher und juristischer Personen Fragen auf. Das gleiche gilt für den konkreten Sanktionsbeschluss des Rats sowie die Rechtsprechung des Gerichts der

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Europäischen Union (EuG) in den Fällen, in denen die betroffenen Wirtschaftseliten gegen die Sanktionen geklagt hatten. Auf jeden Fall ist nach nunmehr mehr als zwei Jahren Krieg angesichts der Tatsache, dass die Russische Föderation durch die Sanktionen zumal der betroffenen Eliten kaum bzw. überhaupt nicht beeindruckt scheint, klar, dass die Sanktionen zur Erreichung ihres Ziels, nämlich einer Änderung der russischen Politik, nicht geeignet sind und deswegen das Grundrecht des Eigentums der betroffenen systemfernen Wirtschaftseliten rechtswidrig beschränkt ist. Dazu stellt sich die Frage, ob nicht auch ihre Menschenwürde verletzt ist, da ihnen gegenüber mit diesen rein symbolischen Sanktionen ein Exempel statuiert wird.

Keywords

Smart sanctions gegen Wirtschaftseliten – rechtliche Voraussetzungen einer Sanktionierung nach Art. 215 Abs. 2 AEUV – Eigentumsbeschränkungen – Nichtgeeignetheit der Sanktionen zur Zielerreichung – Menschenwürdeverletzung

I. Einleitung**

Nach dem Angriff Russlands auf die Ukraine im Februar 2022 hat die EU auf der Grundlage von Art. 215 Abs. 1 AEUV ein ganzes Paket von Sanktionen gegen die Russische Föderation erlassen. Auf der Grundlage von Art. 215 Abs. 2 AEUV sind mit dem mittlerweile 15. Sanktionen-Paket vom 16. Dezember 2024 auch gegen mehr als 2200 natürliche Personen Sanktionen erlassen worden, darunter hochrangige Vertreter der privaten Wirtschaft, nach etwas veralteter Terminologie¹ sog. Oligarchen. Die nach dem Angriff auf die Ukraine im Februar 2022 erlassenen Sanktionen sind eine verschärfte und umfassende Fortsetzung jener Sanktionen, die 2014 nach der Annexion

** Russische sowie ukrainische Eigennamen und Termini wurden, soweit es nicht um Fremdzitate z. B. aus Gerichtsentscheidungen oder ähnliches geht, und abgesehen von allgemein gebräuchlichen Wörtern wie Selenskij nach Iso 9 transkribiert. Abgesehen von wenigen Einzelfällen war Redaktionsschluss des Textes der 15. November 2024.

¹ Der Terminus ‘Oligarchen’ bezieht sich auf diejenigen Wirtschaftseliten, die im Rahmen der Privatisierung in den ‘wildem’ 90er Jahren große Vermögen angehäuft haben. Im Sog von Putin – zum Beispiel wegen Freundschaft oder geheimdienstlichem Hintergrund – entstand eine ganz neue Gruppe von Milliardären; s. dazu Catherine Belton, *Putins Netz* (Harper Collins 2023), passim, z. B. 375 ff., 442 ff.; insofern zumindest terminologisch etwas veraltet D. Siegel, ‘From Oligarchs to Oligarchy’, *Wld. Aff.* 185 (2022), 249 ff.

der Krim und der Stützung der separatistischen Bewegungen in den Gebieten Lugans'k und Donec'k erlassen wurden.²

Ziel der Sanktionen ist, den Krieg gegen die Ukraine für die Russische Föderation so belastend und teuer zu machen, dass diese zu einem Waffenstillstand bzw. Friedensvertrag mit der Ukraine bereit ist, idealiter unter Rückgabe der seit 2014 annektierten Gebiete und Ersatz des durch den Krieg verursachten Schadens; dies sind auch die Kriegsziele der Ukraine.³ Von einer dies voraussetzenden Kriegsmüdigkeit bei der Russischen Föderation kann allerdings nicht die Rede sein. Diese hat sich auf einen langen Krieg eingestellt. Das zeigen alle politischen Verlautbarungen hochgestellter Funktionsträger und insbesondere Präsident Putins⁴ und das tatsächliche Handeln der Russischen Föderation, etwa der Haushalt des Jahres 2024.⁵ Die russischen Eliten scheint Putin unter Kontrolle zu haben. Illusorisch ist es wohl auch, darauf zu warten, dass der Krieg wegen breiten Widerstandes in der Bevölkerung sein Ende finden könnte. Die mit Vorsicht zu bewertenden⁶ Meinungsumfragen zum Thema des Krieges zeigen noch immer eine mehrheitliche (wenn auch manchmal zweifelnde⁷) Unterstützung des Krieges.

² S. die Zusammenstellung der mittlerweile 15 Sanktionenpakete vom 1. Sanktionenpaket vom 17. März 2014 bis zum 15. Sanktionenpaket vom 16. Dezember 2024, mit Links zu den jeweiligen Beschlüssen sowie Begründungen, <<https://www.consilium.europa.eu/de/policies/sanctions-against-russia/timeline-sanctions-against-russia/>>, zuletzt besucht 27. Januar 2025.

³ Zu den Zielen der EU bei der Sanktionierung s. etwa Felix Lange, *Der russische Angriffskrieg gegen die Ukraine und das Völkerrecht* (De Gruyter 2023), 22 (unter Verweis auf <https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_de>, zuletzt besucht 14. Januar 2025): Politisches Ziel sei, 'dem Kreml die Mittel zur Finanzierung des Kriegs zu kappen, der für die Invasion verantwortlichen politischen Elite in Russland spürbare wirtschaftliche und politische Kosten aufzuerlegen und die russische Wirtschaft zu schwächen.' Zu den Vorstellungen und Bedingungen des ukrainischen Präsidenten Selenskiy für einen Friedensvertrag s. etwa dessen Rede vor der UNO am 20. September 2023, <<https://unric.org/de/220922-selenskiy/>>, zuletzt besucht 14. Januar 2025.

⁴ S. etwa die Verlautbarung von Putins Pressesprecher Peskov zu den russischen Kriegszielen vom August 2023, <<https://www.n-tv.de/politik/Russland-will-noch-gewaltige-Gebiete-erobern-article24313285.html>>, zuletzt besucht 14. Januar 2025; zur (äußeren) Geschlossenheit der Funktionsträger sei an die Sitzung des UN-Sicherheitsrates v. 21. Februar 2022 erinnert, s. dazu Sabine Fischer, 'Russland auf dem Weg in die Diktatur', SWP-Aktuell Nr. 31 (April 2022), bes. 2.

⁵ S. die Analyse des Budgets 2024 von Pavel Luzin und Alexandra Prokopenko, 'Russia's 2024 Shows it's Planning for a Long War in Ukraine', <<https://carnegieendowment.org/politika/90753>>, zuletzt besucht 14. Januar 2025.

⁶ S. das Interview vom 8. April 2022 mit dem russischen Soziologen Grigorij Judin in <<https://www.dekoder.org/de/article/judin-krieg-ukraine-oeffentliche-meinung>>, zuletzt besucht 14. Januar 2025.

⁷ S. die Umfrage vom Oktober 2024 von Levada, <<https://www.levada.ru/2024/11/06/konflikt-s-ukrainoj-vnimanie-podderzhka-otnoshenie-k-mirnym-peregovoram-i-k-sluzhbe-po-kontraktu-v-oktyabre-2024-goda>>, zuletzt besucht 14. Januar 2025.

Ähnlich illusorisch dürfte es sein, auf einen Erfolg der Sanktionen zu hoffen. Sanktionen werden seit der ersten Hälfte des letzten Jahrhunderts vor allem von den mächtigeren Staaten, insbesondere den USA, als Druckmittel auf die Politik anderer Staaten angewandt.⁸ Sie sind aber auch bei langer Dauer nicht unbedingt erfolgreich, wie Kuba oder der Iran zeigen.⁹ Nach einer auf breiter quantitativer Basis durchgeführten Wirksamkeitsanalyse von Sanktionen von 2009 sollen diese nur in ungefähr einem Drittel der Fälle erfolgreich sein.¹⁰ Im Falle der Russischen Föderation vermindern weitere Faktoren diese schlechten Erfolgsaussichten: Sie ist autark, was lebensnotwendige und nicht lebensnotwendige Rohstoffe betrifft. Der Russischen Föderation stehen viele alternative Handelspartner als Ersatz für den Westen zur Verfügung um Versorgungslücken zu schließen, oder um für ihre Rohstoffe andere Abnehmer zu finden und so Staatseinnahmen zu generieren. Versorgungslücken im Bereich der Spitzentechnologie werden durch China und den grauen Import über Drittstaaten wie Kasachstan oder Kirgistan zumindest zum Teil geschlossen.¹¹ Die im Vergleich zu 2014 scharfen und

⁸ S. dazu die allgemeine Einführung bei Matthias Valta, *Staatenbezogene Wirtschaftssanktionen zwischen Souveränität und Menschenrechten* (Mohr Siebeck 2019), 3 ff.; zur völkerrechtlichen Zulässigkeit von gegen Staaten gerichteten Sanktionen (auch durch Drittstaaten) s. Gerhard Hafner, 'Völkerrechtliche Grenzen und Wirksamkeit von Sanktionen gegen Völkerrechtssubjekte', *ZaöRV* 76 (2016), 391-413 (404); s. weiter die Darstellung der Geschichte der Sanktionen bei Eva Lotte Stöckel, *Smart Sanctions in der Europäischen Union* (Duncker & Humblot 2014), 49 ff.

⁹ Zum Iran s. Valta (Fn. 8), 19 ff; zu Kuba s. Valta (Fn. 8), 31 ff.

¹⁰ S. die Darstellung der Ergebnisse einer zentralen empirischen Studie (Gary Clyde Hufbauer, *Economic Sanctions Reconsidered*, (3. Aufl., Peterson Institute for International Economics 2009) zur Effektivität von Sanktionen bei Valta (Fn. 8), 69 ff., bes. 71: aus der dort verwendeten Tabelle ergibt sich, dass Sanktionen umso erfolgreicher sind, je gemäßiger ihre Ziele sind; zur niedrigen Effizienz traditioneller Wirtschaftssanktionen s. weiter Stöckel (Fn. 8), 52 ff. bzw. zu smart oder targeted sanction (des UN-Sicherheitsrates) 55 ff.; Peter A. G. van Bergeijk, 'Economic Sanctions and the Russian War on Ukraine: A Critical Comparative Appraisal' (March 2022). International Institute of Social Studies, Working Paper No. 699, 5 f., 7.

¹¹ S. die eingehende und durch viel statistisches Material unterfütterte Analyse von Denis Kasyanchuk, 'Russia's Big Sanctions Workaround', *The Bell* vom 7. Oktober 2023, <<https://en.thebell.io/russias-big-sanctions-workaround/>>, zuletzt besucht 14. Januar 2025; s. weiter Alexander Kolyandr, 'The sneaky way that Russia is still evading western sanctions', *The Spectator* vom 8. September 2024, <https://www.spectator.co.uk/article/the-sneaky-way-that-russia-is-still-evading-western-sanctions/?utm_source=The+Bell+%28Eng%29>, zuletzt besucht 14. Januar 2025; zur Lieferung von Präzisionselektronik an Russland s. auch <<https://theins.press/en/politics/275080>>, zuletzt besucht 14. Januar 2025; zur Umgehung der Sanktionen durch verdeckte Umleitung von für mittelasiatische Staaten bestimmte Exporte nach Russland s. <<https://meduza.io/feature/2024/10/17/v-rossii-propadayut-sanktsionnye-tovary-na-milliardny-dollarov-vo-vremya-tranzita-iz-es-v-strany-azii>>, zuletzt besucht 14. Januar 2025; zu den russischen Gegenmaßnahmen s. Alexander Kolyandr und Alexandra Prokopenko, 'Preparing for New "Confiscation Wars"', <<https://en.thebell.io/preparing-for-new-confiscation-wars/>>, zuletzt besucht 14. Januar 2025.

tiefgehenden Sanktionen haben zwar wirtschaftliche Probleme und eine Verschlechterung der Lebensqualität bewirkt, aber nicht in einem Umfang, dass man auf Veränderung des Entscheidungsverhaltens der russischen Funktionsträger und Eliten hoffen darf.¹² Dass sie zu einer Verschlechterung der Lebensqualität in den europäischen sanktionierenden Staaten geführt haben, macht nachdenklich.¹³

Die nachfolgenden (das Völkerrecht aussparenden¹⁴) Überlegungen betreffen nur Sanktionen gegen institutionell weder unmittelbar noch mittelbar dem russischen Staat zuzuordnende natürliche (und gegebenenfalls auch juristische) Personen, sogenannte „smart“ oder „targeted“ sanctions oder – dies soll der in der Folge benutzte Terminus sein – „personenbezogene Sanktionen“. Mit personenbezogenen Sanktionen verbinden sich zwei Hoffnungen: Zum einen eine größere Effektivität gegenüber herkömmlichen staatenbezogenen Sanktionen, zum anderen eine gewisse Vermeidung der Beeinträchtigung des Lebens der Zivilbevölkerung.¹⁵

¹² S. etwa die Analyse von Hansueli Schöchli, 'Bald kommen neue EU-Sanktionen gegen Russland – doch wirken sie überhaupt?', NZZ v. 17. November 2023, <<https://www.nzz.ch/international/wirken-die-eu-sanktionen-gegen-russland-ueberhaupt-ld.1766075>>, zuletzt besucht 14. Januar 2025; s. auch van Bergejk (Fn. 10), 12: Größte Wirksamkeit der Sanktionen in der Anfangsphase; s. auch van Bergejk (Fn. 10), 13 f., 16: Ganz zentral sei nicht die Verursachung ökonomischer Nachteile, sondern wann diese Nachteile politischen Wandel bewirkten: Eben daran fehle es völlig bei den Sanktionen gegen Russland. Sehr kritisch auch Julia Grauvogel und Christian von Soest, 'Erfolg und Grenzen der Sanktionspolitik gegen Russland', Aus Politik und Zeitgeschichte: Beilage zur Wochenzeitschrift Das Parlament 73 (2023), 33-39, bes. 38; ebenso sehr kritisch zu den Sanktionen nach 2014 mit weiteren Nachweisen Marina Lenyuschkina, Die europäische Nachbarschaftspolitik am Beispiel des östlichen Nachbarn Russland – Sanktionen als wirksames Mittel zur Durchsetzung politischer Ziele?, 2021, bes. 32 ff., <https://opus.bsz-bw.de/hsf/frontdoor/deliver/index/docId/1980/file/210726_Bachelorarbeit_Lenyushkina.pdf>, zuletzt besucht 3. Februar 2025.

¹³ Holger Görg, Anna Jacobs und Sascha Meuchelböck, 'Auswirkungen der Russlandsanktionen', Wirtschaftsdienst 2022, 735-736, <<https://www.wirtschaftsdienst.eu/inhalt/jahr/2022/heft/9/beitrag/auswirkungen-der-russland-sanktionen.html>>, zuletzt besucht 14. Januar 2025. Dies war im Übrigen schon bei den Sanktionen nach der Annexion der Krim der Fall, s. dazu Jutta Günter, Maria Kristalova und Udo Ludwig, 'Folgen der Sanktionen zwischen der EU und Russland für die deutsche Wirtschaft', Wirtschaftsdienst 2016, 524-526, <<https://www.wirtschaftsdienst.eu/inhalt/jahr/2016/heft/7/beitrag/folgen-der-sanktionen-zwischen-der-eu-und-russland-fuer-die-deutsche-wirtschaft.html>>, zuletzt besucht 14. Januar 2025.

¹⁴ Zum Völkerrecht Valta (Fn. 8); Stefanie Schmahl, 'Völkerrechtliche und europarechtliche Implikationen des Angriffskriegs auf die Ukraine', NJW 14 (2022), 969-974; Hafner (Fn. 8), 391 ff.; s. weiter Ciaran Burke und Kristina Ogonyants, 'Die EU-Wirtschaftssanktionen gegen Russland und die russischen Gegensanktionen. Vereinbarkeit mit dem WTO-Recht', Zeitschrift für Internationales Wirtschaftsrecht (2016), 264-273 zur Situation nach der Annexion der Krim und dem Beginn des Krieges im Donbass.

¹⁵ Zur behaupteten – verwiesen sei auf die in Fn. 11 zitierte Empirie – größeren Effektivität s. etwa Stöckel (Fn. 8), 29, 30; zur (vermeintlich) geringeren Auswirkung auf die Bevölkerung s. etwa Valta (Fn. 8), 246.

Ansatzpunkt personenbezogener Sanktionen ist nicht die staatliche, sondern eine individuelle Verantwortlichkeit. Sie richteten sich ursprünglich gegen die Verantwortlichen von Terrorismus, Piraterie oder Verbrechen gegen die Menschlichkeit.¹⁶ Es waren Maßnahmen gegen nichtstaatliche Akteure, die einen Schaden anrichteten, wie ihn normalerweise nur Staaten anrichten. Die Sanktionierung dieser natürlichen und privaten juristischen Personen schien wegen der staatenähnlichen Schadens- bzw. Gefährdungslage und mangels eines möglichen staatlichen Adressaten unabweislich. Private waren allerdings nach herkömmlichen Vorstellungen, von einigen Ausnahmen wie Konfiszierung von Vermögen oder Inhaftierung von Staatsangehörigen von Feindstaaten abgesehen, keine möglichen Adressaten völkerrechtlicher Unterbindungs- und Vergeltungsmaßnahmen oder sonst Subjekt völkerrechtlicher Beziehungen.¹⁷ Man könnte daher fast von einem schrittweisen Paradigmenwechsel sprechen: Von der (trotz gewisser Ausnahmen) regelmäßigen Verhängung der Sanktionen gegen Staaten ging es über die Sanktionierung von staatenanalogen Akteuren wie Terroristen oder Piraten hin zu „wirklichen“ Privaten. Diese letzte Erweiterung wird in der völkerrechtlichen Standardliteratur wenn, dann nur unter Rechtsschutzgesichtspunkten problematisiert.¹⁸ Was die EU betrifft,

¹⁶ Hafner (Fn. 8), 408; Stöckel (Fn. 8), 31, 32, zu UN-Sanktionen und EU-autonomen Sanktionen gegen Terroristen; als eine beispielhafte Entscheidung, bei der es zentral allerdings um die Problematik der Überprüfung von UN-Sanktionen gegen Terroristen durch EU-Gerichte geht, s. EuGH, *Kadi und al Barakaat International Foundation*, Urteil v. 3. September 2008, Rs. C-402/05 P und C-415/05 P, ECLI:EU:C:2008:461.

¹⁷ Dieses Prinzip wurde mit den Nürnberger Prozessen bezüglich der Bestrafung der Verantwortlichen wohl zum ersten Mal durchbrochen, nach Vorankündigung durch die Moskauer Erklärung vom 30. Oktober 1943 sowie dann durch Schaffung des Londoner Statuts für den internationalen Strafgerichtshof im Rahmen des Londoner Abkommens vom 8. August 1945. Klassischerweise war im Völkerrecht das Individuum als Rechtssubjekt nicht existent und darauf angewiesen, dass ein Staat seine Interessen durchsetzte, man denke an den *Nottebohm*-Fall, in dem Lichtenstein sich bemühte, gegenüber Guatemala die Rechte von F. Nottebohm durchzusetzen, s. IGH, *Nottebohm Case (2nd phase)*, Urteil v. 6. April 1955, ICJ Reports 1955, 4. Für diesen Hinweis danke ich meinem Kollegen K.-P. Sommermann.

¹⁸ S. z. B. Knut Ipsen (Begr.), Volker Epping und Wolff Heintschel von Heinegg (Hrsg.), *Völkerrecht* (8. Aufl., C. H. Beck 2024), 589 mit Fn. 145; Torsten Stein, Christian von Butlar und Markus Kotzur, *Völkerrecht* (15. Aufl., Vahlen 2024), 334 Rn. 10, 347 Rn. 15: die Problematik wird auf eine 'normale Grundrechtsproblematik' reduziert; Carlo Focarelli, *International Law* (Elgar 2019), § 76.2 (206 f.); § 26.4 (99): Grundrechtsproblematik; § 181.12 (539 f.): Rechtsschutz; fokussiert nur auf den Rechtsschutz Malcom N. Shaw, *International Law* (9. Aufl., Cambridge University Press 2021), 1106 ff. sowie Hennie Strydom, *International Law* (Oxford University Press 2017), 190 ff. – Unspezifisch Meinhard Schröder in: Wolfgang Graf Vitzthum und Alexander Proelß (Hrsg.), *Völkerrecht* (8. Aufl., De Gruyter 2019), Siebenter Abschnitt, Rn. 120, 122: Sanktionen gegen Terroristen und Wirtschaftsunternehmen als besondere Kategorie, ohne weitere Problematisierung; s. weiter z. B. Stöckel (Fn. 8), 306 und öfter; ohne weitergehende Vertiefung auch Valta (Fn. 8), 224 ff. – Keine Erwähnung von smart sanctions z. B. bei Jan Klabbers, *International Law* (4. Aufl., Cambridge University Press 2023), 180 ff.

wird diese Möglichkeit des Zugriffs auf Private durch ihre umfassende Grundrechtsbindung bis hin zum extraterritorialen Schutz von Nicht-EU-Bürgern begrenzt.¹⁹

II. Beispiele von Sanktionen gegen konkrete Oligarchen und ihre Begründungen

Der erste Sanktionen gegen natürliche und juristische Personen regelnde Beschluss des Rates²⁰ normiert für die Begrenzung der Freizügigkeit, Art. 1 Beschluss des Rates 2014/145/CSFP, sowie das Einfrieren des Vermögens, Art. 2 Beschluss des Rates 2014/145/CSFP, eine Reihe von möglichen Adressaten. Art. 2 Abs. 1g Beschluss des Rates 2014/145/CSFP ermöglicht das Einfrieren des Vermögens von führenden Wirtschaftsvertretern und juristischen Personen, die in Sektoren der Wirtschaft tätig sind, die eine substantielle Einkommensquelle für die Regierung der Russischen Föderation darstellen, [die für die Annexion der Krim sowie für die Destabilisierung der Ukraine verantwortlich ist], sowie natürliche und juristische Personen, die mit diesen assoziiert sind. Nach Art. 2 Abs. 1a, b und d Beschluss des Rates 2014/145/CSFP ist das Einfrieren des Vermögens von Personen weiter möglich, wenn diese für die Bedrohung der Ukraine verantwortlich sind, sie diese Bedrohung oder die russischen Entscheidungsträger materiell oder finanziell unterstützen oder von diesen profitieren. Profitieren von der russischen Regierung wird in Unterpunkt f separat aufgeführt. Unter den gleichen Voraussetzungen schließlich kann nach Art. 1 Abs. 1a und g Beschluss des Rates 2014/145/CSFP ein Verbot der Einreise in und der Durchreise durch das Territorium der Mitgliedsstaaten der Europäischen Union verfügt werden. In der Folge sollen sich die Analyse auf das Einfrieren des im Westen befindlichen Vermögens der sanktionierten Personen beschränken; soweit es auch um Beschränkungen der Freizügigkeit geht, wird dies kurz vermerkt werden.

¹⁹ S. etwa Valta (Fn. 8), 237 ff.; zur Russischen Föderation s. etwa 262; Felix Lange, 'EU-Sanktionen gegen Individuen – Möglichkeiten und Grenzen', EuR 59 (2024), 3–20 (7); s. weiter Hafner (Fn. 8), 405, 407; s. auch die 'Leitlinien zur Umsetzung und Evaluierung restriktiver Maßnahmen (Sanktionen) im Rahmen der Gemeinsamen Außen- und Sicherheitspolitik der EU' v. 15. Juni 2012, Dok. Nr. 11205/12.

²⁰ S. die 1 Sanktionen-VO vom 17. März 2014, <<https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32014R0269>>, zuletzt besucht 12. März 2025; die Liste der sanktionierten Personen wurde dann sukzessive bis hin zum 15. Sanktionspaket vom 16. Dezember 2024 erweitert, s. dazu in Fn. 2 zitierte Liste.

Bei den sanktionierten Personen handelt es sich zum einen um (zum Teil auch ehemalige) staatliche Funktionäre der Russischen Föderation aus unterschiedlichen institutionellen Zusammenhängen. Umfasst sind etwa Mitglieder der Präsidentialverwaltung, der Regierung, der Duma, des Föderationsrates, der Geheimdienste, der Armee sowie anderer staatlicher und privater bewaffneter Formationen. Überdies werden alle Richter des russischen Verfassungsgerichts und Richter anderer Gerichte sanktioniert. Die Verfassungsrichter sind wegen der verfassungsrechtlichen Billigung der Inkorporation der Gebiete Donec'k, Lugans'k, Herson und Zaporiz'â in die Russische Föderation betroffen, andere Richter wegen voreingenommener Spruchpraxis.²¹ Zum anderen wurden das Führungspersonal der großen Staatskonzerne, die Mitglieder beratender staatlicher Institutionen wie etwa des Präsidentialen Rats für Menschenrechte und Zivilgesellschaft sowie Personen aus Medien, Kirchen und Kultur sanktioniert. Letztere sind deshalb das Ziel der Maßnahmen, weil sie sich beginnend mit dem Politikwechsel des Jahres 2012 in irgendeiner Weise mit Hetze gegen die Ukraine exponiert haben.²² Sanktioniert sind auch die wesentlichen Funktionsträger der Krim, von Sevastopol' sowie der jetzt im Rahmen des Kriegs annektierten Gebiete.

Das Führungspersonal privater Wirtschaftskonzerne oder großer Unternehmen ist im Vergleich nur in relativ wenigen Fällen mit Sanktionen belegt worden. Die wegen Art. 296 Abs. 2 AEUV notwendige Begründung des Sanktionierungs-Beschlusses besteht bei diesen in der Regel aus drei Elementen: Zunächst werden die Bedeutung des jeweiligen Wirtschaftskonzerns und die leitende Funktion der zu sanktionierenden Person dargestellt. Bei den „substanziellen Einnahmen“ des russischen Staates aus der Wirtschaftsbranche sind die Begründungen eher sparsam und knüpfen an die Position des Sanktionierten an. Auf die vom Sanktionierten oder seinem Konzern an den russischen Staat gezahlten Steuern wird selten eingegangen.²³ Dies ist anders

²¹ Zur Sanktionierung der Richter des Verfassungsgerichts der Russischen Föderation s. die No. 1335 bis 1344. Aus anderen Gerichten etwa G. V. Redko, Richterin des Obersten Gerichts der Krim, No. 199; als weitere Beispiele zwei Richter des Kiever Gebietsgerichts in Simferopol, M. N. Belousov, No. 193, und A. N. Dolgopoloj, No. 194; im 13. Sanktionen-Paket kamen noch eine Reihe von Richtern dieses Gerichts hinzu, in diesem Fall wegen ihrer repressiven Rechtsprechung in Sachen Terrorismus, s. die No. 1706, V. F. Kamynina, oder die No. 1708, O. P. Kuznecova.

²² S. dazu ausführlich Gulnaz Sharafutdinova, *The Red Mirror. Putin's Leadership and Russia's Insecure Identity* (Oxford University Press 2020), z. B. 139 ff.

²³ Ohne konkrete Ausführungen zum Beispiel die Sanktionierung von P. Aven, No. 674 und M. Fridman, No. 675, von der Alfa-Bank. Anders die Begründung der Sanktionierung von R. Abramovič, No. 879: Der Konzern Evraz, bei dem Abramovič Mehrheitsaktionär sei, sei einer der größten Steuerzahler der Russischen Föderation.

bei den von staatlichen oder teilstaatlichen Unternehmen abgeführten Gewinnen.²⁴

Schließlich wird die enge Beziehung der Sanktionierten zu Präsident Putin hervorgehoben. Soweit es sich um Personen aus der engeren oder engsten Umgebung Putins handelt, wie etwa bei G. Timčenko, Ju. Koval'čuk oder A. Rotenberg, werden die konkreten persönlichen Kontakte, die Dauer der Freundschaft und ähnliche relevante Tatsachen angeführt.²⁵ Das erscheint stimmig, weil die engste Umgebung Putins tatsächlich aus seinen langjährigen Freunden besteht.²⁶ Alternativ zur persönlichen Nähe wird als Beweis enger persönlicher Beziehungen das Treffen Putins mit 37 hochgestellten Wirtschaftsführern am 24. Februar 2022 angeführt.²⁷ Das ist weniger überzeugend: Angesichts des autokratischen Führungsstils Putins, des schlechten rechtlichen Schutzes des Eigentums von Unternehmern in der Russischen Föderation²⁸ und schließlich der Gewissheit, dass die sys-

²⁴ S. die Nennung substanzieller Einnahmen durch die VTB-Bank, No. 82; ebenso EuG (6. Kammer), *VTB Bank RAO v. Council of the European Union*, Urteil v. 13. September 2018, Rs. T 734/4, ECLI:EU:T:2018:542, Rn. 83, 84 und auch 118: Das Gericht weist nur darauf hin, dass die VTB-Bank sich zu 60,9 % im Eigentum des russischen Staates befindet.

²⁵ S. etwa die Darstellung der engen persönlichen Beziehungen zwischen Putin und Arkadij Rotenberg aus der Begründung der Sanktionierungsliste im Urteil des EuG (9. Kammer), *A. R. Rotenberg gegen Rat der Europäischen Union*, Urteil v. 30. November 2016, Rs. T 720/14, ECLI:EU:T:2016:689, Rn. 18.

²⁶ S. zum Beispiel Alëna Ledenëva, *Can Russia Modernise? Sistema, Power Networks and Informal Governance* (Cambridge University Press 2013), etwa 50 ff.; Anders Åslund, *Russia's Crony Capitalism, The Path from Market Economy to Kleptocracy* (Yale University Press 2019), 44 ff. sehr kompakt Alexander Blankenagel, 'An Russland kann man nur glauben. Eine soziologische, kulturwissenschaftliche und rechtliche Analyse Russlands', *JöR* 65 (2017), 313-342, 313/340.

²⁷ Zur Liste der Anwesenden bei diesem Treffen s. den Bericht der TASS (staatliche russische Nachrichtenagentur), <<https://tass.ru/ekonomika/13846883?ysclid=ipecktkdks485406187>>, zuletzt besucht 14. Januar 2025. Nicht sanktioniert sind etwa L. Mihelson/Novatek, S. Kogogin/Kamaz oder V. Evtušenkov/Sistema. Nicht sanktioniert, weil kaum öffentlich bekannt, wurden systemnahe Milliardäre wie Ilya Dimov/Stroieksportservice, s. Sergei Ezhov, 'Proxy Billionaire: Ties With Some of Putins Oldest Allies Propel Mystery Businessman Onto Russias Forbes List', *The Insider* v. 17. Oktober 2024, <<https://theins.press/en/corruption/275410>>, zuletzt besucht 14. Januar 2025. Zur geringen Bedeutung der Teilnahme an diesem Treffen s. Markus Ackerett, 'Bestrafter Musterschüler – wie groß ist der Einfluss des russischen Stahlmagnaten Alexei Mordaschow auf Putin', *NZZ* v. 16. November 2023, <<https://www.nzz.ch/wirtschaft/russland-und-cyprus-confidential-wer-ist-alexei-mordaschow-ld.1765775>>, zuletzt besucht 14. Januar 2025, anlässlich eines Artikels über A. Mordasov (Severstal').

²⁸ S. dazu die ausgezeichnete und ausführliche Analyse von Maksim Trudolyubov, *The Tragedy of Property. Private Life, Ownership and the Russian State* (Wiley 2018); Vladimir Shlapentokh und Anna Arantunyan, *Freedom, Repression and Private Property in Russia* (Cambridge University Press 2013). Die Schwäche des Eigentumsschutzes in der Russischen Föderation zeigt die aktuelle Welle von die Eigentümer-Rechte aushebelnden Rück-Verstaatlichungen, s. dazu <<https://en.thebell.io/nobody-is-safe-from-russias-wave-of-re-nationalization/>>, zuletzt besucht 14. Januar 2025.

temtragenden Eliten vor Gewalt und Mord nicht zurückschrecken, hätte es viel Mut erfordert, eine Teilnahme zu verweigern.²⁹ Sanktioniert sind sehr häufig auch Ehefrauen, Kinder und sonstige nahe Angehörige der Wirtschaftseliten.³⁰ In der Tat verteilen reiche Russen ihr Vermögen aus vielerlei Gründen auf ihre Angehörigen. Eine die Sanktionierung rechtfertigende Nähebeziehung zu Putin oder eine Befürwortung des Krieges beweist dies jedoch nicht.³¹ Eine Aufhebung der Sanktionen durch den Rat im Rahmen ihrer regelmäßigen Überprüfung hat es nur in wenigen, dann aber auch nachvollziehbaren Fällen gegeben.³²

²⁹ Zur 'Unglücksserie' russischer Wirtschaftsmagnaten s. ausführlich <https://en.wikipedia.org/wiki/Suspicious_deaths_of_notable_Russians_in_2022-2024>, zuletzt besucht 14. Januar 2025.

³⁰ So etwa die Frau von G. Timčenko, E. Timčenko, No. 903: Die wesentliche Begründung, in Ausführung des Merkmals 'persons associated with them' bestand in der Feststellung, dass Elena Timčenko sozial und finanziell von ihrem Gatten profitiere; weitere Beispiele sind G. A. Pumpânskaâ, No. 724, die Frau von D. A. Pumpânskij (ohne jede Begründung abgesehen von der Tatsache der Ehe); A. Melničenko, No. 1172, die Ehefrau von A. Melničenko; auch hier war, neben der Übertragung einer beneficial trust-ownership, die Tatsache der Ehe, konkret gemeinsames Eigentum an Immobilien, die Rechtfertigung der Sanktionierung. M. Mordašova, No. 1156, die 3. Ehefrau von A. Mordašov, wurde sanktioniert mit der Begründung, er habe ihr seine Anteile an TUI und einer anderen Holding im Wert von 1,5 Mrd. Euro übertragen. Auch Ex-Ehefrauen wurden sanktioniert, so etwa die Ex-Frau von I. I. Sečin, M. V. Sečina, No. 890; hier wurde immerhin damit argumentiert, dass ihre Firmen Aufträge im Rahmen der Vorbereitung der Winter-Olympiade in Soči erhalten hätten. Sanktioniert wurden auch andere Familienangehörige, so etwa G. Izmailova, No. 1110, die Schwes-ter des usbekischen Oligarchen A. Usmanov. Die Begründung: Sie helfe ihrem Bruder, seine Reichtümer zu verschleiern.

³¹ V. Prigožina, No. 223, wurde als Mutter des Unternehmers und Wagner-Chefs E. V. Prigožin sanktioniert und war Miteigentümerin einiger der zum Wagner-Imperium gehörenden Unternehmen; die Begründung der Sanktionierung war die Beziehung zu ihrem Sohn. In ihrem Fall hatte das EuG die Sanktionierung für rechtswidrig erklärt; eine Verwandtschaftsbeziehung reichte nicht aus, s. die Presse-Mitteilung in beck aktuell, becklink 2028282 bzw. EuG, *Prigožina v. Rat*, Urteil v. 2. Mai 2023, Rs. T-212/22, 2023/C 155/75. Erfolgreich gegen die Sanktionierung klagte auch der Sohn von D. Mazepin, N. Mazepin, ein Formel 1-Rennfahrer, s. EuG, *Mazepin v. Rat*, Urt. v. 20. März 2024, Rs. T-743/22, ECLI:EU:T:2023:406; auch hier reichte allein die verwandtschaftliche Beziehung dem Gericht nicht. Das gleiche gilt für A. Pumpânskij, den Sohn von D. Pumpânskij, s. <<https://meduza.io/news/2023/11/29/sud-evrosoyuza-posta-novil-otmenit-sanktsii-protiv-syna-milliardera-dmitriya-pumpyanskogo>>, zuletzt besucht 14. Januar 2025. Allerdings: In anderen Fällen reichte die Tatsache der Eigentumsübertragung auf Verwandte, s. Fn. 30. – In einigen Fällen waren wohl auch die Tatsachen, mit denen die Sanktionierung begründet wurde, zweifelhaft, s. <<https://meduza.io/feature/2023/09/21/politi-co-es-vvodit-sanktsii-protiv-rossiyan-osnovyvas-na-vikipedii-i-nedostovernih-istochni-kah>>, zuletzt besucht 14. Januar 2025.

³² So bei etwa A. Šul'gin, F. Ahmedov, B. Berëzkin; G. Šuvaev, s. Beschluss (GASP) 2023/1767 des Rates zur Änderung des Beschlusses 2014/145/GASP v. 13. September 2023, <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=uriserv%3A0J.L._2023.226.1.0104.01.DEU&toc=OJ%3AL%3A2023%3A226%3ATOC>, zuletzt besucht 14. Januar 2025; Erfolgreich in der Wiederholung seiner Klage gegen die Sanktionen war D. Pumpânskij, s. EuG

III. Die Rechtsprechung zu Sanktionen gegen Wirtschaftsführer

Art. 215 Abs. 3 AEUV sieht ausdrücklich die Notwendigkeit eines Rechtsschutzes gegen Maßnahmen nach Art. 215 Abs. 1 und 2 AEUV vor. Bei personenbezogenen Sanktionen, bei denen regelmäßig individuelle Betroffenheit vorliegt, ist dies vor allem der Rechtsschutz nach Art. 263 Abs. 4 AEUV; grundsätzlich möglich ist aber auch eine Vorlage nach Art. 267 AEUV. Sowohl gegen die 2014 als auch gegen die ab 2022 erlassenen Sanktionen gibt es eine ganze Reihe von Klagen. Vor allem bei den Klagen gegen die Sanktionen des Jahres 2014 erstaunt angesichts der Systemnähe der Kläger eine gewisse Unverfrorenheit. Geklagt hat etwa A. Rotenberg, langjähriger Judo-Partner und enger Freund von Putin, reich geworden durch große Staatsaufträge bei der Winterolympiade und dann beim Bau der Brücke über die Meerenge von Kerč.³³ Geklagt hat auch D. Kiselëv, ein die Putin'sche Politik äußerst aggressiv und unnachgiebig propagierender populärer Fernseh-Journalist.³⁴ Geklagt hat ferner der Ölkonzern Rosneft', welcher durch Aneignung der ertragreichsten Ölquellen des JUKOS-Konzerns, Juganskneftegaz (und auch anderer wie Bašneft' und Tatneft'), der größte Mineralöl-Konzern Russlands wurde und von Putin-Intimus I. Sečin ge-

(1. Kammer), *Dmitry Alexandrovich Pumpjanskiy v. Rat*, Urteil v. 26. Juni 2024, Rs. T 740/22, ECLI:EU:T:2024:418: Das EuG erkannte in dieser zweiten Entscheidung an, dass Pumpjanskiy nach dem Ausscheiden aus dem Sinara-Konzern und aus der TMK-Gruppe keine 'leading business person' mehr sei, Rn. 65f. (in der Folge zitiert als *Pumpjanskiy 2*). Gestrichen von der Sanktionenliste wurde auch A. Volož, der Mitbegründer von Yandeks, s. <<https://meduza.io/news/2024/03/13/evrosoyuz-snyal-sanktsii-s-soosnovatelya-yandeksa-arkadiya-volozha>>, zuletzt besucht 14. Januar 2025; aufgehoben wurden von der britischen Regierung die Sanktionen gegen O. Tinkov, der den Krieg gegen die Ukraine öffentlich kritisiert und dann später seine russische Staatsangehörigkeit niedergelegt hatte, s. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1172447/Notice_Russia_200723.pdf>, No. 5, zuletzt besucht 12. März 2025; die russische Staatsangehörigkeit legten insgesamt 9 weitere Milliardenäre seit Kriegsbeginn nieder, s. <<https://meduza.io/news/2024/02/08/vasilij-anisimov-stal-sedmyim-milliardierom-otkazavshimsya-ot-rossijskogo-grazhdanstva-posle-nachala-voyny>>, zuletzt besucht 12. März 2025 sowie <<https://meduza.io/news/2024/02/29/esche-dvoe-biznesmenov-iz-spiska-forbes-otkazalis-ot-rossijskogo-grazhdanstva>>, zuletzt besucht 14. Januar 2025.

³³ S. EuG, *Rotenberg* (Fn. 25); zu Rotenberg s. Profil in Forbes, <<https://www.forbes.com/profile/arkady-rotenberg/>>, zuletzt besucht 14. Januar 2025.

³⁴ S. EuG (9. Kammer), *D. K. Kiselëv gegen Rat der Europäischen Union*, Urteil v. 15. Juni 2017, Rs. T 262/15, ECLI:EU:T:2017:392; der Fall ist insoweit speziell, als Kiselëv vor allem eine Verletzung der Meinungsäußerungsfreiheit rügte, s. Rn. 68 ff. und dann 72 ff. Zu Kiselëv s. <<https://civilmplus.org/en/actors/dmitry-kiselyov/>>, zuletzt besucht 14. Januar 2025.

führt wird.³⁵ Bei den Klägern nach 2014 waren die Stützung der Ukraine-feindlichen Politik und die Nähe zu Putin nicht zweifelhaft; insofern erschien die Sanktionierung angemessen.

Bei den Klagen gegen die nach dem Angriff auf die Ukraine 2022 verhängten Sanktionen ist die Sachlage in vielen Fällen komplizierter. Anhängig waren bzw. sind rund 60 Klagen.³⁶ Geklagt haben zum Teil Putin nahestehende Personen wie etwa G. Timčenko,³⁷ aber hauptsächlich nicht systemnahe Unternehmer, die nur zum Teil bei dem Treffen mit Putin am 24. Februar 2022 anwesend waren.³⁸ Außer G. Timčenko (Novatek) kam, soweit ersichtlich, kein Kläger aus dem Energiebereich.³⁹ Die Kläger repräsentierten in der Mehrzahl große Konzerne aus verschiedenen russischen Regionen. Bis auf – soweit ersichtlich – bisher acht Verfahren waren die Kläger erfolglos. Gründe für das Obsiegen der Kläger waren fehlende Nähe zu Putin (P. Aven und M. Fridman), Ausscheiden aus der Leitung des Konzerns (A. Šul'gin und D. Pumpānskiĭ), Begründung der Sanktionen hauptsächlich mit verwandtschaftlichen Beziehungen (V. Prigožina, N. Ma-

³⁵ S. EuGH (Große Kammer), *Rosneft v. Her Majesty's Treasury*, Urteil v. 28. März 2017, Rs. C 72/15, ECLI:EU:C:2017:236; zu Rosneft allgemein <<https://de.wikipedia.org/wiki/Rosneft>>, zuletzt besucht 14. Januar 2025; zu Bašneft etwa Benjamin Triebe, 'Wer bekommt Russlands schwarze Perle?', NZZ v. 31. August 2016, <<https://www.nzz.ch/wirtschaft/wirtschaftspolitik/bashneft-privatisierung-wer-bekommt-russlands-schwarze-perle-ld.113907>>, zuletzt besucht 14. Januar 2025. – Die erwähnten Klagen sind nicht die einzigen gegen die Sanktionen nach der Annexion der Krim; s. als ein weiteres erfolgloses Beispiel EuG (6. Kammer), *S. Topor Gilka und WO Technopromexport gegen Rat der Europäischen Union*, Urteil v. 11. September 2019, Rs. T 721/17, T 722/17, ECLI:EU:T:2019:579: Hier ging es um die Lieferung von Siemens-Turbinen auf die Krim.

³⁶ Beck online, Beck aktuell, becklink 2028282.; veraltet, weil von 2019, die Zahlen bei Alexander Egger, 'Sanktionen – Grundrechte und Rechtsschutz: Strenge Voraussetzungen aus Luxemburg', EuZW 30 (2019), 326-332 (326).

³⁷ Die Klage von G. Timčenko wurde am 6. September 2023 abgewiesen, EuG (6. Kammer), *Gennady Nikolayevich Timchenko gegen Rat der Europäischen Union*, Urteil v. 6. September 2023, Rs. T-252/22, ECLI:EU:T:2023:496; Zu Timčenko allgemein <<https://www.forbes.com/profile/gennady-timchenko/>>, zuletzt besucht 14. Januar 2025. Geklagt hatte auch Timčenko's Frau Elena, s. EuG (1. Kammer), *Elena Petrovna Timchenko gegen Rat der Europäischen Union*, Urteil v. 6. September 2023, Rs. T 361/22, ECLI:EU:T:2023:502.

³⁸ Zur Liste der Anwesenden bei diesem Treffen s. Fn. 27. Von den Teilnehmern klagten etwa D. A. Mazepin – insoweit seine Klage, EuG (1. Kammer), *Dmitry Arkadievich Mazepin gegen Rat der Europäischen Union*, Urteil v. 8. November 2023, Rs. T 282/22, ECLI:EU:T:2023:701, Rn. 12 – und D. A. Pumpānskiĭ – s. insoweit seine Klage EuG (1. Kammer), *Dmitry Alexandrovich Pumpyanskiy gegen Rat der Europäischen Union*, Urteil v. 6. September 2023, T 270/22, ECLI:EU:T:2023:490, Rn. 14 und 50 (in der Folge zitiert als *Pumpyanskiy 1*).

³⁹ EuG *Pumpyanskiy 1* (Fn. 38) wurde zwar vom Gericht dem Energiebereich zugeordnet; das ist aber nur mittelbar plausibel; der Konzern OAO TMK stellt Stahlröhren her, für die die Öl- und Gasindustrie zwar ein wichtiger, aber keinesfalls der einzige Abnehmer ist.

zepin, A. Pumpânskij) und zu langes zeitliches Zurückliegen Ukraine-feindlicher Handlungen (D. Ovsânnikov).⁴⁰

Die Rügen der Kläger überschneiden sich größtenteils. Gerügt wurde zum einen eine Verletzung des Rechts auf effektiven Rechtsschutz aus Art. 47 Charta der Grundrechte der Europäischen Union (GrChEU). Konkret sollte nach dem Klägervortrag eine effiziente Verteidigung unmöglich sein, weil die Begründungen zur Aufnahme in die Liste sanktionierter Personen unverständlich waren. Gerügt wurde weiter alternativ zum effektiven Rechtsschutz die Tragfähigkeit der vom Rat für die Begründung seiner Entscheidung herangezogenen Tatsachen und damit Nichterfüllung der nach der ständigen Rechtsprechung den Rat treffenden Beweislast.⁴¹ Zum Teil wurde eine Verletzung des Rechts auf rechtliches Gehör geltend gemacht; vor Erlass der Sanktionen hatte der Rat den Betroffenen kein rechtliches Gehör gewährt, da so der Effekt der Sanktionen unterlaufen worden wäre.⁴² In der Sache wendeten sich die Kläger gegen die Verletzung des Grundrechts des Eigentums, Art. 17 GrChEU, der unternehme-

⁴⁰ Zu Aven und Fridman s. EuG (1. Kammer), *Petr Aven gegen Rat der Europäischen Union*, Urteil v. 10. April 2024, Rs. T 301/22, ECLI:EU:T:2024:214 sowie EuG (1. Kammer), *Mikhail Fridman gegen Rat der Europäischen Union*, Urteil v. 10. April 2024, Rs. T 304/24, ECLI:EU:T:2024:215; s. dazu auch die Pressemitteilung Nr. 61/24 des Gerichtshofs der Europäischen Union v. 10. April 2024. Die im März 2023 verhängten Sanktionen gegen Aven und Fridman sind allerdings weiter in Kraft. Im August 2024 hat Fridman Luxemburg wegen des Einfrierens seiner Aktiva auf 16 Mrd. Schadensersatz beim Internationalen Schiedsgericht Hongkong verklagt, s. <https://www.vedomosti.ru/finance/articles/2024/08/14/1055632-fridman-podal-isk-k-lyuksemburgu-na-16-mlrd?utm_campaign=newspaper_14_8_2024>, zuletzt besucht 14. Januar 2025. Bei A. Šul'gin konnte das Gericht nicht nachvollziehen, weshalb er nach dem Ausscheiden aus der Geschäftsleitung noch ein einflussreicher Geschäftsmann sein solle, s. Beck aktuell, becklink 2028282; D. Ovsânnikov war Gouverneur von Sevastopol' bzw. stellvertretender Minister in der russischen Regierung und im Juli 2019 bzw. April 2020 von seinen Posten abgelöst worden, EuG (5. Kammer), *Dmîtry Vladimirovich Ovsyannikov gegen Rat der Europäischen Union*, Urteil v. 26. Oktober 2022, Rs. T 714/20, ECLI:EU:T:2022:674, s. zur Argumentation des EuG etwa Rn. 77 ff. sowie Rn. 88 ff., 95 ff. Zu den erfolgreichen Klagen von V. Prigožina, N. Mazepin, A. Pumpânskij sowie später auch D. Pumpânskij s. Fn. 31 und 32. Neue Konflikte gibt es wegen der Verpflichtung zur Offenlegung ihrer Aktiva in Europa; hier waren die Klagen von G. Timčenko, M. Fridman, P. Aven und G. Chan erfolglos, s. <<https://meduza.io/news/2024/09/11/sud-es-otklonil-iski-timchenko-fridmana-avena-i-hana-oni-osparivali-obyazannost-deklarirovat-svoi-evropejskie-aktivy>>, zuletzt besucht 14. Januar 2025.

⁴¹ Dass das Grundrecht auf effektiven Rechtsschutz bei Sanktionen im Rahmen der GASP bedeutsam ist, hatte der EuGH z. B. schon in der *Rosneft*-Entscheidung (Fn. 35) konstatiert. – Die Rüge der ungenügenden Tatsachen s. etwa in EuG, *Pumpyanskiy 1* (Fn. 38), Rn. 26 ff.; das Gericht schwenkt dann allerdings auf Art. 47 GrChEU ein, s. EuG, *Pumpyanskiy 1* (Fn. 38), Rn. 31 sowie 32 ff.; zur Pflicht der Offenlegung der Tatsachen bei individuellen Maßnahmen s. noch einmal EuGH *Rosneft* (Fn. 35), Rn. 121 f. – Zu den strengen Anforderungen an die Begründung von Sanktionen allgemein s. Stöckel (Fn. 8), 359 ff.

⁴² Sehr ausführlich zu diesem Punkt etwa EuG (1. Kammer), *Mordashev gegen Rat der Europäischen Union*, Urteil v. 20. September 2023, Rs. T 248/22, ECLI:EU:T:2023:573, A., Rn. 60 ff.; ein Recht auf rechtliches Gehör ist dann allerdings mangels einer Gefährdung der Wirksamkeit der Sanktionen bei deren Verlängerung gegeben, s. EuG, *Mordashev* (Fn. 42), Rn. 71 ff.

rischen Freiheit, Art. 16 GrChEU, sowie der Freizügigkeit, Art. 45 Abs. 2 GrChEU. Diese grundrechtlichen Rügen liefen auf die Verletzung des Verhältnismäßigkeitsgrundsatzes, Art. 52 Abs. 1 GrChEU, hinaus. Daneben wurde zum Teil noch die Verletzung des Gleichheitssatzes gerügt, Art. 20 GrChEU, beispielsweise wegen der Nichtsanktionierung anderer vergleichbarer Unternehmen oder Oligarchen oder auch wegen der nur teilweisen Sanktionierung der Teilnehmer an dem Treffen mit Putin am 24. Februar 2022.⁴³

Das EuG hat eine Verletzung des Grundrechts auf effektiven Rechtsschutz im Hinblick auf Art. 2g und Art. 1g Beschluss des Rates 2014/145/CFSP abgelehnt. Unproblematisch war dabei die Subsumtion unter das Merkmal der führenden Wirtschaftsvertreter: Alle Kläger waren die Vorstandsvorsitzenden großer Konzerne oder Unternehmen, so dass die Rüge, die Begründung dieses Tatbestandsmerkmals sei unverständlich, eher bizarr wirkte.⁴⁴ Ohne Bedeutung war nach der Ansicht des EuG die Tatsache, dass ein Kläger kurz nach dem russischen Angriff auf die Ukraine seine Funktionen im Vorstand seines Unternehmens niedergelegt und seine Eigentumsanteile an Dritte überschrieben hatte; später änderte das EuG diese Ansicht.⁴⁵ Die Kläger brachten weiter vor, man stelle angesichts der Größe des Budgets der Russischen Föderation sowie des Umfangs des Einkommens etwa von Energiekonzernen keine „Quelle substantziellen Einkommens“ dar.⁴⁶ Mit den „Quel-

⁴³ Eine kompakte Zusammenfassung dieser sich in den meisten Verfahren wiederholenden Rügen s. etwa in der Gerichtsinformation zur Klageeinreichung durch A. A. Uss, EuG (1. Kammer), *Artem Alexandrovich Uss gegen Rat der Europäischen Union*, Urteil v. 29. August 2023, Rs. T 542/23, ECLI:EU:T:2024:369, oder auch der zur Klageeinreichung durch I. Kesaev, EuG (1. Kammer), *Igor Albertovich Kesaev gegen Rat der Europäischen Union*, Beschluss v. 3. Juni 2024, T 543/23, ECLI:EU:T:2024:367; die gleichen Rügen finden sich im Übrigen auch schon in viel früheren Verfahren, in denen es um die Sanktionierung von Terroristen ging, s. etwa EuGH, *Kadi und al Barakaat International Foundation* (Fn. 17), Rn. 116 und 117.

⁴⁴ EuG, *S. V. F. Rashnikov v. Council of the European Union*, Urteil v. 13. September 2023, T 305/22, ECLI:EU:T:2023:530, Rn. 39: Das EuG argumentiert hier mit dem Steueraufkommen der von Rashnikov geführten Firma MMK; wer diese Firma führe, sei auch eine 'leading businessperson'; s. weiter die Wiederaufnahme EuG, *Rashnikov* (Fn. 44), Rn. 66 f. sowie 74; Rashnikov hatte im Übrigen nur bestritten, dass er ein Oligarch ist, s. *Rashnikov* (Fn. 44), Rn. 78, 80; als weitere Beispiele EuG *Pumpyanskiy 1* (Fn. 38), Rn. 48 ff., 56; EuG, *Mordashov* (Fn. 42), Rn. 93 ff.

⁴⁵ Dies tat z. B. D. A. Pumpānskijs zum 1. und 3. März 2022, EuG *Pumpyanskiy 1* (Fn. 38), Rn. 63; das Gericht führte hier kühl aus, dass auch eine Übertragung der Anteile vor dem 24. Februar 2022 die Sanktionierung nicht rechtswidrig gemacht hätte, da die Sanktionierung nicht auf seiner Stellung als Vorstand und Aktionär beruhe, s. a. Rn. 65: dies korrigierte dann das EuG in *Pumpyanskiy 2* (Fn. 32) Rn. 65 f. Bei A. Šul'gin (Fn. 40) hatte die Klage wegen der Aufgabe der Geschäftsführung dagegen direkt Erfolg: Der Rat habe nicht belegen können, wieso Šul'gin nach diesem Rückzug noch ein einflussreicher Geschäftsmann sei. Allerdings: Die Begründung der Sanktionierung bei Šul'gin erschöpfte sich auch in seiner Teilnahme an dem Treffen von Putin v. 24. Februar 2022.

⁴⁶ S. EuG, *Mazepin* (Fn. 38), Rn. 78 f.

len substanziellen Einkommens“ könnten auch nicht Steuern und schon gar nicht indirekte Steuern wie die Umsatzsteuer gemeint sein.⁴⁷ Das EuG hat, eine kollektive Verantwortlichkeit konstruierend, klargestellt, dass mit der „substanziellen Quelle des Einkommens“ das Einkommen des Wirtschaftszweigs, in dem der Unternehmer oder sein Konzern tätig seien, inklusive aller Steuern gemeint seien, nicht das Einkommen des sanktionierten Unternehmers.⁴⁸ Die Relevanz indirekter Steuern bei der Ermittlung einer substanziellen Einkommensquelle begründete das Gericht damit, dass der Wortlaut der Vorschrift diese Steuern nicht ausschliesse.⁴⁹

Das EuG äußerte sich im Rahmen des Art. 47 GrChEU auch zum Ziel der Sanktionen, wie wohl dies bei der Frage des effizienten Rechtsschutzes eigentlich irrelevant ist: Das Ziel ist, so sonst das EuG, eine Frage der Geeignetheit im Rahmen der Verhältnismäßigkeit.⁵⁰ Zum Teil spricht das Gericht davon, dass es darum ginge, die Kosten des Krieges gegen die Ukraine für die Russische Föderation und in der Konsequenz die Bereitschaft zu einem Waffenstillstand oder Frieden zu erhöhen;⁵¹ schon hier hat das EuG den weiten Gestaltungsspielraum des Rates betont.⁵² Wieso sich allerdings, dieser Vorgriff auf die später folgende Kritik sei erlaubt, durch die Sanktionierung von natürlichen und juristischen Personen die Kosten des Krieges für die Russische Föderation erhöhen sollen, bleibt das Geheimnis des Gerichts (und des Europäischen Rats): Die Gewinnabführungs- und Steuerpflichten werden durch die Sanktionierten weiter erfüllt. Ihr im Westen befindliches (dorthin vor dem russischen Staat in Sicherheit gebrachtes) sistiertes Eigentum ist nicht und war nie Teil von dessen „substanziellen

⁴⁷ EuG, *Rashnikov* (Fn. 44), Rn. 94 ff.; EuG, *Mazepin* (Fn. 38), Rn. 20.

⁴⁸ EuG, *Rashnikov* (Fn. 44), Rn. 69, 70; EuG, *Mazepin* (Fn. 38), Rn. 56, 80. Anders und viel konkreter argumentiert das EuG in EuG, *Mordashov* (Fn. 42), Rn. 110: als substanzieller Aktionär der Bank Rossija (5,9 % der Anteile) müsse *Mordashov* sich deren Unterstützung des Krieges gegen die Ukraine zurechnen lassen; die Bank Rossija ist die ‘Hausbank Putins’ und seiner engsten Vertrauten; s. dazu Belton (Fn. 1), 378 ff., unter der treffenden Kapitelüberschrift ‘Obschak’: Der (in richtiger Transliteration) ‘Obšak’ ist die gemeinsame Kasse verbrecherischer Vereinigungen.

⁴⁹ S. EuG, *Rashnikov* (Fn. 44), Rn. 98, 95; EuG, *Mazepin* (Fn. 38), Rn. 78 f., 82.

⁵⁰ S. EuG, *Mazepin* (Fn. 38), Rn. 27; die Ausführungen davor machen klar, dass es um die Begründung als verfahrensrechtliches Erfordernis geht. So klar ist das allerdings nicht in allen Entscheidungen; in EuG, *Mordashov* (Fn. 42), Rn. 52 ff., berührt das EuG mit der Erwähnung der Bank Rossija schon substanzielle Fragen.

⁵¹ S. EuG, *Rashnikov* (Fn. 44), Rn. 66 ff. sowie Rn. 107, 108; EuG, *Mazepin* (Fn. 38), Rn. 54 ff.; diese Ziele nennt auch Lange, ‘EU Sanktionen’ (Fn. 19), 3. Ähnlich schon die Rosneft-Entscheidung des EuGH, *Rosneft* (Fn. 35), Rn. 29; bei Sanktionen (in diesem Fall nach der Annexion der Krim und den Aktionen im Donbass) gegen einen großen Konzern wie Rosneft mag man schon eher auf eine gewisse Wirksamkeit hoffen.

⁵² S. EuG, *Rashnikov* (Fn. 44), Rn. 102; es komme nicht darauf an, dass die Sanktionen sofortige Wirkung zeitigen müssten, Rn. 103; EuG, *Mazepin* (Fn. 38), Rn. 86.

Einnahmen“. Dazu kommt noch, dass die Unmöglichkeit der Ausreise in den Westen und der Verfügung über das dort befindliche Vermögen die Adressaten der Sanktionen zu größerem Steuergehorsam zwingt, wie dies auch einige Kläger vorbrachten.⁵³

Sekundär sollen die Sanktionen, wie das EuG in einigen Entscheidungen erwähnte, die betroffenen Wirtschaftsführer, soweit sie an dem Treffen mit Putin vom 22. Februar 2022 teilnahmen, dazu bewegen auf die politische Führung im Sinne einer Beendigung des Krieges einzuwirken.⁵⁴ Das mag die Absicht hinter den Sanktionen sein, verträgt sich aber nicht mit der Interpretation des EuG von Art. 2 Abs. 1g des Beschlusses des Rates 2014/145/CFSP, nach der es um das Einkommen geht, das die russische Regierung von dem jeweiligen Wirtschaftszweig erhält, und gerade nicht um eine Beeinflussung Putins. Die Erwartung eines Einwirkens auf den russischen Präsidenten negiert im Übrigen die Realität des politischen Systems der russischen Föderation und die Gefährlichkeit vom Präsidenten abweichender Meinungen.⁵⁵ Überzeugender ist es da, wenn das EuG auf die Tätigkeit der Bank Rossija, der Hausbank der Putin nahestehenden Eliten, auf der Krim wie im Verfahren G. Timčenko abstellt.⁵⁶

Ein weiterer Schwerpunkt des Vorbringens der Kläger sowie der Entscheidungen war die Rechtmäßigkeit der Grundrechtsbeschränkungen durch das Einfrieren der Klägervermögen, Art. 52 Abs. 1 GrChEU. Unproblematisch waren der im Einfrieren liegende Eigentumseingriff sowie die Voraussetzun-

⁵³ S. als ein Beispiel EuG, *Pumpyanskiy 1* (Fn. 38), Rn. 72 sowie 94; der Kläger brachte weiter vor, dass durch den Zwang, in der Russischen Föderation zu sein, auch die Investitionstätigkeit der sanktionierten Wirtschaftsführer zunehmen werde. Das EuG wies darauf hin, dass die sanktionierten Wirtschaftsführer ja auch in andere Länder ausreisen könnten.

⁵⁴ Besonders klar in EuG, *Pumpyanskiy 1* (Fn. 38), Rn. 50: Die Teilnahme an dem Treffen und die Verleihung des Ordens ‘Verdienste um das Vaterland’ (4. Klasse) zeigten den Einfluss des Klägers. – Zum Teil wird die Teilnahme an dem Treffen auch als Indiz dafür bewertet, dass der betreffende Kläger ein führender Wirtschaftsvertreter ist, s. z. B. EuG, *Mazepin* (Fn. 38), Rn. 33, 89, 90. – In den französisch-sprachigen Urteilen des EuG wird der Grund der Sanktionierung zum Teil klarer formuliert: ‘[...] ces personnes doivent, par leur comportement, s’être rendues responsables d’actions ou de politique qui compromettent ou menacent l’intégrité territoriale, la souveraineté et l’indépendance de l’Ukraine’, EuG, *Timchenko* (Fn. 37), Rn. 117, unter Bezugnahme auf EuG, *Rotenberg* (Fn. 25), Rn. 74; etwas anders, allerdings nicht überzeugend, EuG, *Mordashov* (Fn. 42), Rn. 136: Die Tatsache der Einladung zeige die besondere Nähe zu Putin; allerdings waren Putin sehr nahestehende Personen wie A. Rotenberg, G. Timčenko oder Ju. Kovalčuk nicht anwesend.

⁵⁵ Die Erwartung einer solchen Distanzierung bzw. den Vorwurf, das nicht gemacht zu haben, s. etwa in EuG, *Timchenko* (Fn. 37), Rn. 112 ff. – Relativ offen ausgesprochen wird diese Absicht des Einwirkens auf den Präsidenten etwa in EuG, *Mazepin* (Fn. 38), Rn. 54 und 55. Zur Gefährlichkeit der Kritik an Putin s. Fn. 29, 30.

⁵⁶ So EuG, *Timchenko* (Fn. 37), Rn. 118 ff., 122; zur Bank Rossija als Hausbank der Putin’schen Eliten s. Siegel (Fn. 1), 263 sowie Fn. 48.

gen des Art. 52 Abs. 1 S. 1 GrChEU, nämlich das Vorliegen einer gesetzlichen Grundlage und die Nichtberührung des Wesensgehalts des Grundrechts.⁵⁷ Auch die Verhältnismäßigkeit, Art. 52 Abs. 1 S. 2 GrChEU, hat das EuG bejaht. Die Sanktionen seien zur Erreichung ihres Ziels, nämlich der Beendigung des russischen Angriffs auf die Ukraine, nicht offenkundig ungeeignet und der Gesetzgeber habe eine weite Einschätzungsprärogative.⁵⁸ Sie seien auch erforderlich: Gleich geeignete, aber weniger grundrechtsbeschränkende Sanktionen existierten nicht; im Übrigen könnten die Sanktionierten in Notlagen eine partielle Aufhebung der Sanktionen beantragen.⁵⁹ Die Angemessenheit schließlich – wobei die Prüfung von Erforderlichkeit und Angemessenheit ineinander verschwimmt – sei durch die regelmäßige Überprüfung der Sanktionen gewährleistet.⁶⁰ Das EuG hatte also keine Zweifel an der Verhältnismäßigkeit der Sanktionen.

Auch die Berufung einiger Kläger auf den Gleichheitssatz war erfolglos. Hier wurde zum Teil gerügt, dass nicht alle Teilnehmer des Treffens mit Putin am 24. Februar 2022 mit Sanktionen belegt worden waren. Weiter wurde vorgebracht, andere russische und nichtrussische Konzerne seien qua Steuern Quellen erheblicher Einkünfte für die russische Regierung, aber nicht sanktioniert.⁶¹ Auch beim Gleichheitssatz gibt das EuG dem Rat bei der Entscheidung über die Sanktionierung einen weiten Ermessensspielraum: Nicht jeder, der die Kriterien erfülle, müsse auch sanktioniert werden. Selbst wenn eine Person die Kriterien erfülle, könne der Rat eine Verhängung von Sanktionen gegen diese für nicht angemessen („not appropriate“) halten – was immer diese Nichtangemessenheit bedeuten mag.⁶² Die Sank-

⁵⁷ S. EuG, *Rashnikov* (Fn. 44), Rn. 118, 123, 124; EuG, *Mazepin* (Fn. 38), Rn. 102 ff., bes. 105 und 106; EuG, *Pumpyanskiy 1* (Fn. 38), Rn. 80 ff.

⁵⁸ EuG, *Rashnikov* (Fn. 44), Rn. 130: ‘manifestly inappropriate’ im Hinblick auf das verfolgte Ziel; ebenso in EuG, *Mazepin* (Fn. 38), Rn. 112 und 113: ‘manifestly inordinate’, mit Verweisen auf weitere Rechtsprechung; EuG, *Pumpyanskiy 1* (Fn. 38), Rn. 85 ff., insbes. 87; s. weiter EuG, *Mordashov* (Fn. 42), Rn. 162. – So im Übrigen schon EuGH, *Rosneft* (Fn. 35), Rn. 146, mit weiteren Nachweisen. Etwas gründlicher und auch überzeugender die Argumentation in EuG, *VTB* (Fn. 24), Rn. 150 ff.: Maßnahmen gegen Banken im Staatseigentum seien ein geeignetes Mittel, um die Kosten der Destabilisierung der Ukraine für die Russische Föderation zu erhöhen.

⁵⁹ S. EuG, *Rashnikov* (Fn. 44), Rn. 134, 135; EuG, *Mazepin* (Fn. 38), Rn. 108 ff.

⁶⁰ EuG, *Rashnikov* (Fn. 44), Rn. 137, s. auch EuG, *Mazepin* (Fn. 38), Rn. 119.; EuG, *Mordashov* (Fn. 42), Rn. 161 ff.

⁶¹ S. EuG, *Mazepin* (Fn. 38), Rn. 124.; zur Frage, wer von den Wirtschaftsführern sanktioniert wurde und von wem, s. die allerdings nicht vollständige Liste in <<https://www.forbes.at/artikel/DIE-OLIGARCHENLISTE.html>>, zuletzt besucht 12. März 2025; s. weiter die Liste der 200 reichsten Russen von 2021, von denen in der Tat nur ein kleiner Teil sanktioniert ist, s. in <<https://www.forbes.ru/rating/426935-200-bogateyshih-biznesmenov-rossii-2021-reyting-f-orbes>>, zuletzt besucht 27. Januar 2025.

⁶² EuG, *Mazepin* (Fn. 38), Rn. 128 f.

tionierung nicht-russischer Unternehmer sei im Übrigen durch Art. 2 Abs. 1g Beschluss des Rates 2014/145/CFSP nicht ausgeschlossen.⁶³ Schließlich verneinte das EuG auch die zum Teil geltend gemachte Verletzung des Rechts auf rechtliches Gehör (bei der Überprüfung der Sanktionierungsentscheidungen).⁶⁴

IV. EU-Grundrechte und personenbezogene Sanktionen gegen Wirtschaftseliten

Die Verhängung von Sanktionen gegen natürliche (und auch juristische) Personen muss als hoheitliches Handeln der EU im Rahmen der Gemeinsamen Außen- und Sicherheitspolitik (GASP), den in der EU geltenden Grundrechten der Grundrechte-Charta, Art. 6 Abs. 1 S. 1 Vertrag über die Europäische Union (EUV), wie auch den Grundrechten der Europäischen Menschenrechtskonvention (EMRK), Art. 6 Abs. 3 EUV, entsprechen. In der Sache folgen aus den zwei parallelen Grundrechtstexten keine rechtlichen Unterschiede.⁶⁵ Die von der Rechtsprechung in den von sanktionierten Personen initiierten Verfahren durchgeführten Prüfungen, vor allem des Grundrechts auf effektiven Rechtsschutz, Art. 47 GrChEU, sowie des Grundrechts des Eigentums, Art. 17 GrChEU, vermögen in der Sache nicht zu überzeugen. Zum einen fehlen jegliche Ausführungen zu den rechtlichen Voraussetzungen der Verhängung von Sanktionen gegen natürliche Personen nach Art. 215 Abs. 2 AEUV; zum anderen können die Erörterungen der Verhältnismäßigkeit im Rahmen der Eigentumsprüfung nicht überzeugen. Es fragt sich auch, ob die grundrechtlichen Fragen mit einer eigentums- bzw. verhältnismäßigkeitszentrierten Prüfung erschöpfend behandelt sind.

1. Die Voraussetzungen der Verhängung von personenbezogenen Sanktionen nach Art. 215 Abs. 2 AEUV

Rechtsgrundlage der Sanktionen gegen natürliche Personen im Recht der EU ist der nach dem Vertrag von Lissabon eingefügte Art. 215 Abs. 2 AEUV,

⁶³ EuG, *Rashnikov* (Fn. 44), Rn. 144.

⁶⁴ EuG, *Rashnikov* (Fn. 44), Rn. 154 ff., 158.

⁶⁵ Stöckel (Fn. 8), 304 f.; Stöckel (Fn. 8), 306: Alle personenbezogenen Sanktionen seien am Primärrecht der Gemeinschaft, insbesondere den Grundrechten zu überprüfen; s. dann Stöckel (Fn. 8), die ausführliche Diskussion zum Grundrecht des Eigentums (allerdings des Art. 1 1. Zusatzprotokoll EMRK), 309 ff.

wonach restriktive Maßnahmen im Sinne von Art. 215 Abs. 1 AEUV auch gegen natürliche und juristische Personen sowie Gruppierungen erlassen werden können. Allerdings konnten nach allgemeiner Meinung auch vor der Schaffung des Art. 215 Abs. 2 AEUV Sanktionen gegen natürliche Personen auf der Grundlage des – dies nicht ausdrücklich regelnden – Art. 215 Abs. 1 AEUV erlassen werden. Sie waren aber beschränkt auf solche Privatpersonen oder Personengruppen, die Machthaber des Staates oder mit diesen verbundene Personen waren. Die Verbindung zu dem jeweiligen Staat musste offensichtlich sein und durfte nicht nur vermutet werden. Trotz der Schaffung des Art. 215 Abs. 2 AEUV geht ein Teil der Kommentarliteratur weiter von der Möglichkeit des Erlasses personenbezogener Sanktionen nach Art. 215 Abs. 1 AEUV aus.⁶⁶

Für die Verhängung personenbezogener Sanktionen nach Art. 215 Abs. 2 AEUV fordert die nicht sehr umfangreiche Literatur, dass die sanktionierten Personen mit dem auslösenden Sachverhalt, der Völkerrechtsverletzung, in unmittelbarem Zusammenhang stehen oder in die dem Staat zurechenbaren Handlungen in irgendeiner Weise involviert waren;⁶⁷ dieser unmittelbare Zusammenhang müsse „meist“ bestehen.⁶⁸ Betont wird das weite Ermessen

⁶⁶ Auf Art. 215 Abs. 1 AEUV verweisen immer noch Marc Bungenberg, ‘Art. 215 AEUV’ in: Hans von der Groeben, Jürgen Schwarze und Armin Hatje (Hrsg.), *AEUV* (7. Aufl., Nomos 2015), Rn. 5; Henning Schneider und Jörg Terhechte, ‘Art. 215 AEUV’ in: Eberhard Grabitz, Meinhard Hilf und Martin Nettesheim (Hrsg.), *Das Recht der Europäischen Union: EUV/AEUV*, (80. EL, August, Beck 2023), Rn. 11; Rudolf Geiger und Lando Kirchmair, ‘Art. 215 AEUV’ in: Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur und Lando Kirchmair (Hrsg.), *EUV/AEUV* (7. Aufl., Beck 2022), Rn. 8; s. freilich die dem widersprechende Aussage in Rn 13. – Anders wohl Hans-Joachim Cremer, ‘Art. 215 AEUV’ in: Christian Callies und Matthias Ruffert (Hrsg.), *EUV/AEUV* (6. Aufl., Beck 2022), Rn. 5, wonach die Verhängung von personenbezogenen Sanktionen als Teil von staatenbezogenen Sanktionen (gem. Art. 301, 60 sowie 308 EGV a.F.) nur vor der Schaffung des Art. 215 AEUV stattfand; s. a. Rn. 12, wonach für Maßnahmen gegen natürlich Personen nunmehr Art. 215 Abs. 2 AEUV die einschlägige Rechtsgrundlage ist; ebenso Juliane Kokott, ‘Art. 215 AEUV’ in: Rudolf Streinz (Hrsg.), *AEUV* (3. Aufl., Beck 2018), Rn. 3; so wohl auch, freilich nur en passant, Valta (Fn. 8), 93 f.; Jens Brauneck, ‘Ukraine-Krise: Zu viel und zu wenig Rechtsschutz gegen Wirtschaftsanktionen’, *EuR* 50 (2015), 498-521 (499); Lange, ‘Der russische Angriffskrieg’ (Fn. 3), 23 f.; unklar Egger (Fn. 36), 329, der das ‘erforderlich’ in Art. 215 Abs. 1 AEUV nicht nur auf den GASP-Beschluss, sondern auch auf den Verhältnismäßigkeitsgrundsatz bezieht, was nahelegt, dass Sanktionen gegen natürliche Personen gemeint sind.

⁶⁷ Hafner (Fn. 8), 408; Schneider und Terhechte (Fn. 66), Rn. 29 fordern (im Zusammenhang mit der gerichtlichen Kontrolldichte) eine hinreichende tatsächliche Grundlage; ebenso Kokott (Fn. 66), Rn. 39; Burghard Hildebrandt und Eva Koch, *Smart Sanctions – Grundlagen und Bedeutung der EU-Sanktionslisten*, IWRZ 2016, 152-158 (152, 154), zum Urteil des EuGH v. 1. März 2016, Az. C-440/14 P – *Iran-Sanktionen*.

⁶⁸ So Hafner (Fn. 8), 408; in der Folge spricht er davon, dass es um Maßnahmen gegen Einzelpersonen gehe, die mehr oder weniger in die dem Staat zurechenbaren Handlungen involviert waren.

bei der Entscheidung über die Sanktionierung.⁶⁹ Das EuG ist, soweit ersichtlich, auf Art. 215 Abs. 2 AEUV nicht eingegangen und hat die Rechtmäßigkeit der Sanktionen nur am Maßstab der im Vollzug von Art. 215 Abs. 2 AEUV ergangenen Verordnungen geprüft.

In der Tat kann Anknüpfungspunkt der personenbezogenen Sanktionen nach Art. 215 Abs. 2 AEUV nur eine „Beteiligung“ der sanktionierten Personen an der Völkerrechtsverletzung durch (in der Regel) den eigenen Staat sein: „Grundlose“ Sanktionierungsmöglichkeiten existieren nicht. Dies bestätigen die zu den restriktiven Maßnahmen erlassenen Leitlinien des Rates.⁷⁰ Die Verhängung von Sanktionen nach Art. 215 Abs. 2 AEUV erfordert also eine Sonderbeziehung oder besondere Nähe des Adressaten zu der von dem Staat begangenen Völkerrechtsverletzung, die die Verursachung der Völkerrechtsverletzung zurechenbar macht. Die Kriterien der Zurechnung müssen allerdings schärfer gefasst werden: Immerhin werden die Grundrechte dieser institutionell in den Bruch des Völkerrechts nicht integrierten Sanktionsadressaten, konkret das Grundrecht des Eigentums (oder auch der Freizügigkeit), durch den zeitweisen, oft lang andauernden Entzug tiefgehend eingeschränkt.⁷¹ Der unmittelbare Zusammenhang muss daher immer und nicht nur „meist“ bestehen. Sofern er nicht besteht, wird dem Sanktionsadressaten sein Eigentum ohne Rechtsgrundlage entzogen. Die auch vorgeschlagene

⁶⁹ Bungenberg, (Fn. 66), Rn. 34, spricht von einem weiten Ermessen sowohl im Rahmen des Art. 215 Abs. 1 wie auch im Rahmen des Art. 215 Abs. 2 AEUV; hinsichtlich der Ausgestaltung bei gegen Staaten gerichteten Wirtschaftssanktionen bestünde ein Ermessen, welche Personen, Organisationen und Einrichtungen, die dem Staat zuzurechnen sind, erfasst werden; auf das Ermessen (im Unterschied zu Art. 215 Abs. 1, wonach der GASP-Beschluss umgesetzt werden muss), weist auch Cremer (Fn. 66), Rn. 14, hin; zu den Voraussetzungen von Sanktionen fehlen allerdings Ausführungen, s. Cremer (Fn. 66), Rn. 21, 22; ohne Aussage auch Lange, ‘EU Sanktionen’ (Fn. 19), 5 f. Unklar Schneider und Terhechte (Fn. 66), Rn. 13: Die Sanktionierung nach Art. 215 Abs. 2 AEUV gegenüber natürlichen Personen soll möglich sein, wenn diese in keiner Verbindung zu einem Drittstaat oder einer internationalen Organisation stehen?

⁷⁰ S. die ‘Leitlinien zur Umsetzung und Evaluierung restriktiver Maßnahmen (Sanktionen) im Rahmen der Gemeinsamen Außen- und Sicherheitspolitik der EU’, Dokument 5664/18 vom 4. Mai 2018 Rn. 13:

‘Die getroffenen Maßnahmen sollen auf die ausgerichtet sein, die für die Politik oder die Handlungen, die die EU zur Verhängung restriktiver Maßnahmen veranlasst haben, verantwortlich sind, sowie auf diejenigen, die von solcher Politik oder solchen Handlungen profitieren oder sie unterstützen.’

⁷¹ Stöckel (Fn. 8), 45: Nötig seien wegen des ‘polizeirechtlichen Charakters’ angemessene Verfahrensgarantien und grundrechtliche Gewährleistungen; s. weiter Stöckel (Fn. 8), 46 f. sowie dann eingehend 312 f.: Die Ausnahmesituation der Sicherungsmaßnahme werde zur Regel, was zu einem Absinken des materiellen Schutzstandards führe; s. weiter Stöckel (Fn. 8), 321; Hafner (Fn. 8), 408; er weist darauf hin, dass sie damit völkerrechtlich nicht als ‘Gegenmaßnahmen’ qualifiziert werden können, da diese nicht in die Rechte anderer Rechtssubjekte eingreifen dürfen, s. Text und Fn. 66; s. auch die Zusammenfassung der Anwendung der ‘rule of reasonableness’ auf Sanktionen bei Valta (Fn. 8), 149 f. sowie auch 154.

„Involvierung in irgendeiner Weise“ erfordert eine verursachende Beteiligung. Eine neutrale soziale Nähe zu den eigentlichen Verursachern ohne substanzielle Beteiligung am Völkerrechtsbruch reicht nicht.⁷² Bei Sanktionen, auch personenbezogenen, handelt es sich rechtstechnisch um Gefahrenabwehr,⁷³ Gefahrenabwehr in der Variante, dass der Schaden am Schutzgut der Völkerrechtsordnung, schon eingetreten ist und die Rechtsverletzung rückgängig gemacht werden muss und soll.⁷⁴ Wie im innerstaatlichen Gefahrenabwehrrecht kann daher grundsätzlich nur ein „(Mit)Verursacher“ Adressat der personenbezogenen Sanktionen sein.⁷⁵ Soweit nach dem Beschluss 2014/145/CFSP des Rats die Verhängung von Sanktionen auch gegen Nichtverursacher möglich erscheint, ist dieser daher im Hinblick auf die Ermächtigungsgrundlage problematisch.

2. Eine kritische Analyse der Rechtsprechung des EuG zu den Sanktionen

Der Beschluss des Rates 2014/145/CFSP entspricht größtenteils, konkret in den Unterpunkten a, d, e und f., der Ermächtigungsgrundlage des Art. 215 Abs. 2 AEUV. Der Kreis der „Verantwortlichen“ wird zwar sehr weit gezogen,⁷⁶ die Vorschriften sind jedoch bei entsprechend rechtsstaatlicher und grundrechtskonformer Interpretation hinzunehmen. Problematisch ist dagegen Art. 2 Abs. 1g Beschluss des Rates 2014/145/CFSP, wonach „leading

⁷² Das EuG verlangt zum Teil eine direkte oder indirekte Involvierung, so bei Kriterium a), so bei den erfolgreichen Klagen von P. Aven, EuG, *Aven* (Fn. 40), Rn. 41, und M. Fridman, EuG, *Fridman* (Fn. 40), Rn. 41, jeweils unter Verweis auf EuG, *Rotenberg* (Fn. 25), Rn. 74.

⁷³ So auch ausdrücklich die Leitlinien Rat (Fn. 70), Anlage 1, 46; ebenso Stöckel (Fn. 8), 36, soweit es um staatliche Funktionsträger geht; mit etwas gründlicheren Überlegungen kommt sie für Terroristen zum gleichen Ergebnis, s. Stöckel (Fn. 8), 41 ff., bes. 45; zur speziellen Ermächtigungsgrundlage des Art. 75 AEUV bei der Sanktionierung von Terroristen s. Stöckel (Fn. 8), 205; s. schließlich, anlässlich der Frage eines Verstoßes gegen die Unschuldsvermutung, Stöckel (Fn. 8), 318 ff., bes. 320. – Zu den sonstigen möglichen Funktionen s. Hafner (Fn. 8), 394.

⁷⁴ Kurt Graulich, ‘Teil E’, in: E. Denninger, Hans Liskens, Matthias Bäcker und Kurt Graulich (Hrsg.), *Handbuch des Polizeirechts* (7. Aufl., Beck 2021), Rn. 126 ff.

⁷⁵ Dies wird etwa bei Stöckel aus den von ihr ganz selbstverständlich angeführten Adressatengruppen von personenbezogenen Sanktionen ersichtlich, Stöckel (Fn. 8), 89: Personen, die für die Verletzung von Demokratie, Rechtsstaatlichkeit und Menschenrechten verantwortlich gemacht werden, s. a. Stöckel (Fn. 8), 92.

⁷⁶ Es geht um mittelbare Unterstützung: ‘[...] supporting, materially or financially, or benefitting from Russian decision-makers responsible [...]’, Art. 2 Abs. 1d Beschluss des Rats 2014/145/CFSP; Art. 2 Abs. 1f regelt analog für die Regierung der Russischen Föderation.

business persons or legal persons, entities or bodies involved in economic sectors providing a substantive source of revenue to the government of the Russian Federation“ sanktioniert werden können: Eine zurechenbare (Mit-) Verantwortung für den Völkerrechtsbruch ist hier nicht zu erkennen. Gerade mit dieser Bestimmung hat jedoch das EuG die Sanktionierung der Kläger zumeist begründet. Als weitere Rechtsgrundlagen erörterte das EuG mal Art. 2 Abs. 1f Beschluss des Rats 2014/145/CFSP – „natural or legal persons [...] supporting, materially or financially, or benefitting from the Government of the Russian Federation [...]“ – und mal Art. 2 Abs. 1a Beschluss des Rats 2014/145/CFSP – „natural persons responsible for, supporting or implementing actions or policies, which undermine [...]“. In beiden Fällen ging es in der Sache um die (vermeintliche) Nähe zu Putin wegen des Treffens am 24. Februar 2022. Das EuG hat allerdings offen gelassen, ob dieses eingreife, da schon Art. 2 Abs. 1g Beschluss des Rats 2014/145/CFSP die Sanktionierung rechtfertigte.⁷⁷

Die Rechtsprechung des EuG zu den personenbezogenen Sanktionen gegen russische Wirtschaftsführer vermag somit nur zum Teil zu überzeugen. Die substanziellen Einnahmen, Art. 2 Abs. 1g Beschluss des Rates 2014/145/CSFP, für die russische Regierung werden auf den Wirtschaftszweig, dem der sanktionierte Wirtschaftsführer angehört, und nicht auf ihn selbst bezogen. Der Wirtschaftszweig begründet jedoch keine Gruppenidentität, die es erlauben würde, allen Vertretern dieses Wirtschaftszweigs quasi als „Team“ die „erheblichen Einnahmen“ insgesamt zuzurechnen. Zudem handelt es sich bei diesen Einnahmen um Steuern. Die sanktionierten Wirtschaftsführer könnten also nur durch eine rechtswidrige (kollektive) Steuerverweigerung dem russischen Staat die substanziellen Einnahmen entziehen und so dem Anwendungsbereich des Art. 2 Abs. 1g Beschluss des Rates 2014/145/CFSP entkommen.⁷⁸

Ebenso wenig überzeugt der Verweis auf die Teilnahme an dem Treffen mit Putin am 24. Februar 2022 als Grundlage der Bejahung der Involvierung

⁷⁷ S. z. B. EuG, *Pumpyanskiy 1* (Fn. 38), Rn. 71: Keine Notwendigkeit, das ‘f-criterion’ zu prüfen; das Gericht weist allerdings im Sachverhalt, Rn. 14, darauf hin, dass der Kläger an dem Treffen von 37 Wirtschaftsführern mit Präsident Putin am 24. Februar 2022 teilgenommen habe, sowie auf die Tatsache der intensiven Geschäftsbeziehungen mit Staatsunternehmen wie Gazprom, Rosneft oder den staatlichen Eisenbahnen (RŽD), Rn. 48, sowie die Teilnahme am Treffen v. 22. April 2022, Rn. 50; EuG, *Mazepin* (Fn. 38), Rn. 95.

⁷⁸ Seine Rechtsprechung, die dieses Problem in anderen Entscheidungen für relevant gehalten hatte, bezeichnet das EuG ausdrücklich als irrelevant, EuG, *Rasbnikov* (Fn. 44), Rn. 97, 98, unter Verweis auf EuG, *Peftiev v. Council*, Urteil v. 9. Dezember 2014, T-4441/11, ECLI:EU:T:2014:1041, sowie EuG, *Chyzh and others v. Council*, Urteil v. 6. Oktober 2015, T-276/12, ECLI:EU:T:2015:748.

auf irgendeine Weise. Die nahestehenden Gruppen ist bekannt.⁷⁹ Die Teilnehmer des Treffens gehörten nur zum Teil zu diesen Gruppen. G. Timčenko etwa ist Teil des engen „zweiten Kreises“, war aber kein Teilnehmer des Treffens am 24. Februar 2022. Er wurde sanktioniert. Sein Novatek-Geschäftspartner L. Mihelson, der an dem Treffen teilnahm, wurde hingegen nicht sanktioniert.⁸⁰ Andererseits nahmen an dem Treffen Industrielle teil, die zu keiner der Putin nahestehenden Personengruppen gehörten, wie etwa D. Mazepin, D. Pumpânskij, V. Raševskij oder P. Aven.⁸¹ Zweifellos würde jeder Russe, reich oder arm, einer Einladung zu einem Treffen mit Putin schon aus Gründen der Selbsterhaltung nachkommen, allenfalls mit der Ausnahme bekannter Systemgegner.⁸² Die Begründung der Verhängung von personenbezogenen Sanktionen sowohl im Beschluss des Rates 2014/145/CFSP wie auch in der Rechtsprechung des EuG ist also je nach konkretem Sanktionsadressaten ergänzungs- und vertiefungsbedürftig oder auch schlicht ungenügend.⁸³

3. Die Verhältnismäßigkeit der Eigentumsbeschränkung

Das Einfrieren von Guthaben sowie der Arrest von Immobilien ist wegen der nicht absehbaren Dauer dieser Maßnahmen ein tiefgehender Eingriff in

⁷⁹ S. z. B. Åslund (Fn. 26), 226 ff.

⁸⁰ Zur Position von G. Timčenko im zweiten Kreis s. Åslund (Fn. 26), 228; zu Mihelson und Timčenko s. Åslund (Fn. 26), 139 ff. wobei nach Åslunds Vermutungen Timčenko das Novatek-Aktienpaket oder Teile davon, das er 2008/2009 erwarb, für Putin hält wie zuvor schon die Gunvor-Anteile. – Zu Mihelson, immerhin geschätzt auf 24 Mrd. US\$, s. <<https://www.forbes.com/profile/leonid-mikhelson/>>, zuletzt besucht 17 Januar 2025; zur Teilnahme an dem Treffen s. noch einmal den Bericht in <<https://tass.ru/ekonomika/13846883?ysclid=ipecktkdks485406187>>, zuletzt besucht 17 Januar 2025. Generell wurden eine ganze Reihe der reichsten Russen nicht sanktioniert, s. dazu die vergleichende Analyse bei Grauvogel und von Soest (Fn. 12), 35 f.

⁸¹ Zum Treffen noch einmal der TASS-Bericht (Fn. 27). Im Falle von P. Aven hat das EuG mittlerweile ein Treffen im Atlantic Council im Mai 2018 für irrelevant erklärt, s. EuG *Aven* (Fn. 40), Rn. 81 ff.

⁸² Bei O. Tinkov, dem Gründer der Tinkov-Bank, die er dann weit unter Wert verkaufen musste, könnte man sich eine solche Weigerung vorstellen; zu seiner Aufgabe der Staatsangehörigkeit s. Fn. 32; am 15. Februar 2024 wurde er dann absurderweise vom russischen Justizministerium zum ‘ausländischen Agenten’ erklärt, s. <<https://meduza.io/news/2024/02/16/mi-nyust-rossii-ob-yavil-inoagentami-olega-tinkova-i-nikitu-kukushkina>>, zuletzt besucht 17. Januar 2025.

⁸³ Lange, ‘Der russische Angriffskrieg’ (Fn. 3), 26, hatte also mit seiner Prognose, die europäischen Gerichte würden die personenbezogenen Sanktionen weitgehend aufrechterhalten, recht.

das Eigentum.⁸⁴ Das erste Element der Verhältnismäßigkeitsprüfung ist die Geeignetheit der Maßnahme zur Erreichung des legitimen Ziels, also der Beendigung des Angriffs Russlands auf die Ukraine. Die Geeignetheit hat in der Rechtsprechung zu den personenbezogenen Sanktionen wie auch sonst wenig Kontrollschärfe, da aus Gründen der Gewaltenteilung die Gerichte der Legislative oder Exekutive eine sehr weite Einschätzungsprärogative einräumen. Nur offenkundig ungeeignete Maßnahmen verstoßen gegen den Verhältnismäßigkeitsgrundsatz.⁸⁵

Staatenbezogene Sanktionen haben nur eine bescheidene Erfolgswahrscheinlichkeit.⁸⁶ Personenbezogene Sanktionen dürften demgegenüber eine noch geringere Erfolgswahrscheinlichkeit aufweisen, da sie den Staat allenfalls mittelbar betreffen. Dies wird im Falle der staatenbezogenen und personenbezogenen Sanktionen gegen Russland leider bestätigt. Die meisten Entscheidungen des EuG wurden nach eineinhalb Jahren Krieg in der Ukraine im Herbst 2023 getroffen. Es lagen also praktische Erfahrungen zur Wirksamkeit der Sanktionen vor. Die Entschlossenheit der russischen Führung, den Krieg (bis zur Erreichung eines jedenfalls aus der Sicht Außenstehender unklaren Ziels) fortzusetzen, schien und scheint unbeeinträchtigt, trotz der wiederholten Verschärfung der Sanktionen⁸⁷ und einer Erweiterung des sanktionierten Personenkreises.⁸⁸ Die gegen Russland und insbesondere die russische Wirtschaft gerichteten Sanktionen verursachen zwar Probleme; diese wirken sich aber anscheinend nicht auf die Entscheidung der russischen Führung, den Krieg fortzusetzen, aus.⁸⁹ Auch die Bevölkerung scheint die

⁸⁴ So die Entscheidungen des EuG; ebenso Brauneck (Fn. 66), 506: '[...] absoluter Freiheitsentzug im vermögensrechtlichen Bereich, der die Handlungsfähigkeit der betroffenen Person weitgehend lähmt', mit weiteren Nachweisen. Stöckel (Fn. 8), 308 f.: 'potentiell vernichtend'; 'de-facto-Enteignung' (allerdings bezogen auf Terroristen); s. auch weiter Stöckel (Fn. 8), 312 f. sowie 318. Im Übrigen treffen die Sanktionen auch die jeweiligen Unternehmen, s. dazu Franziska Bremus und Pia Hüttl, Sanktionen gegen russische Oligarch:innen treffen auch von ihnen geleiteten Unternehmen, DIW-Wochenbericht, Vol. 89, iss.21/2022, 299 ff., <https://www.diw.de/sixcms/detail.php?id=diw_01.c.841876.de>, zuletzt besucht 17. Januar 2025. Die Studie lässt allerdings leider die Frage offen, ob die jeweiligen Unternehmen auch direkt Adressat von Sanktionen sind wie bei I. Sečín/Rosneft' oder E. Prigožin/Patriot Media Group (No. 194 der Liste sanktionierter Unternehmen).

⁸⁵ S. dazu die Nachweise in Fn. 58.

⁸⁶ S. oben Fn. 11 und 12.

⁸⁷ S. den Nachweis in Fn. 2.

⁸⁸ S. noch einmal die Nachweise in Fn. 2.

⁸⁹ Zu der Widerstandsfähigkeit der russischen Wirtschaft und ihren Gründen s. Alexandra Prokopenko, Permanent Crisis Mode: Why Russia's Economy Has Been So Resilient Against Sanctions, ZOIS-Report 2023 No. 4 (November 2023); auf das Wachstum der russischen Wirtschaft weist auch M. Fridman hin, s. <<https://meduza.io/paragraph/2024/08/22/zapad-hotel-na-nesti-uscherb-rossijskoy-ekonomike-a-ona-rastet>>, zuletzt besucht 17. Januar 2025. S. weiter die sehr ambivalente Bewertung in dem Sammelband von Thieß Petersen u. a., 'Sanktionen

Einbußen an Lebensqualität im Sinne eines „rally around the flag“ hinzunehmen.⁹⁰ Ein Effekt der Sanktionierung der hier fokussierten Wirtschaftsführer oder auch staatsnaher Personen ist nicht festzustellen, wenn man von der Erschwerung des persönlichen Lebens der sanktionierten Personen absieht.⁹¹ Die Wirkung erschöpft sich mehr oder weniger in symbolischer Missbilligung.⁹² Insofern ist es schwer nachvollziehbar, dass das EuG automatenhaft und ohne eine konkret tatsachenbezogene Erörterung die offenkundige Ungeeignetheit der Sanktionen verneint⁹³ und sich hinter seiner Auslegung, es ginge um die Einnahmen des jeweiligen Wirtschaftszweiges, versteckt.⁹⁴ Im Übrigen gibt es auch eine zeitliche Verhältnismäßigkeit, die in der Sache ein Aspekt der Geeignetheit ist: Eine Maßnahme ist zu beenden, wenn ihr Ziel

gegen Russland: Wurde ihrer Wirksamkeit überschätzt? – Eine Zwischenbilanz’, ifo-Schnelldienst 5/2023, 76. Jahrgang; ähnlich kritisch Justus Vasel, ‘De bello oeconomico’, EuZW 33 (2022), 541-550 (549): effektivvoll, aber weitestgehend erfolglos.

⁹⁰ S. die Analyse des Chefsoziologen des unabhängigen Levada-Meinungsforschungsinstituts Aleksej Levinson: Die Gründe für die ungebrochene Popularität Putins seien zum einen der Integrationseffekt des Westens als Feind, zum anderen die Integration durch die gemeinsame Erinnerung, dass man eben wie damals den Gürtel enger schnallt und nur noch Kartoffeln und Makkaroni isst; s. <<https://gorby.media/articles/2023/09/06/putinskie-signaly?ysclid=lr9eylgpv5895805477>>, zuletzt besucht 17 Januar 2025.

⁹¹ S. etwa den Bericht über die Rückkehr von M. Fridman (Alfa Bank) nach Moskau, wegen des eingefrorenen Vermögens und der strafrechtlichen Diskriminierung durch die englischen Behörden in der NZZ, <<https://www.nzz.ch/wirtschaft/russland-michail-fridmans-rueckkehr-nach-moskau-ist-eine-paradoxe-folge-der-sanktionen-ld.1760229>>, zuletzt besucht 17. Januar 2025; Fridman, selbst ein Ukrainer aus L’viv, hatte sich im Übrigen gleich am Anfang kritisch zu dem Überfall der Ukraine geäußert. Unproblematisch ist diese Rückkehr in die ‘Heimat’ nicht, s. die bösartige Aussage des Duma-Vorsitzenden Vjačeslav Volodin zu Rückkehrern ‘Hier wartet niemand auf sie!’, <<https://meduza.io/news/2023/11/25/zdes-ih-nikto-ne-zhdet-volodin-o-relokantah-kotorye-vozvrashaetsya-v-rossiyu>>, zuletzt besucht 17. Januar 2025.

⁹² Valta (Fn. 8), 244 ff., sieht die symbolische Missbilligung in der Tat als einen Aspekt der Eignung von Sanktionen; dazu auch Siegel (Fn. 1), 266; s. weiter Alexandra Hofer, ‘The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law’, AJIL Unbound 113 (2019), Unilateral Targeted Sanctions Symposium, 163 (165 ff.), mit einer Anleihe beim symbolischen Interaktionismus bezüglich der Funktionen und Effekte von Stigmatisierung. Bei staatenbezogenen Sanktionen mag man dem noch etwas abgewinnen können; bei personenbezogenen Sanktionen wirft diese reine Symbolik weitere grundrechtliche Fragen auf, s. dazu unten bei Fn. 105 ff.

⁹³ S. EuG, *Rashnikov* (Fn. 44), Rn. 131, 132: Das EuG stellt sich keine Wirksamkeitsfragen; es führt nur lakonisch aus, die vom Kläger behaupteten kontraproduktiven Effekte der Sanktionen (Rn. 110) seien im Hinblick auf die Wichtigkeit der verfolgten Ziele nicht ‘manifestly disproportionate’; s. weitere Nachweise in Fn. 58 sowie Siegel (Fn. 1), 275: Gegenteiliger Effekt der Sanktionen. – Die substanzielle gerichtliche Tatsachenkontrolle als Element des effektiven Rechtsschutzes wird so vernachlässigt, s. dazu m. w. N. Stöckel (Fn. 8), 329 f. und dann bezüglich der Rechtsprechung der europäischen Gerichte 339 ff.

⁹⁴ S. EuG, *Rashnikov* (Fn. 44), Rn. 133

nicht mehr erreicht werden kann.⁹⁵ Die Leitlinien des Rats zu den restriktiven Maßnahmen enthalten allerdings eine an die Erfolglosigkeit der Sanktionen anknüpfende Relevanz des Faktors Zeit nicht.⁹⁶ Das EuG erwähnt zwar den Aspekt der Zeit, prüft aber nicht in der Sache.

Man gewinnt den Eindruck, dass, soweit es nicht um der russischen Führung nahestehende Personen geht,⁹⁷ eine Art Negativvermutung gegenüber „Oligarchen“ vorliegt. Diesen eilt der Ruf voraus, dass sie ihre Vermögen in den 90er-Jahren des letzten Jahrhunderts ja sowieso mit krummen Machenschaften an sich gebracht hätten, so dass man sie auch etwas „härter rannehmen“ könne. Erinnert sei in diesem Zusammenhang an den Ausspruch von Joe Biden: Wir werden ihre Yachten, ihre Luxushäuser und ihre anderen unrechtmäßigen Gewinne beschlagnahmen.⁹⁸ Der gleiche Eindruck entsteht bei den in Deutschland unternommenen strafprozessualen Maßnahmen gegen Alisher Usmanov angesichts ihrer rechtsstaatlichen Merkwürdigkeiten.⁹⁹

⁹⁵ Die zeitliche Dimension betont etwa Valta (Fn. 8), 82, wenn er auf die Notwendigkeit der Nachsteuerung von Sanktionen (in diesem Fall allerdings der UNO) verweist. Das EuG betont, eine sofortige Wirkung der Sanktionen sei nicht nötig, s. etwa EuG *Rasbnikov* (Fn. 44), Rn. 103, unter Verweis auf die EuGH, *Rosneft* (Fn. 35). – Die Polizeigesetze enthalten regelmäßig eine Regelung zur zeitlichen Verhältnismäßigkeit, s. z. B. § 11 Abs. 3 ASOG Berlin:

„Eine Maßnahme ist nur solange zulässig, bis ihr Zweck erreicht ist oder sich zeigt, dass er nicht erreicht werden kann.“

⁹⁶ Rn. 35 der Leitlinien Rat (Fn. 70) regelt nur die Selbstverständlichkeit, dass die Restriktionen aufgehoben werden sollen, wenn ihre Ziele erreicht sind. Auch Rn. 15 des Unterpunkts ‘Überprüfung der Maßnahmen’ im Anhang der Leitlinien thematisiert nicht die Situation, dass die restriktiven Maßnahmen offenkundig ungeeignet sind.

⁹⁷ Verwiesen sei hier noch einmal auf das Verfahren EuG, *Rotenberg* (Fn. 25), Rn. 104 ff., sowie 124 ff., wo das EuG sehr detailliert auf die besondere Nähebeziehung Rotenbergs zur Ukraine-Politik der Russischen Föderation nach der Annexion der Krim eingeht, nachdem es im Übrigen vorher das Vorbringen anderer Verbindungen Rotenbergs zur russischen Führung als ungenügend abgelehnt hatte, Rn. 79 ff. sowie 89 ff.

⁹⁸ Zitiert nach dem Kommentar von Gerald Hosp in der NZZ v. 12. April 2024, s. <<https://www.nzz.ch/meinung/zwei-russische-magnaten-von-der-sanktionsliste-gestrichen-was-nun-ld.1826112>>, zuletzt besucht 17. Januar 2025.

⁹⁹ Zu den der Presse offensichtlich im Voraus bekanntgegebenen Durchsuchungsaktionen der Staatsanwaltschaft und der Aufhebung der Maßnahmen durch die Gerichte s. Berliner Zeitung v. 16./17. Dezember 2023, 27 ‘Ein Milliardär kämpft um sein Recht’; die Ermittlungen wegen Geldwäsche wurden jetzt im Rahmen eines Deals eingestellt, <<https://meduza.io/news/2024/11/04/v-germanii-prekratili-rassledovanie-ob-otmyvanii-deneg-protiv-usmanova>>, zuletzt besucht 17. Januar 2025. S. weiter Bärbel Sachs und Sarah Beischau, ‘Vorläufiger Rechtsschutz gegen EU-Russland-Sanktionen am Beispiel von Entscheidungen des EuGH (T 193/22 R, OT/Rat, sowie 237/22, Alisher Usmanov/Rat)’, *Ukraine-Krieg und Recht* 2022, 623-625 (624 ff.) – In gleicher Weise äußerte sich M. Fridman, s. Fn. 91. Ein weiteres Beispiel s. bei Lukas Kleinert, ‘Kleiner Bär ganz groß – Anmerkung zum Beschluss RG 22/05931 des Appellationsgerichts von Paris’, *Ukraine-Krieg und Recht* 2022, 596, zur Nichtvorlage an den EuGH im Verfahren der Beschlagnahme der Yacht des russischen Milliardärs A. Kuz’mičëv (ehemals Alfa Group).

Das Ziel, die russische Führung zu einer Beendigung des Krieges gegen die Ukraine zu veranlassen,¹⁰⁰ scheint unreal und deswegen nachrangig gegenüber innenpolitischen und internationalen Gesichtspunkten wie Abschreckung und Labelling. Die Sanktionen haben in der Sache, wie gefahrenabwehrende Maßnahmen oft, einen strafähnlichen Charakter:¹⁰¹ Sie sind deswegen nicht nur im Hinblick auf die Geeignetheit, sondern auch im Hinblick auf die Ermächtigungsgrundlage des Art. 215 Abs. 2 AEUV mehr als fragwürdig.¹⁰² Mit der Verneinung der Geeignetheit der personenbezogenen Sanktionen ist eine Prüfung der anderen Elemente des Verhältnismäßigkeitsgrundsatzes obsolet:¹⁰³ Eine nicht geeignete Maßnahme kann weder erforderlich noch angemessen sein.¹⁰⁴

¹⁰⁰ Dies bezeichnet Lothar Harings, 'Das Einfrieren von Vermögenswerten im Sanktionenrecht', *Ukraine-Krieg und Recht* 2022, 6-9 (6), als alleiniges Ziel der Sanktionen; es gehe nicht primär darum, dem russischen Staat Einnahmequellen zu entziehen – wie auch, wenn die Gelder in westlichen Banken liegen.

¹⁰¹ Den Straffeffekt betont besonders Hofer (Fn. 92), 167; Strydom (Fn. 18), 195.

¹⁰² Zur Funktion der Gefahrenabwehr s. die Nachweise in Fn. 72; angesichts der schwachen Wirksamkeit wäre auch eine Pönalisierung eines Verstoßes gegen die Sanktionen fragwürdig; s. Katja Rath und Darius Ruff, 'Der Zweck heiligt die Mittel – Eine Analyse des EU-Reformpakets zur Strafbarkeit bei Verstößen gegen EU-Sanktionen', *EuZW* 33 (2022), 692-699 (696 ff.).

¹⁰³ Bei personenbezogenen Sanktionen sind rein symbolische Sanktionen, deren sonstige Nichteignung von Anfang an feststeht, fragwürdig, wie der folgende Abschnitt zur Menschenwürdeproblematik dieser Sanktionen zeigt; a. A. Valta (Fn. 8), 64 f. sowie 244 ff.

¹⁰⁴ Die Ungeeignetheit der Sanktionen ist auch Folge einer gewissen Fantasiosigkeit bei der Konzeption der Sanktionen. Zu einer Beeinträchtigung der Kriegsfähigkeit der Russischen Föderation käme es mit hoher Wahrscheinlichkeit zum Beispiel im Falle einer Kapitalflucht großen Ausmaßes aus der Russischen Föderation; deswegen wäre die Ermöglichung eines freien Kapitaltransfers in die westlichen Länder sinnvoll gewesen, natürlich ohne dann diese Gelder einzufrieren. Das gleiche gilt (jenseits der Frage der Aufnahmekapazitäten) für den freien Personenverkehr in den Westen: Je mehr Männer im wehrfähigen Alter sich in den Westen absetzen, desto größer werden die Personalprobleme der russischen Armee und die Knappheit von Arbeitskräften, s. Alexandra Prokopenko, *The Great Russian Brain Drain*, <[https://www.bushcenter.org/catalyst/the-great-gray-wave/the-great-russian-brain-drain?utm_source=The+Bell+\(Eng\)](https://www.bushcenter.org/catalyst/the-great-gray-wave/the-great-russian-brain-drain?utm_source=The+Bell+(Eng))>, zuletzt besucht 17. Januar 2025. Für andere Sanktionen im Energiebereich Vladislav Inozemtsev, <<https://theins.press/en/opinion/vladislav-inozemtsev/273374>>, zuletzt besucht 17. Januar 2025. Schließlich: Die Sanktionen haben auch kontraproduktive Konsequenzen: Viele reiche Russen verlagern ihr Vermögen zurück nach Russland, trotz der Gefahr einer Konfiszierung, s. <<https://meduza.io/news/2024/05/09/bloomberg-bogatye-rossiyane-iz-za-sanktsiy-vozvraschayut-aktivy-v-rf-nesmotrya-na-ugrozu-natsionalizatsii>>, zuletzt besucht 17. Januar 2025. Sehr kritisch wegen des Solidarisierungseffekts mit dem System auch Siegel (Fn. 1), 260, 261, 271 sowie 272. Ein durch die Sanktionen autarker gewordenes Russland mag auch noch aggressiver werden, s. van Bergejk (Fn. 10), 16, sowie Siegel (Fn. 1), 267.

4. Berührung der Menschenwürde, Art. 1 GrChEU

Die in den Sanktionen und den Gerichtsurteilen durchschimmernde, den Sanktionen wohl zugrundeliegende Hoffnung auf ein „Einwirken auf Putin“ wirft bei den systemfernen Wirtschaftseliten noch ein weiteres grundrechtliches Problem auf. Man möchte diese Wirtschaftseliten für die Erreichung eines bestimmten Ziels in Anspruch nehmen, mit anderen Worten „benutzen“. Sie sollen auf Putin auf eine bestimmte Weise einwirken, weil dieser nicht erfolversprechend in Anspruch genommen werden kann. Um dies zu erreichen, wird ihnen das Grundrecht des Eigentums durch ein Einfrieren auf unbestimmte Zeit (und das Grundrecht der Freizügigkeit) entzogen. Sie werden mit anderen Worten für die Erreichung eines bestimmten Ziels, zu dem sie in keiner besonderen Beziehung stehen, benutzt. Wird jemand gegen seinen Willen und ohne hinreichenden Grund benutzt, so wirft dies im Hinblick auf die Menschenwürde, Art. 1 GrChEU, Fragen auf.¹⁰⁵

Art. 1 GrChEU, die Unantastbarkeit der Menschenwürde, ist die wichtigste normative Entscheidung des europäischen Vertragswerks. Er enthält eine verbindliche Rechtsnorm und ist maßgeblich für die Auslegung und Anwendung sämtlicher weiteren Grundrechte und Grundsätze des europäischen Rechts.¹⁰⁶ Ferner gilt er, wie alle Grundrechte, auch im Bereich der auswärtigen Angelegenheiten, Art. 21 Abs. 1 S. 2 EUV.¹⁰⁷ Art. 1 GrChEU ist zum einen ein subjektives, einklagbares Recht,¹⁰⁸ zum anderen Element des Wesensgehalts – der Menschenwürdekern – der Einzelgrundrechte, Art. 52 Abs. 1 S. 1 GrChEU. Die herrschende Meinung tendiert wegen des erschöpfenden Grundrechtekatalogs der EU-Charta zu einem Verständnis des Art. 1 GrChEU als Menschen-

¹⁰⁵ Sanktionen gegen Angehörige anderer Staaten werden regelmäßig grundrechtlich fragwürdig sein, wenn der sanktionierende Staat sich auch in seinem auswärtigen Handeln als grundrechtlich gebunden definiert, s. dazu Stefanie Schmahl, 'Grundrechtsbindung der deutschen Staatsgewalt im Ausland', NJW 73 (2020), 2221-2224 (2221 ff.).

¹⁰⁶ Martin Borowsky, 'Art. 1 EMRK' in: Jürgen Meyer und Sven Hölscheidt (Hrsg.), *Charta der Grundrechte der Europäischen Union* (6. Aufl., Nomos 2024), Rn. 28 f.

¹⁰⁷ Borowsky, (Fn. 106), Rn. 59; s. auch die freilich die Menschenwürde nur erwähnende Rechtsprechung des EuGH, s. z. B. EuGH (GK), *Europäisches Parlament gegen Rat der Europäischen Union*, Urt. v. 14. Juni 2016, Rs. C 263/14, ECLI:EU:C:2016:435, Rn. 47, unter Bezugnahme auf Art. 21 Abs. 1 Unter-Abs. 1, Abs. 2b und Abs. 3, Art. 23 EUV; EuG, *Front Polisario v. Rat*, Urt. v. 10. Dezember 2015, ECLI:EU:T:2015:953, Rs. T 512/12, Rn. 228: Handelsabkommen mit Marokko muss die Menschenwürde und weitere Grundrechte der betroffenen Bevölkerung wahren. – Dass das in der Praxis, zum Beispiel beim Schutz der Außengrenzen, leider nicht immer funktioniert, ändert nichts an der grundsätzlichen Geltung von Grundrechten und Menschenwürde, s. EuGH, *Zakaria*, Urteil v. 17. Januar 2013, Rs. C 23/12, ECLI:EU:C:2013:24, Rn. 40. S. auch Art. 7 Abs. 1 Schengener Grenzkodex (VO 2016/399/EU): Durchführung der Aufgaben unter uneingeschränkter Wahrung der Menschenwürde.

¹⁰⁸ S. Borowsky (Fn. 106), Rn. 33 f.

würdekern der Einzelgrundrechte.¹⁰⁹ Im Falle der personenbezogenen Sanktionen geht es allerdings um die direkte Verletzung der Menschenwürde als solcher: Eine Beschränkung des Eigentums (und der Freizügigkeit, soweit die Betroffenen Unionsbürger sind, was durch goldene Pässe häufig der Fall sein wird) findet zwar auf einer pragmatischen Ebene statt. Diese Maßnahme beinhaltet aber gleichzeitig eine davon getrennte, grundsätzliche Abwertung der betroffenen Personen, der diese nicht entkommen können.

Eine Verletzung der Menschenwürde ist nach der sogenannten Objektformel¹¹⁰ gegeben, wenn staatliches Handeln die Subjektqualität des Betroffenen grundsätzlich in Frage stellt. Allerdings: Nicht jede oktroyierte Inanspruchnahme stellt diese Subjektqualität grundsätzlich in Frage.¹¹¹ Dies zeigt sich etwa bei der Inanspruchnahme des Nichtstörers im Polizeirecht: Wiewohl nicht Verursacher der Gefahr, wird das Individuum unter bestimmten, sehr engen Voraussetzungen für deren Beseitigung (auch gegen seinen Willen) in Anspruch genommen, vermeintlich wie ein „Objekt“. Die Objektformel ist hier jedoch nicht berührt. Der rechtfertigende Grund der Inanspruchnahme ist die anders nicht zu behebende Not und die (gesetzlich geregelte und nachvollziehbare) Erwartung der Gesellschaft, dass das Individuum als deren Mitglied solidarisch genug sein wird, um zu helfen. Dieser Appell an seine Solidarität ist gerade keine grundsätzliche Infragestellung seiner Subjektstellung. Die Menschenwürde des als Nichtstörer im polizeilichen Notstand in Anspruch genommenen Individuums wird nicht berührt.¹¹² Bei den Sanktionen gegen systemferne Wirtschaftseliten ist die Situation anders: Ein Völkerrechtsobjekt, dem sie nicht angehören, nimmt sie in Anspruch, weil das Völkerrechtsobjekt, dem sie (in der Regel) angehören, sich völkerrechtswidrig verhalten hat: An dessen Verhalten sind sie nicht ursächlich beteiligt; dem sanktionierenden Völkerrechtsobjekt schulden sie keinerlei Solidarität; auch sind sie nicht die „Inhaber eines Gegenmittels“, also der Möglichkeit, Putin und seine Eliten zur Beendigung des Krieges zu veranlassen.¹¹³ Verletzt die

¹⁰⁹ Borowsky (Fn. 106), Rn. 34, 37.

¹¹⁰ Borowsky (Fn. 106), Rn. 27: Relevanz der vom BVerfG zu Art. 1 Abs. 1 GG entwickelten Objektformel auch bei Art. 1 Abs. 1 GrChEU. Relevant sind auch die Verfassungstraditionen der Mitgliedstaaten und vertreten wird zum Teil auch ein gemeineuropäisches Menschenwürdekonzept.

¹¹¹ Das BVerfG spricht von der nicht unbegrenzten Leistungsfähigkeit der Formel, s. BVerfGE 109, 279 (312); BVerfGE 96, 375 (399); BVerfGE 117, 71 (89); BVerfGE 131, 268 (286); BVerfGE 144, 20 (Rn. 540). – Der EGMR tendiert auch in Richtung Objektformel, im Rahmen des Art. 3 EMRK, Folterverbot, s. EGMR, *Tyrer v. Vereinigtes Königreich*, Urteil v. 25. April 1978, Nr. 5856/72 Rn. 33.

¹¹² S. etwa § 16 ASOG Berlin – polizeilicher Notstand; s. a. Graulich (Fn. 74), Teil E, Rn. 221.

¹¹³ S. zu dieser Rechtfertigung der ordnungsrechtlichen Inanspruchnahme des Nichtstörers etwa OVG Lüneburg, Urteil v. 24. September 1987, 12 A 269/86, Rn. 9.

Sanktionierung der nicht systemnahen Wirtschaftseliten also die Menschenwürde?

Die Beantwortung der Frage erfordert eine Konkretisierung der Objektformel. Eine grundsätzliche Missachtung der Subjektqualität liegt dann vor, wenn jemand wie ein Gebrauchsgegenstand „instrumentalisiert“, „benutzt“ wird.¹¹⁴ Die sanktionierten Wirtschaftseliten werden durch die EU zum bloßen Gegenstand eines sie nicht betreffenden Verfahrens gemacht. Über sie wird zur Erreichung der Ziele der EU durch zeitweisen (?) Entzug ihres Eigentums „verfügt“: Zur Erreichung eines politischen Ziels der EU werden sie in dreierlei Art und Weise instrumentalisiert.¹¹⁵ Zum einen werden sie wegen ihrer institutionellen Zugehörigkeit zu einem dem russischen Staat Einnahmen verschaffenden Wirtschaftszweig als solchem sanktioniert.¹¹⁶ Weiter bedürfte es zum Entzug der den Krieg finanzierenden Einnahmen einer (kollektiven) Steuerverweigerung. Den sanktionierten Wirtschaftsführern wird also ein rechtswidriges Verhalten zugemutet, über dessen Wirksamkeit sie dazu noch keine Kontrolle haben, da die anderen Führungspersonen „mitmachen“ müssen. Schließlich wird mit dem Versuch, sie zu einem Einwirken auf Putin zu „veranlassen“, ein bei realistischer Betrachtung ohne Selbstgefährdung nicht durchführbares und deswegen nicht zumutbares Verhalten erwartet.¹¹⁷ Im Übrigen würde dieses Verhalten das erstrebte Ziel, nämlich die Entscheidung, den Krieg mit der Ukraine zu beenden, mit hoher Wahrscheinlichkeit nicht verwirklichen.

Man fühlt sich angesichts der tendenziellen Unmöglichkeit des erwarteten Verhaltens ein wenig an das römischrechtliche Prinzip „*ultra posse nemo tenetur*“ oder gar an den Mythos von Sisyphos erinnert. Das ist entwürdigend:¹¹⁸ Bar

¹¹⁴ Borowsky (Fn. 106), Rn. 43.

¹¹⁵ BVerfGE 96, 375 (400); BVerfGE 144, 20 (Rn. 540) spricht von einer Menschenwürdeverletzung, wenn eine Person einem Kollektiv oder einer Ideologie oder Religion unbedingt untergeordnet wird; im Falle der Sanktionierung werden die Betroffenen den politischen Zielen der EU untergeordnet; s. auch BVerfGE 109, 279 (312): Der Straftäter dürfe nicht zum bloßen Objekt der Verbrechensbekämpfung und Strafvollstreckung gemacht werden – mit weiteren Nachweisen zur Rechtsprechung.

¹¹⁶ Nach der Rechtsprechung des EuG hätte die Sanktionierung ja auch dann rechtlichen Bestand, wenn die konkreten Unternehmen des betreffenden Wirtschaftsführers auf Grund wirtschaftlicher Probleme keine Einnahmen für den russischen Staat generierten, da es ja auf die Einnahmen des Wirtschaftszweigs ankommt.

¹¹⁷ S. die Nachweise in Fn. 29.

¹¹⁸ Die Rechtsprechung hat, auch wenn die Fälle anders gelagert sind, die Möglichkeit einer Verletzung der Menschenwürde durch ein entwürdigendes Verhalten von Vorgesetzten bei Maßnahmen gegen Soldaten – Schikanen – verschiedentlich bejaht, s. BVerwGE 83, 300 (301) = BeckRS 1987, 30440188; BVerwGE 86, 305 (306 f.) = BeckRS 1990, 30439446; BVerwG, NVwZ-RR 1992, 33/33; s. auch Brauneck (Fn. 66), 507: Sanktionen als Anprangerung und Stigmatisierung.

selbstbestimmter Handlungsmöglichkeiten werden die sanktionierten systemfernen Wirtschaftseliten zum Objekt des Handelns der EU. Die Sanktionen missachten den Wert, der jedem Menschen um seiner selbst willen zukommt und den die Menschenwürde schützt.¹¹⁹ C. Sunstein hat in ganz anderem Zusammenhang die einfache Formel vorgeschlagen, dass das Gegenteil von Würde Erniedrigung sei; die Menschenwürde eines Individuum werde nicht respektiert, wenn es wie ein Kind oder wie eine Sache behandelt werde, „subject to the superior authority of another“.¹²⁰ Die Menschenwürde der sanktionierten systemfernen Wirtschaftsführer ist berührt und, da unantastbar, verletzt: An ihnen wird mit Sanktionen, deren Wirkung auf reine Symbolik beschränkt ist,¹²¹ ein Exempel statuiert.

5. Gleichheit

In einigen Verfahren hatten die Kläger auch eine Verletzung des Gleichheitssatzes gerügt, etwa da nicht alle Teilnehmer des Treffens am 24. Februar 2022 beim Präsidenten sanktioniert worden seien oder auch, weil der russische Staat auch von nicht sanktionierten Wirtschaftseliten substantielle Einnahmen erhalte. Nicht-russische Unternehmen seien überhaupt nicht sanktioniert worden.¹²² Die Rüge einer Verletzung des Gleichheitssatzes durch die Kläger mutet etwas seltsam an: Da sie ja die eigene Sanktionierung für rechtswidrig hielten, hätte ein Erfolg der Rüge bedeutet, dass auch andere Wirtschaftseliten rechtswidrig sanktioniert worden wären: Das wäre eine ganz neue Variante der Gleichheit im Unrecht bzw. von „krugovaja poruka“, einer traditionell russischen Form kollektiver Verantwortung und Haftung!¹²³ Ein kurzer Blick sei auf das Problem der Gleichheit geworfen, auf welches es wegen der Ungeeignetheit der Sanktionen nicht mehr ankommt.

¹¹⁹ Ständige Rechtsprechung; s. z. B. BVerfGE 30, 1 (26); BVerfGE 109, 279 (313). – S. auch die Einordnung personenbezogener Sanktionen als moderne Version des ‘bürgerlichen Todes’, also als Verlust der Privatrechtsfähigkeit bei Stöckel (Fn. 8), 46 f.

¹²⁰ Cass Sunstein, ‘The Ethics of Nudging’, *Yale Journal on Regulation* 32 (2015), 413-450 (440).

¹²¹ Zu rein symbolischen Sanktionen, gegen die, sofern sie Staaten betreffen, auch nichts einzuwenden ist, s. noch einmal Valta (Fn. 8), 244 ff.

¹²² S. oben bei den Fn. 62 und 63.

¹²³ Zur traditionellen, noch aus dem Zarismus herrührenden Verantwortungsdiffusion durch ‘krugovaja poruka’, bei dem etwa die Dorfgemeinschaft für individuelle Steuerschulden der Mitglieder der Dorfgemeinschaft einstehen mussten, s. Alëna Ledenëva, *How Russia Really Works. The Informal Practices that Shaped Post-Soviet Politics and Business* (Cornell University Press 2006), 91 ff.

Das EuG hat sich hinter einer weiten Einschätzungsprärogative und einer inhaltlich offengelassenen Nicht-Angemessenheit einer Sanktionierung derjenigen, die nicht sanktioniert wurden, versteckt: Der Rat müsse nicht jeden, der die Kriterien der Sanktionierung erfülle, auch sanktionieren; eine Sanktionierung könne im Hinblick auf deren Ziele nicht angemessen („not appropriate“) sein.¹²⁴

Der Rat hat in der Tat nach allgemeiner Meinung bei Maßnahmen nach Art. 215 Abs. 2 AEUV ein Ermessen.¹²⁵ Dieses bezieht sich, da die zu treffenden Maßnahmen inhaltlich feststehen (Einfrieren von Vermögen und Mobilitätsbeschränkungen/Einreiseverbot), auf die Auswahl der Sanktionsadressaten. Ordnungsrechtliche Grundsätze, etwa die Effizienz der Inanspruchnahme oder die finanzielle Leistungsfähigkeit des Adressaten, helfen hier trotz der Einordnung der Sanktionen als Gefahrenabwehr nicht weiter.¹²⁶ Denkbarer Differenzierungsgrund könnte, weil es um eine außenpolitische Maßnahme geht, der Versuch einer angemessenen, nicht jegliches Verhandeln verunmöglichenden Antwort auf das völkerrechtswidrige Handeln des Zielstaates sein. Man mag auch an Erwägungen praktischer Umsetzung denken.¹²⁷ Diese möglichen Differenzierungsgründe wiegen jedoch sehr leicht; ob sie das tendenziell willkürliche Herauspicken einiger Vertreter der Wirtschaftseliten rechtfertigen könnten, erscheint eher zweifelhaft.

V. Schluss

Die Überlegungen zeigen die grundrechtliche und rechtsstaatliche Fragwürdigkeit der personenbezogenen Sanktionen in den Fällen, in denen das Eigentum von systemfernen Wirtschaftseliten eingefroren wurde. Es fehlt zum Teil die wegen Art. 215 Abs. 2 AEUV notwendige Mitverursachung, nach der ihnen das völkerrechtswidrige Handeln der Russischen Föderation und ihrer Regierung – der Angriff auf die Ukraine oder die Fortführung des Krieges – zugerechnet werden könnte. Um eine solche Zurechnung haben

¹²⁴ S. EuG *Mazepin* (Fn. 38), Rn. 128 f.

¹²⁵ S. EuG, *Bank Melli Iran v. Rat*, Rs. T-35/10, ECLI:EU:T:2013:397, Rn. 192 ff.: Der Rat habe ein Ermessen und sei auch bei Vorliegen eines entsprechenden Beschlusses im Rahmen der GASP nicht verpflichtet, restriktive Maßnahmen zu erlassen; kritisch zu diesem sehr weiten Ermessen Cremer (Fn. 67), Rn. 14: das Ermessen sei aus Gründen des Grundrechtsschutzes sinnvoll – was immer das heißen mag.

¹²⁶ S. dazu Graulich (Fn. 74), Teil E, bes. Rn. 224 ff.

¹²⁷ Zur Praktikabilität als ein eine Ungleichbehandlung rechtfertigender Differenzierungsgrund s. etwa BVerfGE 100, 195 (205); BVerfGE 103, 225 (235 f.).

sich auch weder der Rat noch das EuG bemüht: Eine nicht direkte, sondern über die Einnahmen des Staates von einem bestimmten Wirtschaftszweig vermittelte institutionelle Verbindung reichte ihnen aus. Auch die Konstruktion einer „engen persönlichen Verbindung“ wegen der Teilnahme an dem Treffen mit dem russischen Präsidenten am 24. Februar 2022 hat als solche keinerlei Tragfähigkeit: Manche Teilnehmer stehen dem Präsidenten nahe, andere nicht,¹²⁸ und ihre Gutheißung des Kriegs gegen die Ukraine ist (im Übrigen auch bei Putin nahestehenden Personen) nachweisbedürftig. Die in den Gerichtsurteilen durchschimmernde Hoffnung auf ein „Einwirken auf Putin“ verkennt dessen Beratungsresistenz. Die Sanktionen sind mangels Eignung ein rechtswidriger Eigentumseingriff. Wegen ihres schikanösen Charakters verletzen sie darüber hinaus die Menschenwürde der Sanktionierten. Die EU versteht sich laut Art. 3 EUV als „Rechtsgemeinschaft“:¹²⁹ Bei den hier thematisierten personenbezogenen Sanktionen ist davon wenig zu bemerken.

Summary: Smart Sanctions Against Russian Oligarchs – Neither Smart Nor Legal!

In reaction to the war against Ukraine, the EU has imposed severe sanctions on Russian business elites on the basis of Art. 215, 2nd para. Treaty on the Functioning of the European Union (TFEU), including the freezing of their property. As the article argues, the legality of sanctions against business elites not close to the political system and not supporting the war is doubtful. Art. 215, 2nd para. TFEU only allows to sanction natural persons who somehow have made a causal contribution to the violation of international law. What is more, Council Decision 2014/145 of March 17th 2014, as interpreted by the European General Court, restricts the basic right of property of the sanctioned business elites in a manifestly inappropriate way and therefore violates the principle of proportionality, Art. 52 Charter of Fundamental Rights of the European Union (EUCharFR). The sanctions are

¹²⁸ S. dazu Åslund (Fn. 26); s. weiter sehr aktuell Elena Kolebakina-USmanova, Politburo 2.0, <<https://www.business-gazeta.ru/article/635478?ysclid=m5ea6co1fd644617669>>, zuletzt besucht 27. Januar 2025.

¹²⁹ Dies betont auch der EuGH, *Kadi und al Barakaat International Foundation* (Fn. 16), Rn. 281. – Im Hinblick auf diesen Charakter als Rechtsgemeinschaft sind auch die unterschiedlichen Pläne, die Einnahmen aus dem im Westen befindlichen russischen – staatlichen und privaten – Vermögen oder gar das ganze russische Vermögen zugunsten der Ukraine zu konfiszieren, sehr fragwürdig, s. zu diesen Plänen, allerdings ohne Bedenken, Lange, ‘EU Sanktionen’ (Fn. 19), 13 ff.

furthermore an objectification of the sanctioned persons and therefore a violation of Art. 1 EUCharFR, dignity of man: They oblige the addressees to endanger themselves and attain something impossible.

Keywords

Sanctions against natural persons – manifest inappropriateness of property restrictions – victimisation and dignity of man

Fleisch auf dem Verhandlungstisch – Die Tierhaltung im völkerrechtlichen Klimaschutzsystem des Pariser Abkommens

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Abstract

Dieser Beitrag analysiert, welche Vorgaben das völkerrechtliche Klimaschutzsystem des Pariser Abkommens (PA) für Klimaschutzmaßnahmen in der Tierhaltung macht. Entsprechend seines Charakters als Rahmenordnung enthält das Pariser Abkommen diesbezüglich verschiedene implizite und sehr allgemeine Pflichten. Etwa impliziert die Verpflichtung zu ehrgeizigen Maßnahmen zugunsten des Temperaturziels des Pariser Abkommens gem. Art. 2 Abs. 1 lit. a; Art. 3 S. 1; Art. 4 Abs. 2 PA auch eine Pflicht zu Klimaschutzmaßnahmen in der Tierhaltung. Der durch das Abkommen geschaffene Rahmen wurde durch die Nationally Determined Contributions und Übereinkommen auf weiteren Vertragsstaatenkonferenzen jedoch unzureichend ausgefüllt. Der Umfang, in dem die Vertragsstaaten die Tierhaltung in ihren Nationally Determined Contributions adressieren, ist sowohl quantitativ als auch qualitativ für eine Begrenzung der Erderwärmung auf deutlich unter 2°C unzureichend. In den auf Vertragsstaatenkonferenzen des Pariser Abkommens verabschiedeten Übereinkünften findet sich die auch auf nationaler Ebene auftauchende Tendenz wieder, die Tierhaltung aus Klimaschutzbemühungen von vorneherein auszunehmen oder bei tierhaltungsbezogenen Klimaschutzmaßnahmen nur auf Innovationen und Anreize zu setzen. Der Beitrag wirbt für ein globales Tierschutzrecht als Mittel tierhaltungsbezogenen Klimaschutzes und als Gegengewicht zu lauter werdenden Rufen nach Effizienzsteigerungen in der Tierhaltung.

Keywords

Tierhaltung – Klimaschutz – Pariser Abkommen – Umweltvölkerrecht – Agricultural Exceptionalism

I. Einleitung

Im November und Dezember 2023 fand die 28. Conference of Parties (COP) des Rahmenübereinkommens der Vereinten Nationen über Klimaänderungen (UNFCCC) in Dubai statt. Hier fielen die Lobbyorganisationen der Tierhaltung durch eine bisher ungekannt starke Präsenz auf. Mit 120 Delegierten waren dreimal so viele Interessenvertreter der Fleisch- und Milchindustrie anwesend wie noch bei der COP27 in Scharm El-Scheich.¹ Betrachtet man die Bedeutung der Tierhaltung für den menschengemachten Klimawandel, erklärt sich das hohe Interesse der Tierhaltungslobby an den Gesprächen auf der Klimakonferenz. In ihren aktuellen Daten schreibt die Food and Agriculture Organization of the United Nations (FAO) der Tierhaltung mit ca. 6,2 Gigatonnen Kohlenstoffdioxidäquivalenten einen Anteil von 12 % an den jährlichen Treibhausgasemissionen der Menschheit zu.² Für eine wirksame Begrenzung des Klimawandels wäre es entscheidend, diese Emissionen zu verringern.

Auch wenn Klimaschutzmaßnahmen typischerweise auf nationaler Ebene getroffen werden, ist das Völkerrecht für ein kooperatives und koordiniertes Vorgehen der Staaten beim Ergreifen dieser Maßnahmen entscheidend. Das neben der UNFCCC³ wichtigste völkerrechtliche Übereinkommen zum globalen Klimaschutz ist heute das Pariser Abkommen.⁴ Angesichts der großen Bedeutung der Tierhaltung für die Treibhausgasemissionen der Menschheit untersucht dieser Beitrag, wie sich das durch das Pariser Ab-

¹ Rachel Sherrington, Clare Carlile und Hazel Healy, 'Big Meat and Dairy Lobbyists Turn Out in Record Numbers at Cop28', The Guardian v. 9. Dezember 2023, <<https://www.theguardian.com/environment/2023/dec/09/big-meat-dairy-lobbyists-turn-out-record-numbers-cop28>>, zuletzt besucht 6. März 2025.

² FAO, Pathways Towards Lower Emissions: A Global Assessment of the Greenhouse Gas Emissions and Mitigation Options from Livestock Agrifood Systems, FAO 2023, 4; die dort genannten Zahlen basieren auf FAO, GLEAM 3.0 Global Emissions from Livestock in 2015, FAO 2022, <https://foodandagricultureorganization.shinyapps.io/GLEAMV3_Public/>, zuletzt besucht 6. März 2025. Die genaue Höhe des Beitrags der Tierhaltung zum Klimawandel ist umstritten. Einen guten Überblick über die verschiedenen Schätzungen und die Gründe für deren Auseinanderfallen liefern Dan Blaustein-Rejto und Chris Gambino, 'Livestock Don't Contribute 14.5 % of Global Greenhouse Gas Emissions', The Breakthrough Institute, 20. März 2023, <<https://thebreakthrough.org/issues/food-agriculture-environment/livestock-dont-contribute-14-5-of-global-greenhouse-gas-emissions#fn-1>>, zuletzt besucht 6. März 2025, denen zufolge die meisten gängigen Einschätzungen von einem Anteil zwischen 10 und 20 % ausgehen.

³ United Nations Framework Convention on Climate Change v. 09. Mai 1992, UNTS 1771, 107.

⁴ Paris Agreement v. 12. Oktober 2015, UNTS 3156, 79.

kommen und seine Vertragsstaatenkonferenzen⁵ geschaffene völkerrechtliche Klimaschutzsystem zur Tierhaltung verhält. Er betrachtet zunächst, worauf genau die hohen Treibhausgasemissionen der Tierhaltung zurückzuführen sind und welche Klimaschutzmaßnahmen Staaten in der Tierhaltung überhaupt zur Verfügung stehen (II.). Anschließend wird in den Blick genommen, welche Vorgaben das Pariser Abkommen für staatliche Klimaschutzmaßnahmen in der Tierhaltung trifft (III.). Daraufhin untersucht der Beitrag, wie der vom Pariser Abkommen vorgegebene Rahmen durch die Nationally Determined Contributions (NDCs) (IV.) und durch Übereinkommen auf Vertragsstaatenkonferenzen des Pariser Abkommens (V.) ausgefüllt wurde. In der abschließenden Bilanz wird für ein globales Tierschutzrecht als Mittel tierhaltungsbezogenen Klimaschutzes und als Gegengewicht zu lauter werdenden Rufen nach Effizienzsteigerungen in der Tierhaltung geworben (VI.).

II. Tierhaltung, Klimaschutz und staatliche Maßnahmen

1. Zusammenhang von Tierhaltung und Klimawandel

Die große Bedeutung der Tierhaltung für den menschengemachten Klimawandel lässt sich vor allem auf folgende Faktoren zurückführen:

Ein Großteil der tierhaltungsbezogenen Emissionen entfällt auf die Produktion und den Transport von Tierfutter (vgl. die grünen Flächen der Abbildung).⁶ Etwa 77 % der globalen Ackerflächen werden für den Anbau von Tierfutter verwendet.⁷ Ein Teil dieser Agrarflächen wurde und wird weiterhin aus Kohlenstoffsenken wie Mooren oder Wäldern geschaffen, wodurch gebundene Treibhausgase frei werden. Ein weiterer Faktor ist, dass beim Ausbringen von Kunstdünger und Gülle auf die Futterracker Lachgas entsteht. Zudem fallen der Transport des Futters und die Emissionen für die Produktion von landwirtschaftlichen Hilfsmitteln wie Pestiziden ins Gewicht.⁸

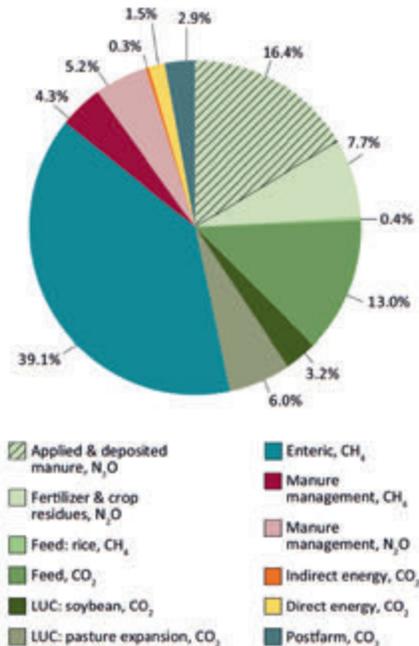
⁵ Gem. Art. 1 S. 2 lit. b und Art. 16 Abs. 1 PA dienen die Vertragsstaatenkonferenzen des UNFCCC, d. h. die UN-Klimakonferenzen, auch als Vertragsstaatenkonferenzen des Pariser Abkommens. Daher werden die drei Begriffe hier gleichbedeutend verwendet.

⁶ Jeroen Dijkman, Alessandra Falucci, Pierre Gerber u. a., *Tackling Climate Change Through Livestock – A Global Assessment of Emissions and Mitigation Opportunities* (FAO 2013), 17.

⁷ Wissenschaftliche Dienste, Ernährungssicherheit und Tierhaltung WD 5 3000 068/22, Wissenschaftliche Dienste des Deutschen Bundestages 2022, 14.

⁸ Dijkman, Falucci, Gerber u. a. (Fn. 6), 20.

FIGURE 4. Global emissions from livestock supply chains by category of emissions



Dijkman, Falcucci, Gerber u.a. (Fn. 6), 17. Source: Food and Agriculture Organization of the United Nations. Reproduced with permission.

Durch Verdauungsprozesse von Wiederkäuern freigesetztes Methan macht einen weiteren großen Teil der Tierhaltungsemissionen aus (vgl. die blaue Fläche der Abbildung).⁹ Es entsteht bei der enterischen Fermentation. Im Pansen von Wiederkäuern zersetzen Mikroben unter Luftabschluss Cellulose in verdaubare Bestandteile. Hierbei wird Methan frei.¹⁰ Unter anderem wegen der enterischen Fermentation hat Fleisch von Wiederkäuern wie Rindern einen höheren Treibhausgasfußabdruck je Kilogramm als solches von Nicht-Wiederkäuern wie Schweinen oder Hühnern.¹¹

⁹ Dijkman, Falcucci, Gerber u. a. (Fn. 6), 17.

¹⁰ Jens Hürdler, Methanminderung für kosteneffizienten Klimaschutz in der Landwirtschaft (Deutsche Umwelthilfe 2018), 4 f.

¹¹ Jessica Bellarby, Adrian Leip und Jan Lesschen, 'Livestock Greenhouse Gas Emissions and Mitigation Potential in Europe', *Global Change Biology* 19 (2013), 3-18 (5); siehe auch Dijkman, Falcucci, Gerber u. a. (Fn. 6), 16.

Weiterhin fallen bei der Güllelagerung und -verarbeitung erhebliche Emissionen an (vgl. die rote und die rosafarbene Fläche der Abbildung).¹² Die rund 39 Milliarden Hühner, Rinder, Schweine, Schafe, Enten und Ziegen weltweit¹³ produzieren große Mengen an Fäkalien. Bei der Aufbewahrung dieser Fäkalien und der Verwendung als Dünger entstehen Methan und Lachgas.¹⁴

Neben den genannten Faktoren ist zu berücksichtigen, dass durch die Tierhaltung nicht nur laufend Emissionen entstehen, sondern auch ein großes Senkpotenzial für Kohlenstoffdioxid verloren geht. Würde sich die gegenwärtige Weltbevölkerung vegan ernähren, könnten auf der freiwerdenden Fläche durch eine Wiederherstellung natürlicher Ökosysteme 358-743 Gigatonnen Kohlenstoffdioxid gebunden werden.¹⁵ Ausgehend von dem durch den Intergovernmental Panel on Climate Change (IPCC) im sechsten Sachstandsbericht ermittelten Emissionsbudget kann die Menschheit ab 2023 noch etwa 380 Gigatonnen Kohlenstoffdioxidäquivalente emittieren, um mit 50 % Wahrscheinlichkeit die Erderwärmung auf 1,5°C zu begrenzen.¹⁶ Dies verdeutlicht, um welche Dimensionen es bei den durch die Tierhaltung verlorenen Kohlenstoffsinken geht. Insgesamt ist die Tierhaltung einer der Hauptverursacher des menschengemachten Klimawandels. Ihre Bedeutung könnte sich in Zukunft noch vergrößern, da sich wegen der steigenden Nachfrage im globalen Süden der weltweite Konsum von Tierprodukten bis 2050 um bis zu 70 % erhöhen wird.¹⁷

¹² Dijkmann, Falcucci, Gerber u. a. (Fn. 6), 17.

¹³ Statistisches Bundesamt, Globale Tierhaltung, Fleischproduktion und Fleischkonsum, Statistisches Bundesamt 2021, <https://www.destatis.de/DE/Themen/Laender-Regionen/Internationales/Thema/landwirtschaft-fischerei/tierhaltung-fleischkonsum/_inhalt.html>, zuletzt besucht 6. März 2025.

¹⁴ Julián Rivera und Julian Chará, 'CH₄ and N₂O Emissions from Cattle Excreta: A Review of Main Drivers and Mitigation Strategies in Grazing Systems', *Frontiers in Sustainable Food Systems* 5 (2021), 657936 (2, 4 f.); Douglas Kysar und Jonathan Lovvorn, 'Climate Change and Animal Production' in: Anne Peters, Kirsten Stilt und Saskia Stucki (Hrsg.), *Oxford Handbook of Global Animal Law* (Oxford University Press 2025) (noch nicht erschienen).

¹⁵ Matthew Hayek, Helen Harwatt, William Ripple und Nathaniel Mueller, 'The Carbon Opportunity Cost of Animal-Sourced Food Production on Land', *Nature Sustainability* 4 (2021), 21-24 (21).

¹⁶ Pierre Friedlingstein, Michael O'Sullivan, Matthew Jones u. a., 'Global Carbon Budget 2022', *Earth System Science Data* 14 (2022), 4811-4900 (4847). Teilweise wird am sechsten Sachstandsbericht kritisiert, der IPCC gehe von zu großzügigen Emissionsbudgets aus, siehe hierzu etwa: Felix Ekardt, Marie Bärenwaldt und Katharine Heyl, 'The Paris Target, Human Rights, and IPCC Weaknesses: Legal Arguments in Favour of Smaller Carbon Budgets', *MDPI Environmental Science* 9 (2022), 112 (1 ff.). Zahlen über Emissionsbudgets sind immer mit gewissen Unsicherheiten behaftet. Hier dienen sie lediglich dazu, die Dimensionen der Klimafolgen der Tierhaltung zu verdeutlichen.

¹⁷ Justi Corti Varela, 'CAFOs: Climate Change, Livestock Production and the Law' in: Cinzia Caporale, Ilja Pavone und Maria Pia Ragionieri (Hrsg.), *How Food Law Can Balance Health, Environment and Animal Welfare* (Wolters Kluwer 2022), 233-251 (234).

2. Tierhaltungsbezogene Klimaschutzmaßnahmen

Angesichts der großen Bedeutung der Tierhaltung für den Klimawandel sollte wirksamer Klimaschutz eine Reduktion von Tierhaltungsemissionen einschließen. Um zu ermitteln, inwiefern das durch das Pariser Abkommen geschaffene völkerrechtliche Klimaschutzsystem tierhaltungsbezogene Klimaschutzmaßnahmen gebietet, muss zunächst kurz betrachtet werden, welche Maßnahmen Staaten zur Emissionsreduktion in der Tierhaltung überhaupt ergreifen könnten.

a) Business-As-Usual-Strategie

Um tierhaltungsbezogene Emissionen zu mindern, können Staaten im Sinne einer Business-As-Usual-Strategie auf wenig einschneidende Maßnahmen setzen. Dies umfasst die Anwendung klimafreundlicher Technologien und Bewirtschaftungsformen sowie Effizienzsteigerungen.¹⁸ Emissionsmindernde Technologien in der Tierhaltung sind etwa Zusatzstoffe im Futtermittel, die die Methanemissionen von Wiederkäuern senken,¹⁹ oder Methan-Auffangmechanismen in Güllelagern.²⁰ Eine klimaschützende Bewirtschaftungsform in der Tierhaltung ist beispielsweise das Pflanzen kohlenstoffdioxidbindender Bäume auf Weideland (Agroforstwirtschaft).²¹ Die Entwicklung und der Einsatz derartiger Technologien sowie Bewirtschaftungsformen könnte staatlich subventioniert und/oder vorgeschrieben werden.

b) Transformative Strategie, insbesondere Abkehr vom „Agricultural Exceptionalism“

Alternativ könnten Staaten im Sinne einer transformativen Strategie auf einschneidendere Maßnahmen setzen.²² Sie könnten die gesetzlichen und finanziellen Privilegien, die gegenwärtig der Tierhaltung gewährt werden, abbauen. Allein in Deutschland erhält die Tierhaltung pro Jahr 13,2 Milliarden Euro direkte oder indirekte finanzielle Förderung durch den Staat. Zum

¹⁸ Orientiert an: Kysar und Lovvorn (Fn. 14); IPCC, Climate Change 2022: Mitigation of Climate Change Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, IPCC 2022, 1285.

¹⁹ Valiollah Palangi und Maximilian Lackner, 'Management of Enteric Methane Emissions in Ruminants Using Feed Additives: A Review', MDPI Animals 12 (2022), 3452 (1 ff.).

²⁰ Shahid Abbasi, Tasneem Abbasi, Syed Tauseef und Mani Premalatha, 'Methane Capture from Livestock Manure', Journal of Environmental Management 117 (2013), 187-207 (189 f.).

²¹ Ramachandran Nairl, Mohan Kumar und Vimala Nair, 'Agroforestry as a Strategy for Carbon Sequestration', Journal of Plant Nutrition and Soil Science 172 (2009), 10-23 (11).

²² Orientiert an: Kysar und Lovvorn (Fn. 14); IPCC (Fn. 18), 1285.

Beispiel wird der Anbau von Tierfuttermitteln durch die flächengebundenen Direktzahlungen der Agrarpolitik der Europäischen Union (EU) in Deutschland mit 2,85 Milliarden Euro jährlich subventioniert.²³ In den USA ist die Tierhaltung im Arbeits-, Umweltschutz- und Tierschutzrecht weitreichend privilegiert.²⁴ Die finanzielle und gesetzliche Privilegierung der Tierhaltung bettet sich in den größeren Kontext ein, dass Staaten der Landwirtschaft im Allgemeinen viele Vorteile einräumen. Sie gewähren ihr regulatorische Ausnahmen, Subventionen und die Erlaubnis, Kosten für Umweltschäden bis zur Verneinung des „Polluter-Pays-Prinzip“ zu externalisieren. Dieses System aus Privilegien wird teilweise als „Agricultural Exceptionalism“ bezeichnet.²⁵ Die Beseitigung derartiger Privilegien für die Intensivtierhaltung wäre ein wichtiger Schritt zur Senkung tierhaltungsbezogener Emissionen. Die Preise für Tierprodukte würden steigen und damit einhergehend der Konsum sinken.²⁶ Daran anknüpfend könnten Staaten das Ordnungsrecht verschärfen. Beispielsweise könnte man den Tierbesatz je Fläche in landwirtschaftlichen Betrieben in Gestalt einer Flächenbindung deckeln oder die Umwandlung bestimmter Naturgebiete zu Weideflächen untersagen.²⁷

Eine weitere zu einer transformativen Strategie zählende Maßnahme ist, Treibhausgasemissionen der Tierhaltung zu bepreisen.²⁸ Dies könnte die Wirkung erzielen, dass infolge des Preisanstiegs die Verbraucher weniger Tierprodukte verzehren und die Produzenten Maßnahmen treffen, um Treibhausgasemissionen zu vermeiden. Bislang sparen bestehende Bepreisungssysteme typischerwei-

²³ Alexandra Dannenberg, Friedrich Kirsch, Lisa Knoke u. a., *Milliarden für die Tierindustrie* (Bündnis Gemeinsam gegen die Tierindustrie 2021), 10.

²⁴ David Cassuto, *The CAFO Hothouse: Climate Change, Industrial Agriculture and the Law*, Animals and Society Institute 2010, 15-17; Charlotte Blattner und Odile Ammann, ‘Agricultural Exceptionalism and Industrial Animal Food Production: Exploring the Human Rights Nexus’, *Journal of Food Law & Policy* 15 (2019), 92-151 (101 f.); Guadalupe Luna, ‘An Infinite Distance? Agricultural Exceptionalism and Agricultural Labor’, *University of Pennsylvania Journal of Business Law* 1 (1999), 487-510 (489); Kysar und Lovvorn (Fn. 14).

²⁵ Bradley Finney, ‘Agricultural Law Stifles Innovation and Competition’, *Ala. L. Rev.* 72 (2021), 785-838 (787); Ryan Levandovski, ‘Polluting ‘til the Cows Come Home: How Agricultural Exceptionalism Allows CAFOs Free Range for Climate Harm’, *The Georgetown Environmental Law Review* 33 (2020), 151-171 (153); Blattner und Ammann (Fn. 24), 101 f.; Luna (Fn. 24), 489; speziell zu Agricultural Exceptionalism im Klimaschutz Alexander Zahar, ‘Agricultural Exceptionalism in the Climate Change Treaties’, *Transnational Environmental Law* 12 (2023), 42-70.

²⁶ Kysar und Lovvorn (Fn. 14).

²⁷ Ekkehard Hofmann, ‘Landwirtschaft und Klimaschutz aus deutscher Sicht – Rechtliche Herausforderungen angesichts sich schließender Zeitfenster’, *NVwZ* 38 (2019), 1145-1151 (1148-1151); Felix Ekardt, Beatrice Garske, Jessica Stubenrauch u. a., ‘Land Use, Livestock, Quantity Governance, and Economic Instruments – Sustainability Beyond Big Livestock Herds and Fossil Fuels’, *MDPI Sustainability* 12 (2020), 2058 (14 f.).

²⁸ Hofmann (Fn. 27), 1147 f.

se die Tierhaltung aus.²⁹ Neuseeland will ab 2025 als erstes Land der Welt die Tierhaltung in ein Emissionshandelssystem eingliedern.³⁰ Allgemein kann konstatiert werden, dass Staaten, um die Landwirtschaft und Tierhaltung ökologischer zu gestalten, tendenziell lieber auf Anreize durch Subventionen als auf Bepreisungen oder strengere Vorgaben setzen. Ganz im Sinne des allgemeinen „Agricultural Exceptionalism“ herrscht damit für die Tierhaltung statt eines „Polluter-Pays-Ansatzes“ eine Herangehensweise vor, die man zynisch als „Pay-The-Polluter“ bezeichnen könnte.³¹ Dies ist bedenklich. Klimaschutzsubventionen sind in der Regel weniger kosteneffizient als ein marktorientierter Emissionspreis und machen somit die ökologische Transformation der Landwirtschaft teurer als nötig für die Gesellschaft.³² Zudem ist die bloße Subventionierung klimafreundlicher Produktionsweisen anders als etwa eine Flächenbindung oder höhere Preise für Tierprodukte ungeeignet, die Größe der Nutztierbestände und den Konsum von Tierprodukten quantitativ zu verringern.³³ Hierin liegt aber gerade ein großes Potenzial für die Emissionsreduktion.³⁴

III. Pariser Abkommen

Nachdem deutlich gemacht wurde, inwiefern die Tierhaltung den Klimawandel beeinflusst und welche Handlungsoptionen den Staaten zur Verfügung stehen, stellt sich die Frage, in welchem Umfang das Pariser Abkommen seine Vertragsparteien zum Ergreifen dieser Handlungsoptionen verpflichtet. Sucht man nach tierhaltungsbezogenen Verpflichtungen, fällt auf, dass im Pariser Abkommen die Worte „Landwirtschaft“ und „Tierhaltung“ kein einziges Mal vorkommen.³⁵ Folglich enthält das Pariser Abkommen keine explizit, möglicherweise aber implizit tierhaltungsbezogenen Verpflichtungen.

²⁹ Ekardt, Garske, Stubenrauch u. a. (Fn. 27), 8 f.; Kysar und Lovvorn (Fn. 14).

³⁰ Helena Wright, *Aligning Agricultural Finance with the Paris Agreement: Implications for Public and Private Finance* (FAIRR Initiative 2021), 6.

³¹ Vgl. David Blandford, ‘Climate Change Policies for Agriculture and WTO Agreements’ in: Joseph McMahon und Melaku Geboye Desta (Hrsg.), *Research Handbook on the WTO Agriculture Agreement* (Edward Elgar Publishing 2012), 223-249 (226).

³² Lawrence Goulder und Ian Perry, ‘Instrument Choice in Environmental Policy’, *Review of Environmental Economics and Policy* 2 (2008), 152-174 (155-157); Felix Ekardt, Katharine Heyl, Paula Roos und Lennard Sund, ‘Potentials and Limitations of Subsidies in Sustainability Governance: The Example of Agriculture’, *MDPI Sustainability* 14 (2022), 15859, (18).

³³ Ekardt, Garske, Stubenrauch u. a. (Fn. 27), 8.

³⁴ IPCC (Fn. 18), 1285; Ekardt, Garske, Stubenrauch u. a. (Fn. 27), 8.

³⁵ Vgl. Jonathan Verschuuren, ‘The Paris Agreement on Climate Change: Agriculture and Food Security’, *European Journal of Risk Regulation* 7 (2016), 54-57 (56); Jonathan Verschuuren, ‘Climate Change and Agriculture Under the United Nations Framework Convention on Climate Change and Related Documents’ in: Mary Jane Angelo und Anél du Plessis (Hrsg.), *Research Handbook on Climate Change and Agricultural Law* (Edward Elgar Publishing 2017), 21-46 (43 f.).

1. Reduktion tierhaltungsbezogener Emissionen

Zunächst soll geprüft werden, ob das Pariser Abkommen seine Vertragsstaaten überhaupt zur Emissionsreduktion in der Tierhaltung verpflichtet. Art. 2 Abs. 1 lit. a PA erklärt es zum Ziel des Abkommens, dass die Erderwärmung auf deutlich unter 2°C gegenüber dem vorindustriellen Niveau begrenzt wird. Es ist zu beachten, dass Art. 2 Abs. 1 lit. a PA mit dem Ausdruck „deutlich unter 2°C“ keine Begrenzung auf nur 2°C, sondern eher auf einen Wert um 1,8°C verlangt.³⁶ Ferner will das Abkommen ausweislich seines Wortlauts in Art. 2 Abs. 1 lit. a PA nicht bloß, dass eine Beschränkung auf 2°C vorgenommen wird, sondern auch, dass Anstrengungen unternommen werden, um eine Beschränkung auf 1,5°C zu erreichen.³⁷ Bei naturwissenschaftlichen Unsicherheiten greift das völkergewohnheitsrechtlich geltende sowie über Art. 3 Abs. 3 UNFCCC im Klimavölkerrecht besonders relevante Vorsorgeprinzip. Dieses gebietet, eher von pessimistischen als von optimistischen Szenarien auszugehen.³⁸ Es gilt als sehr unwahrscheinlich, dass die Erderwärmung ohne Emissionsreduktionen in der Tierhaltung auf 1,5°C oder deutlich unter 2°C begrenzt werden kann.³⁹ Für das „1,5°C-Ziel“ verdeutlicht dies das folgende Rechenbeispiel: Ausgehend von jährlichen Emissionen der Tierhaltung in Höhe von 6,2 Gigatonnen Kohlenstoffdioxidäquivalenten könnte selbst bei sofortigen Nullemissionen in allen anderen Sektoren die Tierhaltung die für die 50-prozentige Chance auf das „1,5°C-Ziel“ verbleibenden 380 Gigatonnen Kohlenstoffdioxidäquivalente in unter 70 Jahren aufbrauchen.⁴⁰ Insbesondere unter Zugrundelegung des Vorsorgeprinzips enthält daher das explizite Temperaturziel des Pariser Abkom-

³⁶ Felix Ekardt, Julia Wieding und Anika Zorn, ‘Paris Agreement, Precautionary Principle and Human Rights: Zero Emissions in Two Decades?’, MDPI Sustainability 10 (2018), 2812 (3).

³⁷ Ekardt, Wieding und Zorn (Fn. 36), 3; Ekardt, Bärenwaldt und Heyl (Fn. 16), 9.

³⁸ Ekardt, Wieding und Zorn (Fn. 36), 6 f.; Ekardt, Bärenwaldt und Heyl (Fn. 16), 11; siehe auch zum Verhältnis von Vorsorgeprinzip und Due Diligence im Klimavölkerrecht Lavanya Rajamani, ‘Due Diligence in International Climate Change Law’ in: Heike Krieger, Anne Peters und Leonhard Kreuzer (Hrsg.), *Due Diligence in the International Legal Order* (Oxford University Press 2020), 163-180 (177).

³⁹ IPCC (Fn. 18), 1285; Inês Azevedo, Michael Clark und Kimberly Colgan, ‘Global Food System Emissions Could Preclude Achieving the 1.5° and 2°C Climate Change Targets’, Science 370 (2020), 705-708 (705 f.); Ekardt, Garske, Stubenrauch u. a. (Fn. 27), 8; Frederik Hedenus, Stefan Wirsenius und Daniel Johannsson, ‘The Importance of Reduced Meat and Dairy Consumption for Meeting Stringent Climate Change Targets’, Climate Change 124 (2014), 79-91 (89).

⁴⁰ Sowohl bei den 6,2 Gigatonnen als auch bei den 380 Gigatonnen handelt es sich um umstrittene Zahlen (vgl. Fn. 2, 16). Das Rechenbeispiel soll keine jahrgenaue Prognose darstellen, wann die Tierhaltung das Emissionsbudget verbraucht hätte. Es soll lediglich aufzeigen, dass die globale Tierhaltung in ihrer gegenwärtigen Form eine Begrenzung der Erderwärmung auf 1,5°C mit sehr hoher Wahrscheinlichkeit unmöglich macht.

mens aus Art. 2 Abs. 1 lit. a PA i. V. m. Art. 3 Abs. 3 UNFCCC das implizite Ziel, dass die Staaten die Tierhaltungsemissionen deutlich reduzieren.⁴¹

Gem. Art. 3 S. 1 PA sind die einzelnen Vertragsstaaten verpflichtet, zugunsten der in Art. 2 PA genannten Ziele „ehrgeizige Anstrengungen“ zu unternehmen. Dies geschieht gem. Art. 4 Abs. 2 PA in Form von Nationally Determined Contributions (NDCs) und nationalen Klimaschutzmaßnahmen, die bona fide beabsichtigen, die Selbstverpflichtungen aus den NDCs zu erreichen. Diese Pflichten sind ihrer Natur nach grundsätzlich eher Verhaltenspflichten (obligations of conduct) als Erfolgspflichten (obligations of result).⁴² Allerdings sind die Pflichten aus Art. 4 Abs. 2 PA mit den in Art. 2 PA genannten und zu erreichenden Zielen verknüpft, was nicht zuletzt auch die Vorschrift des Art. 3 S. 1 PA zeigt.⁴³ Bei einer Auslegung, die sich gem. Art. 31 Abs. 1 Wiener Übereinkommen über das Recht der Verträge (WVK)⁴⁴ an Treu und Glauben⁴⁵ sowie am Ziel und Zweck des Abkommens orientiert, ist daher eine „ehrgeizige Anstrengung“ i. S. d. Art. 3 S. 1; Art. 4 Abs. 2 PA nur, was die Ziele aus Art. 2 PA nicht offensichtlich verfehlt. Da Art. 2 Abs. 1 lit. a PA das implizite Ziel enthält, dass Tierhaltungsemissionen reduziert werden, müssen die Vertragsstaaten gem. Art. 2 Abs. 1 lit. a; Art. 3 S. 1; Art. 4 Abs. 2 PA in ihren NDCs eine deutliche Reduktion von Tierhaltungsemissionen anvisieren und hierzu bona fide Klimaschutzmaßnahmen ergreifen.

Dies wird noch deutlicher im systematischen Zusammenhang der benannten Vorschriften mit den Vorgaben der Art. 4 Abs. 1 und Art. 5 PA. In Art. 5 PA werden die Vertragsstaaten aufgefordert, Kohlenstoffsinken zu fördern und ihre Wälder zu schützen. Art. 4 Abs. 1 PA erwähnt ebenfalls die Wichtigkeit von Kohlenstoffsinken. Kohlenstoffsinken und Waldschutz kommen als Klimaschutzaspekte insbesondere bei der Tierhaltung zum Tragen, da diese für viele Waldrodungen verantwortlich ist und auf den von der Tierhaltung gegenwärtig beanspruchten Flächen große Mengen Kohlen-

⁴¹ Vgl. zur Landwirtschaft allgemein Jonathan Verschuuren, ‘Stimulating Climate Smart Agriculture Within the Boundaries of International Trade Law’, *Carbon & Climate Law Review* 10 (2016), 177-186 (178).

⁴² Daniel Bodansky, Jutta Brunnée und Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017), 231; Lavanya Rajamani, ‘The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations’, *J. Envtl. L.* 28 (2016), 337-358 (354).

⁴³ Lavanya Rajamani, ‘Article 2.2 and Article 3’ in: Jane Bulmer, Maria Carazo, Meinhard Doelle u. a. (Hrsg.), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017), 131-140 (138 f.); Till Markus, ‘Klimawandel’ in: Alexander Proelß (Hrsg.), *Internationales Umweltrecht* (2. Aufl., De Gruyter 2022), Rn. 75.

⁴⁴ Vienna Convention on the Law of Treaties v. 23. Mai 1969, UNTS 1155, 331.

⁴⁵ Verhaltenspflichten in Klimaabkommen fordern von Staaten ein Handeln nach dem Due-Diligence-Maßstab, der wiederum ein Handeln nach gutem Glauben verlangt. Siehe hierzu: Rajamani, ‘Due Diligence’ (Fn. 38), 179.

stoffdioxid gebunden werden könnten.⁴⁶ Insoweit zeigen die Art. 4 Abs. 1 und Art. 5 PA als systematischer „Zusammenhang“ i. S. d. Art. 31 Abs. 1 WVK, dass die Verpflichtung der Staaten aus Art. 2 Abs. 1 lit. a; Art. 3 S. 1; Art. 4 Abs. 2 PA, Maßnahmen zugunsten des Temperaturziels des Pariser Abkommens zu ergreifen, eine Verpflichtung zum Klimaschutz in der Tierhaltung beinhaltet. Folglich überlässt das Pariser Abkommen den Vertragsstaaten zwar das „Wie“, nicht aber das „Ob“ einer Emissionsreduktion in der Tierhaltung.

2. Abbau von Subventionen für die Tierhaltung

Weiterhin wirft die großzügige Subventionspraxis von Staaten gegenüber ihren Tierindustrien die Frage auf, ob das Pariser Abkommen zum Abbau dieser emissionsfördernden Subventionen oder deren Umgestaltung zu Klimaschutzsubventionen verpflichtet. Laut Art. 2 Abs. 1 lit. c PA zielt das Abkommen darauf ab, die Finanzmittelflüsse mit einer emissionsarmen Entwicklung in Einklang zu bringen. Der Begriff „Finanzmittelflüsse“ i. S. d. Art. 2 Abs. 1 lit. c PA umfasst nicht nur private, sondern auch öffentliche Finanzmittel wie staatliche Subventionen.⁴⁷ Daher steht es Art. 2 Abs. 1 lit. c PA entgegen, wenn Staaten stark klimaschädliche Wirtschaftssektoren subventionieren, ohne hierbei die Subventionen als Klimaschutzsubventionen auszugestalten.⁴⁸ Bei der Umgestaltung der Finanzmittelflüsse gem. Art. 2 Abs. 1 lit. c PA handelt es sich nicht nur um eine Zielvorgabe, sondern auch um ein Mittel des Pariser Abkommens, um die in Art. 2 Abs. 1 lit. a, b PA genannten Ziele zu erreichen.⁴⁹ Die Vorschrift ist im systematischen Zusammenhang mit Art. 3 S. 1 und Art. 9 PA zu lesen. Gem. Art. 3 S. 1 PA müssen alle Staaten ehrgeizige Maßnahmen ergreifen, um die in Art. 2 PA genannten Ziele zu erreichen. Zu diesen ehrgeizigen Maßnahmen zählt gem. Art. 9 Abs. 3 PA, auf den auch Art. 3 S. 1 PA verweist, die Mobilisierung von Finanzmitteln für Klimaschutz und Klimaanpassung. Angesichts dieses systematischen Zusammenhangs ist Art. 2 Abs. 1 lit. c PA so zu verstehen, dass er nicht nur ein Ziel normiert, sondern Staaten auch verpflichtet, die finanzielle Förderung klimaschädlicher Wirtschaftssektoren

⁴⁶ Siehe oben unter II. 1.

⁴⁷ Ekardt, Heyl, Roos und Sund (Fn. 32), 11 f.; Ralph Bodle und Vicky Noens, ‘Climate Finance: Too Much on Detail, Too Little on the Big Picture?’, *Carbon & Climate Law Review* 3 (2013), 248-257 (250).

⁴⁸ Kati Kulovesi und Harro van Asselt, ‘Seizing the Opportunity: Tackling Fossil Fuel Subsidies Under the UNFCCC’, *International Environmental Agreements: Politics, Law and Economics* 17 (2017), 357-370 (366); Ekardt, Heyl, Roos und Sund (Fn. 32), 11 f.

⁴⁹ Ekardt, Heyl, Roos und Sund (Fn. 32), 12; Bodle und Noens (Fn. 47), 250.

einzuschränken.⁵⁰ Folglich verpflichtet das Pariser Abkommen die Vertragsstaaten dazu, langfristig ihre Subventionen für die Tierhaltung abzuschaffen oder zu Klimaschutzsubventionen umzugestalten. Bei der Subventionierung klimafreundlicher Tierhaltungsmethoden wären stets auch die Regeln des Welthandelsrechts für Landwirtschaftssubventionen zu beachten. Die Vorgaben des Welthandelsorganisations (WTO)-Übereinkommens über die Landwirtschaft⁵¹ und des WTO-Übereinkommens über Subventionen und Ausgleichsmaßnahmen⁵² für Klimaschutzsubventionen in der Landwirtschaft sind relativ strikt.⁵³

3. Gemeinsame Entwicklung und Austausch klimafreundlicher Technologien

Zu den „ehrgeizigen Anstrengungen“, die das Pariser Abkommen gem. Art. 2 Abs. 1 lit. a; Art. 3 S. 1 PA von seinen Vertragsstaaten fordert, zählt gem. Art. 10 PA auch die gemeinsame Entwicklung und Weitergabe von klimafreundlichen Technologien.⁵⁴ Die Vertragsstaaten müssen gem. Art. 10 Abs. 2 PA etwa ihre gemeinsamen Maßnahmen in diesem Bereich verstärken.⁵⁵ Da in der Tierhaltung auch Technologien erhebliche Emissionsminderungen erzielen können,⁵⁶ ist diese Pflicht für tierhaltungsbezogenen Klimaschutz von besonderer Relevanz.

4. Ernährungssicherheit

Das Pariser Abkommen bezeichnet im neunten Absatz seiner Präambel die Gewährleistung von Ernährungssicherheit und die Beendigung des Hun-

⁵⁰ Harro van Asselt, ‘Governing Fossil Fuel Production in the Age of Climate Disruption: Towards an International Law of “Leaving It in the Ground”’, *Earth System Governance* 9 (2021), 100118 (3); Kate Cook and Jorge Viñuales, *International Obligations Governing the Activities of Export Credit Agencies in Connection with the Continued Financing of Fossil Fuel-Related Projects and Activities* (Oil Change International 2021), Rn. 65; Ekardt, Heyl, Roos und Sund (Fn. 32), 12.

⁵¹ Agreement on Agriculture v. 15. April 1994, ABl. 2006 L 336/22.

⁵² Agreement on Subsidies and Countervailing Measures v. 15. April 1994, ABl. 1994 L 336/156.

⁵³ Hierzu etwa: Verschuuren, ‘Stimulating’ (Fn. 41), 180 ff.; David Blandford und Tim Josling, *Greenhouse Gas Reduction Policies and Agriculture: Implications for Production Incentives and International Trade Disciplines* (International Centre for Trade and Sustainable Development 2009), 11 ff.; Blandford (Fn. 31), 223-249.

⁵⁴ Siehe zu emissionsreduzierenden Technologien in der Tierhaltung oben unter II. 2. a).

⁵⁵ Vgl. Bodansky, Brunnée und Rajamani (Fn. 42), 241.

⁵⁶ Siehe oben unter II. 2. a).

gers als „grundsätzliche Priorität“. Das Abkommen unterstreicht in Art. 2 Abs. 1 lit. b PA, der Klimaschutz und die Anpassung an den Klimawandel müssten so erfolgen, dass die Nahrungsmittelerzeugung nicht bedroht wird.⁵⁷ Folglich stellt das Pariser Abkommen die konkrete Ausgestaltung von Klimaschutzmaßnahmen unter den Vorbehalt der Ernährungssicherheit. Das Pariser Abkommen gibt Staaten theoretisch die Möglichkeit, sich vertragsbasiert für das Unterlassen einzelner Klimaschutzmaßnahmen in der Landwirtschaft auf Gesichtspunkte der Ernährungssicherheit zu berufen.⁵⁸ Wie überzeugend derartige Einwände bei der Tierhaltung sind, hängt von den Umständen des jeweiligen Staates ab. Gerade in „Entwicklungsländern“⁵⁹ kann die Tierhaltung noch eine wichtige Rolle spielen, um marginalisierte Bevölkerungsgruppen vor Mangelernährung zu schützen.⁶⁰ Dagegen führen vor allem in „entwickelten Ländern“ ein zu hoher Fleischkonsum und ein zu geringer Konsum gesunder pflanzlicher Lebensmittel zu erheblichen Gesundheitsrisiken.⁶¹ Die Viehhaltung ermöglicht teilweise die landwirtschaftliche Nutzung von Flächen, die sich nur als Weideflächen eignen. Allerdings wird für intensive Viehhaltung auch Tierfutter auf Flächen angebaut, die sich für den Anbau von Nahrungsmitteln für Menschen eignen würden.⁶² Ob-

⁵⁷ Siehe auch Art. 2 S. 2 UNFCCC; allgemein zu den Verweisen auf Ernährungssicherheit in den Klimaschutzverträgen Zahar (Fn. 25), 51 ff.

⁵⁸ Zahar (Fn. 25), 55 f.

⁵⁹ Der Begriff ‘Entwicklungsländer’ ist ebenso wie der Begriff ‘entwickelte Länder’ aus verschiedenen Gründen kritisch zu sehen, vgl. etwa Seye Abimbola, Themrise Khan, Catherine Kyobutungi u. a., ‘How We Classify Countries and People – and Why It Matters’, *BMJ Global Health* 7 (2022), 1-5 (2, 5). Die Begriffe werden in diesem Beitrag gleichwohl verwendet, da das Pariser Abkommen in seinem Wortlaut zwischen ‘entwickelten Ländern’ und ‘Entwicklungsländern’ unterscheidet, vgl. Art. 4 Abs. 4 PA.

⁶⁰ Edward Nesamvuni, ‘Interactions Between Gender, Environment, Livelihoods, Food, Nutrition and Health’ in: Frans Swanepoel, Aldo Stroebel und Siboniso Moyo (Hrsg.), *The Role of Livestock in Developing Communities: Enhancing Multifunctionality* (The Technical Centre for Agricultural and Rural Cooperation 2010), 93-105 (101); einen Überblick über in diese Richtung gehende Untersuchungen liefert Emrobowansan Monday Idamokoro, ‘The Relevance of Livestock Husbandry in the Context of Food Security: A Bibliometric Outlook of Research Studies From 1938 to 2020’, *Frontiers in Sustainable Food Systems* 7 (2023), 1204221, (2).

⁶¹ Beatrice Baumer, Beatrice Conrad, Roger Darioli u. a., ‘Health Risks Associated with Meat Consumption: A Review of Epidemiological Studies’, *International Journal for Vitamin and Nutrition Research* 85 (2015), 70-78 (70) m. w. N.; Lukas Fesenfeld, Lisa Pörtner, Marco Springmann u. a., *Für Ernährungssicherheit und eine lebenswerte Zukunft* (Thünen-Institut 2022), 5; siehe zu den globalen Disparitäten beim Fleischkonsum: Our World in Data, Food and Agriculture Organization of the United Nations – processed by Our World in Data – ‘Meat, total – Food Available for Consumption (kilograms per year per capita), Our World in Data 2023, <<https://ourworldindata.org/grapher/daily-meat-consumption-per-person>>, zuletzt besucht 6. März 2025.

⁶² Henry Janzen, ‘What Place for Livestock on a Re-Greening Earth?’, *Animal Feed Science and Technology* 166-167 (2011), 783-796 (786 f.).

wohl über Dreiviertel der weltweiten Agrarflächen für die Tierhaltung genutzt werden, trägt sie nur zu 18 % der globalen Kalorien- und 37 % der globalen Proteinversorgung bei.⁶³ Angesichts dessen können sich die Vertragsparteien mit einem bloßen Verweis auf Ernährungssicherheit nicht generell Klimaschutzbemühungen in der Tierhaltung entziehen. Im Falle spezieller Umstände könnten sich jedoch insbesondere „Entwicklungsländer“ auf den Einwand der Ernährungssicherheit berufen.⁶⁴

5. Zwischenbilanz

Insgesamt kann festgehalten werden, dass das Pariser Abkommen die Tierhaltung zwar nicht ausdrücklich behandelt, aber diesbezüglich bestimmte implizite Vorgaben trifft. Es überrascht, dass trotz ihrer großen Bedeutung für die globale Erwärmung Tierhaltung und Landwirtschaft – abgesehen von den Vorbehalten für Ernährungssicherheit und Nahrungsmittelerzeugung – im Pariser Abkommen nicht ausdrücklich erwähnt werden. Manche werten dies gar als enttäuschend.⁶⁵ Anders als das Pariser Abkommen verlangte das Kyoto-Protokoll (KP)⁶⁶ in Art. 2 Abs. 1 lit. a (iii) KP von bestimmten Staaten ausdrücklich die Förderung einer klimafreundlichen Landwirtschaft. Anlage A des Kyoto-Protokolls zählte den Bereich Landwirtschaft mitsamt der enterischen Fermentation und der Gülleentsorgung sogar als Emissionsquelle auf. Weiterhin erwähnte das Protokoll die Landwirtschaft in Art. 10 lit. b (i) KP.⁶⁷ Folglich bezog sich das Kyoto-Protokoll seinem Wortlaut nach deutlicher auf Tierhaltung und Landwirtschaft als das Pariser Abkommen.

⁶³ Wissenschaftliche Dienste des Deutschen Bundestages 2022, 14; Joseph Poore und Thomas Nemecek, ‘Reducing Food’s Environmental Impacts Through Producers and Consumers’, *Science* 360 (2018), 987-992 (990).

⁶⁴ Etwa forderte Kenia noch 2013 von dem Subsidiary Body for Scientific and Technical Advice (SBSTA) des UNFCCC wissenschaftliche und technologische Beratung zum Wassermanagement, um seine Produktion von Tierprodukten sogar zu erhöhen. Kenia berief sich unter anderem auf die Notwendigkeit, auch bei Klimaänderungen Ernährungssicherheit gewährleisten zu müssen. SBSTA, *Views on the Current State of Scientific Knowledge on how to Enhance the Adaptation of Agriculture to Climate Change Impacts*, 19. September 2013, FCCC/SBSTA/2013/MISC.17, 10, 13. Hierzu und zu anderen derartigen Argumentationsmustern vor dem SBSTA: Zahar (Fn. 25), 58 ff.

⁶⁵ Verschuuren, ‘Paris Agreement’ (Fn. 35), 56; Verschuuren, ‘Climate Change’ (Fn. 35), 44.

⁶⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11. Dezember 1997, UNTS 2303, 162.

⁶⁷ Siehe zu den aus dem Kyoto-Protokoll folgenden Verpflichtungen zu Klimaschutz in der Landwirtschaft: Victoria Peters, ‘A Legal Obligation to Mitigate Greenhouse Gas Emissions from Agriculture: A Challenge to the European Union’s Emissions Trading System and the EU Member States with the Largest Agricultural Impact’, *UCLA Journal of International Law and Foreign Affairs* 19 (2015), 213-242.

Die Nichterwähnung von Tierhaltung und Landwirtschaft passt sich jedoch in das Regelungskonzept des Pariser Abkommens ein. Auch auf andere für den Klimaschutz entscheidende Sektoren wie die fossilen Energien nimmt das Pariser Abkommen nicht ausdrücklich Bezug.⁶⁸ Insoweit liegt in ihrer Nichterwähnung keine Sonderbehandlung der Tierhaltung und Landwirtschaft.⁶⁹ Das Pariser Abkommen soll die Klimaproblematik nicht abschließend regeln, sondern eine Rahmenordnung bilden, die stärker als das Kyoto-Protokoll auf eine Ausgestaltung durch die NDCs und Übereinkünfte auf weiteren Klimakonferenzen der Vereinten Nationen (UN) setzt.⁷⁰ Die fehlende ausdrückliche Adressierung der Tierhaltung und die nur implizite, sehr allgemeine Normierung tierhaltungsbezogener Pflichten kann dem Pariser Abkommen daher nicht zum Vorwurf gemacht werden. Vielmehr ist dies wegen seines Charakters als Rahmenordnung konsequent. Für die Bewertung des durch das Pariser Abkommen geschaffenen völkerrechtlichen Klimaschutzesystems hinsichtlich der Tierhaltung ist daher maßgeblich, inwiefern der Rahmen des Pariser Abkommens durch die NDCs (IV.) und auf weiteren UN-Klimakonferenzen (V.) adäquat ausgefüllt wurde.

IV. Nationally Determined Contributions

Eine entscheidende Ausgestaltungsform des vom Pariser Abkommen vorgegebenen Rahmens sind die NDCs. Gem. Art. 4 Abs. 2 S. 1, Abs. 9 PA müssen die Vertragsstaaten alle fünf Jahre neue NDCs übermitteln. Das Pariser Abkommen stellt an die NDCs bestimmte normative Erwartungen. Sie müssen gem. Art. 4 Abs. 3 PA stets einen Fortschritt gegenüber der letzten NDC darstellen und unter Berücksichtigung des Prinzips der gemeinsamen, aber unterschiedlichen Verantwortlichkeiten sowie der jeweiligen Fähigkeiten eines Landes die größtmögliche Ambition darstellen.⁷¹ Die NDCs sollen gem. Art. 3 S. 1 PA den übergreifenden Zielen des Pariser Abkommens aus Art. 2 PA dienen. Eine deutliche Reduktion von Tierhaltungsemissionen ist für das Erreichen des Temperaturziels aus Art. 2 Abs. 1

⁶⁸ Kulovesi und van Asselt (Fn. 48), 358.

⁶⁹ Die Verweise auf Ernährungssicherheit und Nahrungsmittelherzeugung im Pariser Abkommen könnte man dagegen durchaus als Ausdruck eines „Agricultural Exceptionalism“ ansehen, da für keinen anderen Wirtschaftssektor derartige Vorbehalte formuliert werden, so Zahar (Fn. 25), 55; siehe oben unter III. 4.

⁷⁰ Walter Frenz, *Grundzüge des Klimaschutzrechts* (2. Aufl., Erich Schmidt Verlag 2022), 47.

⁷¹ Lavanya Rajamani und Jacob Werksman, ‘Climate Change’ in: Lavanya Rajamani und Jacqueline Peel (Hrsg.), *The Oxford Handbook of International Environmental Law* (2. Aufl., Oxford University Press 2021), 493-511 (504).

lit. a PA unabdingbar.⁷² Daher stellt sich die Frage, ob sich ausreichend viele Länder in ihren NDCs auf die Tierhaltung beziehen, ob mithin die NDCs in quantitativer Hinsicht die Tierhaltung hinreichend berücksichtigen (1.). Außerdem fragt sich, ob die angekündigten tierhaltungsbezogenen Klimaschutzmaßnahmen qualitativ ausreichend sind (2.).

1. Quantitative Analyse und Bewertung

Von den gegenwärtig 195 Unterzeichnern des Pariser Abkommens kündigen 129 in ihren NDCs spezifisch landwirtschaftsbezogene Klimaschutzmaßnahmen an.⁷³ Allerdings bezogen sich noch Ende 2022 mit 59 Staaten weniger als ein Drittel der Unterzeichner in ihren NDCs spezifisch auf die Tierhaltung.⁷⁴ Die fünf größten Fleischproduzenten der Welt sind China, die USA, die EU, Brasilien und Russland.⁷⁵ Ende 2022 benannten die USA, China und Brasilien in ihren NDCs immerhin mindestens eine explizit tierhaltungsbezogene Klimaschutzmaßnahme,⁷⁶ die EU-Staaten und Russland dagegen keine einzige.⁷⁷ Wenn Staaten keine spezifischen Klimaschutzmaßnahmen oder Sektorziele für Tierhaltung und Landwirtschaft benennen, halten sie sich dadurch häufig offen, Tierhaltungsemissionen gleichzuhalten oder weiterwachsen zu lassen. Das ist besonders dann der Fall, wenn die betreffenden Staaten – wie die meisten „Entwicklungsländer“ – gleichzeitig für ihre Gesamtwirtschaft keine absoluten, sondern nur relative Emissionsziele, etwa nur im Verhältnis zu ihrem Bruttoinlandsprodukt, benennen.⁷⁸ Folglich erscheint die Aufnahme tierhaltungsbezogener Klimaschutzmaßnahmen in die

⁷² Siehe oben unter III. 1.

⁷³ Climate Watch, *Agriculture* (Climate Watch 2024), <https://www.climatewatchdata.org/sectors/agriculture?category=sectoral_mitigation_measures&contextBy=country¤tLocation=267&display=map&indicator=1247&model=3&scenario=182%2C181%2C180%2C183&subcategory=93&tab=HISTORICAL_EMISSIONS#countries-actions-in-their-ndcs>, zuletzt besucht 24. Juli 2024.

⁷⁴ Kyle Dittmer, Arun Khatri-Chhetri, Katherine Nelson u. a., *Agricultural Sub-Sectors in New and Updated NDCs: 2020-2021 Dataset*. CCAFS Dataset Version 2.1., Updated October 2022 (CGIAR Research Program on Climate Change, Agriculture and Food Security 2022), Summary Measure Rn. 4. Der hier und im Folgenden zitierte Datensatz bezieht alle NDCs bis zum 30. September 2022 mit ein.

⁷⁵ FAO/OECD, *Agricultural Outlook 2021-2030*, FAO/OECD 2021, 168.

⁷⁶ Dittmer, Khatri-Chhetri, Nelson u. a. (Fn. 74), *Mitigation All Measures* Rn. 26, 38, 190. Brasilien hat am 3. November 2023 eine neue NDC übermittelt, diese ist abrufbar unter <<https://unfccc.int/NDCREG>>, zuletzt besucht 24. Juli 2024.

⁷⁷ Dittmer, Khatri-Chhetri, Nelson u. a. (Fn. 74), *Mitigation All Measures* Rn. 12, 19, 28, 46, 48-50, 59, 68, 64, 68, 70, 78, 86, 98, 104, 105, 112, 128, 144, 145, 147, 148, 162, 163, 168, 172. Die EU-Staaten haben am 19. Oktober 2023 ihre neuen NDCs übermittelt, diese sind abrufbar unter <<https://unfccc.int/NDCREG>>, zuletzt besucht 24. Juli 2024.

⁷⁸ Zahar (Fn. 25), 66.

NDCs bereits in quantitativer Hinsicht als unzureichend, um eine Begrenzung der Erderwärmung auf deutlich unter 2°C i. S. d. Art. 2 Abs. 1 lit. a PA zu erreichen.

2. Qualitative Analyse und Bewertung

Eine Reduktion des Konsums von Tierprodukten und der Tierbestände würde die Wahrscheinlichkeit, dass eine Begrenzung der Erderwärmung auf deutlich unter 2°C gelingt, stark erhöhen.⁷⁹ Manche halten anderenfalls die Einhaltung des „1,5°C-Ziels“ sogar für unmöglich.⁸⁰ Es fällt auf, dass kein einziges Land in seiner NDC ausdrücklich davon spricht, die Tierbestände oder den Konsum von Tierprodukten reduzieren zu wollen.⁸¹ Von einer Ernährungsumstellung der Bevölkerung sprachen Ende 2022 in ihren NDCs nur zwei Vertragsstaaten: Äthiopien und Costa Rica.⁸² Costa Rica schlägt eine Form der Verbraucherinformation vor, die den Beitrag einzelner Lebensmittel zum Klimawandel hervorheben soll.⁸³ Äthiopien – ein Land mit einer erheblichen Zahl hungernder Menschen und einem sehr geringen Fleischkonsum pro Kopf⁸⁴ – plant, den Anteil von Hühnerfleisch gegenüber Rindfleisch bei der Versorgung seiner Bevölkerung zu erhöhen.⁸⁵ Folglich blendet der Großteil der Staaten in ihren NDCs die Notwendigkeit, den Konsum von Tierprodukten und die Tierbestände zu reduzieren, aus. Vor allem die NDCs der „entwickelten Länder“ – Länder mit einem sehr hohen Fleischkonsum pro Kopf⁸⁶ – stellen hier nicht die größtmögliche Ambition unter Berücksichtigung ihrer jeweiligen Fähigkeiten und des Prinzips der gemeinsamen, aber unterschiedlichen Verantwortlichkeiten i. S. d. Art. 4 Abs. 3 PA dar. Benennen die Vertragsparteien spezifisch tierhaltungsbezogene Klimaschutzmaßnahmen, sind diese nicht sonderlich durchgreifend. Als tierhaltungsbezogene Klimaschutzmaßnahme nennt die brasilianische NDC das Pflanzen von Bäu-

⁷⁹ IPCC (Fn. 18), 1285; Azevedo, Clark und Colgan (Fn. 39), 705 f.; Ekardt, Garske, Stubenrauch u. a. (Fn. 27), 8; Hedenus, Wirsenius und Johannsson (Fn. 39), 89.

⁸⁰ Ekardt, Garske, Stubenrauch u. a. (Fn. 27), 8 m. w. N.

⁸¹ Tim Benton, Arpana Giritharan, Helen Harwatt u. a., *Aligning Food Systems with Climate and Biodiversity Targets* (Chatham House 2022), 19.

⁸² Dittmer, Khatri-Chhetri, Nelson u. a. (Fn. 74), Both All Measures Rn. 44, 61.

⁸³ Costa Rica, 'Contribución Nacionalmente Determinada', 29. Dezember 2020, <<https://unfccc.int/NDCREG>>, zuletzt besucht 24. Juli 2024, S. 36.

⁸⁴ Our World in Data (Fn. 61); Our World in Data, *Concern Worldwide and Welthungerhilfe – Processed by Our World in Data – 'Global Hunger Index'* (Our World in Data 2022), <<https://ourworldindata.org/grapher/global-hunger-index>> zuletzt besucht 6. März 2025.

⁸⁵ Federal Republic of Ethiopia, 'Updated Nationally Determined Contribution', 23. Juli 2021, <<https://unfccc.int/NDCREG>> zuletzt besucht 24. Juli 2024, S. 13. Zum niedrigeren Treibhausgasfußabdruck von Hühnerfleisch gegenüber Rindfleisch siehe oben unter II. 1.

⁸⁶ Our World in Data (Fn. 61).

men auf Weideflächen,⁸⁷ die chinesische NDC ein verbessertes Güllemanagement⁸⁸ und die NDC der USA ein verbessertes Gülle- sowie Futtermanagement.⁸⁹ Hierbei handelt es sich um sicherlich sinnvolle Einzelmaßnahmen. Sie erscheinen aber zu kosmetisch und qualitativ unzureichend für das Vorhaben, die großen Tierindustrien dieser Länder mit einer Begrenzung der Erderwärmung auf deutlich unter 2°C in Einklang zu bringen.

3. Zwischenbilanz

Auch wenn das Pariser Abkommen möglicherweise eine Entwicklung hin zu mehr tierhaltungsbezogenem Klimaschutz in Gang gesetzt hat, ist der Umfang, in dem sich die Staaten in ihren NDCs auf die Tierhaltung beziehen, in quantitativer und qualitativer Hinsicht für eine Begrenzung der Erderwärmung auf deutlich unter 2°C unzureichend. Insoweit erfüllen die Vertragsstaaten gegenwärtig nicht ihre Pflicht aus Art. 2 Abs. 1 lit. a; Art. 3 S. 1; Art. 4 Abs. 2 PA, durch die Festlegung ihrer NDCs eine Reduktion von Tierhaltungsemissionen, die dem Temperaturziel des Art. 2 Abs. 1 lit. a PA hinreichend Rechnung trägt, anzuvisieren. Insbesondere die NDCs der „entwickelten Länder“ stellen im Tierhaltungsbereich nicht ihre größtmögliche Ambition unter Berücksichtigung ihrer jeweiligen Fähigkeiten und des Prinzips der gemeinsamen, aber unterschiedlichen Verantwortlichkeiten i. S. d. Art. 4 Abs. 3 PA dar. Damit werden die NDCs hinsichtlich der Tierhaltung den normativen Anforderungen, die das Pariser Abkommen an sie stellt, nicht gerecht. Der vom Pariser Abkommen vorgegebene Rahmen wurde durch die NDCs nur unzureichend ausgefüllt. Es ist dringend nötig, dass in den NDCs auch Maßnahmen benannt werden, die auf die Verringerung der absoluten Produktionszahlen der Tierindustrie zielen. Eine Gruppe von Wissenschaftlern rief in der Zeitschrift „The Lancet“ bereits 2020 die Vertragsstaaten des Pariser Abkommens vergeblich dazu auf, in ihren NDCs einen Zeitrahmen für das Erreichen ihres „Peak Livestock“⁹⁰ und eine Strategie zur Ersetzung von Tierprodukten aufzunehmen.⁹¹ Da die Staaten durch die NDCs den vom Pariser Abkommen vorgegebenen Rahmen unzureichend

⁸⁷ Dittmer, Khatri-Chhetri, Nelson u. a. (Fn. 74), Both All Measures Rn. 26. Dies ist auch in der neuen am 3. November 2023 übermittelten NDC der Fall: Brazil, Brazil First NDC 2023 Adjustment, 3. November 2023, <<https://unfccc.int/NDCREG>>, zuletzt besucht 24. Juli 2024, S. 9.

⁸⁸ Dittmer, Khatri-Chhetri, Nelson u. a. (Fn. 74), Both All Measures Rn. 38.

⁸⁹ Dittmer, Khatri-Chhetri, Nelson u. a. (Fn. 74), Both All Measures Rn. 190.

⁹⁰ ‘Peak Livestock’ meint in diesem Zusammenhang einen Zeitpunkt, ab dem die Tierbestände nicht mehr wachsen, sondern gleichbleiben oder sinken.

⁹¹ Matthew Betts, Abhishek Chaudhary, Helen Harwatt u. a., ‘Scientists Call for Renewed Paris Pledges to Transform Agriculture’, *The Lancet* 4 (2020), e9-e10 (e9).

ausgefüllt haben, stellt sich die Frage, ob dies immerhin durch Übereinkünfte auf UN-Klimakonferenzen nach dem Pariser Abkommen geschehen ist (V.).

V. Übereinkünfte auf UN-Klimakonferenzen nach dem Pariser Abkommen

Während auf den UN-Klimakonferenzen unmittelbar nach dem Abschluss des Pariser Abkommens Tierhaltung und Landwirtschaft nur eine untergeordnete Rolle spielten,⁹² wird man auf der Suche nach tierhaltungsbezogenen Übereinkünften besonders bei den Ergebnissen der COP26 in Glasgow, der COP27 in Scharm El-Scheich und der COP28 in Dubai fündig. Allerdings sucht man „harte“ völkerrechtliche Verpflichtungen vergebens. Im Vorfeld der COP27 sprachen sich Politiker und Nichtregierungsorganisation (NGOs) in einem offenen Brief ohne Erfolg für einen völkerrechtlichen Vertrag mit Verpflichtungen zugunsten einer weniger tierhaltungsbasierten globalen Landwirtschaft aus.⁹³ Bei den auf der COP26, COP27 und COP28 beschlossenen tierhaltungsbezogenen Übereinkünften handelt es sich um reines Soft Law. Staaten greifen häufig auf Soft Law statt auf „hartes“ Völkerrecht zurück, wenn sie zwar die Grundlage für internationale Zusammenarbeit in einem Bereich verbessern, aber zugleich Souveränitätseinbußen vermeiden wollen.⁹⁴ Insoweit ist der Umstand, dass Tierhaltung und Landwirtschaft auf Vertragsstaatenkonferenzen des Pariser Abkommens bislang nur in Soft-Law-Dokumenten adressiert wurden, zwar bedauerlich, aber vor allem auf politische Gründe zurückzuführen.

1. Global Methane Pledge

Die COP26 in Glasgow brachte den Global Methane Pledge hervor. Über 150 Staaten, die ca. 50 % der globalen Methanemissionen ausmachen,⁹⁵ ver-

⁹² Thin Lei Win, *Food Systems Take the Stage at COP28: But Will Actions Match Rhetoric?* (Istituto Affari Internazionali 2023), 1.

⁹³ Plant Based Treaty, *Open Letter to World Leaders Calling for a Plant Based Treaty* (Plant Based Treaty 2022), <<https://plantbasedtreaty.org/cop27-open-letter/>>, zuletzt besucht 6. März 2025.

⁹⁴ Daniel Thürer, 'Soft Law' in: Anne Peters und Rüdiger Wolfrum (Hrsg.), *MPEPIL* (Online Ausgabe, Oxford University Press 2009), Rn. 6.

⁹⁵ Climate and Clean Air Coalition, *About the Global Methane Pledge* (Climate and Clean Air Coalition 2024), <<https://www.globalmethanepledge.org/#about>>, zuletzt besucht 6. März 2025.

pflichten sich, kollektiv die globalen Methanemissionen bis 2030 um 30 % gegenüber 2020 zu reduzieren.⁹⁶ Da sich die Staaten nur zu einer kollektiven Emissionsreduktion verpflichten, entfaltet der Global Methane Pledge keine Bindungswirkung für die einzelnen Unterzeichner und ist lediglich Soft Law.⁹⁷ Für die Tierhaltung ist der Global Methane Pledge von erheblicher Bedeutung, da sie 32 % der weltweiten Methanemissionen verursacht.⁹⁸ Gleichwohl sieht der Global Methane Pledge für die Tierhaltung und Landwirtschaft deutlich weniger ambitionierte Klimaschutzbemühungen als etwa für den Energiesektor vor. Er spricht dem Energiesektor das größte Potenzial für die Emissionsreduktion bis 2030 zu.⁹⁹ Als staatliche Beiträge im Energiesektor fordert der Global Methane Pledge Standards, um alle machbaren Emissionsreduktionen zu erreichen. In der Landwirtschaft verlangt der Global Methane Pledge – außerhalb der landwirtschaftlichen Müllentsorgung – dagegen nur technische Innovation sowie Anreize und Partnerschaften mit den Landwirten.¹⁰⁰

Positiv hervorzuheben ist, dass der Global Methane Pledge die Methanemissionen und damit auch die Tierhaltung als großen Methanemittenten mehr in den Fokus der internationalen Klimaschutzbemühungen rückt. Insofern ist er ein Schritt in die richtige Richtung. Allerdings fällt die Privilegierung der Tierhaltung gegenüber anderen Sektoren negativ ins Gewicht. Diese erscheint gerade angesichts des großen Anteils der Tierhaltung an den globalen Methanemissionen widersinnig. Collin Woodall, Vorsitzender der US-Lobbyorganisation „National Cattlemen’s Beef Association“, resümierte zum Global Methane Pledge: „Any way you slice it, that outcome from COP26 was a win for us.“¹⁰¹ Zudem ist ein übermäßiger Fokus auf Anreize beim Klimaschutz, wie er im Global Methane Pledge auftaucht und soweit er vor allem mit dem Gewähren von Subventionen verbunden ist, weder kosteneffizient noch sonderlich effektiv.¹⁰² Da für den Global Methane Pledge ohnehin nur die Form des Soft Law gewählt wurde, wäre ein Bekenntnis zu tierhaltungsbezogenen Klimaschutzmaßnahmen, die über bloße technische Innovationen und Anreize hinausgehen, umso angemessener gewesen.

⁹⁶ Global Methane Pledge, erstes ‘Commit’, <<https://www.ccacoalition.org/en/resources/global-methane-pledge>>, zuletzt besucht 6. März 2025.

⁹⁷ Harro van Asselt und Veera Pekkarinen, *The Global Methane Pledge: A Timely New Step in Global Climate Governance* (CCEEL 2021), <<https://sites.uef.fi/cceel/the-global-methane-pledge-a-timely-new-step-in-global-climate-governance/>>, zuletzt besucht 6. März 2025.

⁹⁸ Lena Höglund-Isaksson, Johan Kuylenstierna, Eleni Michalopoulou u. a., *Global Methane Assessment* (UNEP 2021), 9.

⁹⁹ Global Methane Pledge (Fn. 96), drittes ‘Recognizing’.

¹⁰⁰ Global Methane Pledge (Fn. 96), zweites ‘Commit’; Kysar und Lovvorn (Fn. 14).

¹⁰¹ Kysar und Lovvorn (Fn. 14).

¹⁰² Siehe oben unter II. 2. b).

2. Glasgow Leaders' Declaration on Forests and Land Use

Ebenfalls auf der COP26 in Glasgow wurde die Glasgow Leaders' Declaration on Forests and Land Use verabschiedet. Hierbei handelt es sich um eine gemeinsame Erklärung der Staats- und Regierungschefs aus 145 Ländern, die zusammen etwa 91 % der weltweiten Waldflächen ausmachen. Sie verpflichten sich, zusammenzuarbeiten, um bis 2030 die Entwaldung sowie Verschlechterung von Böden aufzuhalten und teilweise rückgängig zu machen.¹⁰³ Die Inhalte der Glasgow Leaders' Declaration sind für die Tierhaltung besonders wichtig. Viele Waldrodungen dienen der Gewinnung von Agrarflächen für Futtermittel.¹⁰⁴ Die Tierhaltung verursacht oft Bodendegradationen. Zum Beispiel führt Überweidung insbesondere in trockenen Regionen zu Bodenerosion und Wüstenbildung.¹⁰⁵ Insoweit konsequent fordert die Glasgow Leaders' Declaration auch Anstrengungen, um die Landwirtschaft nachhaltiger zu machen.¹⁰⁶ Die Glasgow Leaders' Declaration spricht als Verpflichtungsadressaten nur von „leaders of the countries“. Damit ist sie ein Gentlemen's Agreement, das eine moralische Verpflichtung der beteiligten Regierungsvertreter, nicht aber eine rechtliche Verpflichtung der dahinterstehenden Staaten oder Regierungen bewirkt. Sie ist Soft Law.¹⁰⁷

Zugunsten der Glasgow Leaders' Declaration fällt ins Gewicht, dass sie die Entwaldung und Verschlechterung von Böden im völkerrechtlichen Klimaschutzsystem stärker in den Blick nimmt.¹⁰⁸ Das Pariser Abkommen fordert die Vertragsstaaten in Art. 4 Abs. 1 und Art. 5 PA zur Förderung von Kohlenstoffsinken auf. Die Glasgow Leaders' Declaration kann als Ausgestaltung dieses Auftrags gesehen werden. Ein ähnliches Soft-Law-Dokument, die New York Declaration on Forests, welche die weltweite Entwaldung bis 2020 halbieren wollte, hat ihr Ziel klar verfehlt. Sie wurde nur von 40 Staaten unterzeichnet. Zudem fehlten bei der New York Declaration on Forests anders als bei der Glasgow Leaders' Declaration wichtige Länder wie Russland oder Brasilien.¹⁰⁹ Gegenüber der New York Declaration ist die Glasgow Leaders' Declaration daher ein deutlicher Fortschritt. In der Ver-

¹⁰³ Glasgow Leaders' Declaration on Forests and Land Use, <<https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>>, zuletzt besucht 24. Juli 2024.

¹⁰⁴ Siehe oben unter II. 1.

¹⁰⁵ Orestis Kairis, Christos Karavitis, Kostas Kosmas u. a., 'Exploring the Impact of Overgrazing on Soil Erosion and Land Degradation in a Dry Mediterranean Agro-Forest Landscape (Crete, Greece)', *Arid Land Research and Management* 29 (2015), 360-374 (360).

¹⁰⁶ Glasgow Leaders' Declaration on Forests and Land Use (Fn. 103), Nr. 3-5.

¹⁰⁷ Vgl. zu Gentlemen's Agreements als Soft Law Anne Peters und Anna Petrig, *Völkerrecht Allgemeiner Teil* (6. Aufl., C. F. Müller/Schulthess Juristische Medien 2023), 146.

¹⁰⁸ Adriana Abdenur, *The Glasgow Leaders' Declaration on Forests: Déjà Vu or Solid Restart?* (United Nations University 2022), 1.

¹⁰⁹ Abdenur (Fn. 108), 11.

gangenheit wies insbesondere Brasilien internationale Kritik an der Abholzung des Amazonas-Regenwaldes zugunsten der Viehhaltung mit dem Einwand zurück, es handle sich um eine innere Angelegenheit.¹¹⁰ Gentlemen's Agreements schaffen keine unmittelbaren rechtlichen Bindungen der beteiligten Staaten, erzeugen aber die Erwartung, keine dem Erklärten widersprechenden Positionen zu vertreten. Das Prinzip guten Glaubens schützt diese Erwartung rechtlich. Daher können Staaten, deren Staats- und Regierungschefs an einem Gentlemen's Agreement beteiligt waren, bei Kritik an Verstößen gegen das Gentlemen's Agreement nicht mehr den Einwand erheben, es handle sich um innere Angelegenheiten.¹¹¹ Die Glasgow Leaders' Declaration internationalisiert die Materie Waldschutz und nimmt auf die Wende hin zu einer nachhaltigen Landwirtschaft Bezug. Folglich entkräftet sie für Länder, deren Staats- und Regierungschefs an der Declaration beteiligt waren, den Einwand, die Rodung von Wäldern zugunsten der Tierhaltung sei eine innere Angelegenheit. Insbesondere wegen dieser Wirkung ist die Glasgow Leaders' Declaration ein begrüßenswerter Fortschritt.

3. Global Forest Finance Pledge

Der ebenfalls auf der COP26 geschaffene Global Forest Finance Pledge unterstützt die Ziele der Glasgow Leader's Declaration. In ihm sagen elf Staaten und die EU gemeinsam zu, im Rahmen der öffentlichen Entwicklungszusammenarbeit zwischen 2021 und 2025 zwölf Milliarden US-Dollar für walddreiche „Entwicklungsländer“ bereitzustellen, um sie bei dem Aufhalten der Entwaldung bis 2030 zu unterstützen.¹¹² Insbesondere sollen entwaldungsfreie und nachhaltige landwirtschaftliche Versorgungsketten gefördert werden.¹¹³ Insoweit könnten die Investitionen zum Einsatz kommen, um durch die Tierhaltung ausgelöste Entwaldungsprozesse zu beenden. Als kollektives Versprechen ist der Global Forest Finance Pledge wie der Global Methane Pledge reines Soft Law. Der Global Forest Finance Pledge kann als Maßnahme gesehen werden, mit der die „entwickelten Länder“ zur Erfüllung ihrer Pflicht aus Art. 2 Abs. 1 lit. c; Art. 3 S. 1; Art. 9 Abs. 1 PA schreiten, die „Entwicklungsländer“ mit finanziellen

¹¹⁰ Ellen Häring, *Verlierer und Gewinner am Amazonas* (Deutschlandfunk 2019), <<https://www.deutschlandfunk.de/brasiliens-regenwald-schwindet-verlierer-und-gewinner-am-100.html>>, zuletzt besucht 6. März 2025; Astrid Prange de Oliveira, *Brasilien: Wähler sind wichtiger als Wald* (Deutsche Welthungerhilfe 2020), <<https://www.welthungerhilfe.de/welternahrung/rubriken/klima-ressourcen/brasilien-waehler-sind-wichtiger-als-wald/>>, zuletzt besucht 6. März 2025.

¹¹¹ René Côté, 'Les Gentlemen's Agreements à l'Ère Technologique', *Revue de droit de McGill* 2 (1989), 336-353 (351); Thürer (Fn. 94), Rn. 26 ff.; Peters und Petrig (Fn. 107), 149.

¹¹² Global Forest Finance Pledge, <<https://ukcop26.org/the-global-forest-finance-pledge/>>, zuletzt besucht 6. März 2025.

¹¹³ Global Forest Finance Pledge (Fn. 112), Nr. 5.

Ressourcen bei der Verringerung von Treibhausgasemissionen zu unterstützen. Daher ist der Global Forest Finance Pledge positiv zu bewerten.

4. Agriculture Breakthrough

Im Rahmen der COP27 in Scharm El-Scheich wurde der Agriculture Breakthrough geschaffen. Auf der COP26 hatten sich zahlreiche Staaten im Rahmen der Breakthrough Agenda verpflichtet, zusammenzuarbeiten, um die Entwicklung sowie den Einsatz klimafreundlicher Technologien zu beschleunigen und sicherzustellen, dass diese für alle erschwinglich sind.¹¹⁴ Die Bereiche, in denen diese Anstrengungen vorgesehen wurden, waren zunächst nur der Energiesektor, der Straßentransport, die Stahlproduktion und die Wasserstoffproduktion.¹¹⁵ Auf der COP27 ordneten 13 Staaten der Breakthrough Agenda auch den Bereich Landwirtschaft zu (Agriculture Breakthrough).¹¹⁶ Inzwischen hat der Agriculture Breakthrough 17 Unterstützerländer.¹¹⁷ Der Agriculture Breakthrough betont die Notwendigkeit, die Emissionen in der Tierhaltung zu reduzieren. Insbesondere ist von der Suche nach Innovationen für die Reduktion von Methanemissionen und nach alternativen Proteinquellen die Rede.¹¹⁸ Erwähnenswert ist zudem, dass auf der COP27 zwei neue landwirtschaftsbezogene Initiativen gestartet wurden: Die Food and Agriculture for Sustainable Transformation Initiative (FAST Initiative) sowie die Agriculture Innovation Mission for Climate (AIM for Climate), die beide die Finanzierung der klimafreundlichen Transformation der Landwirtschaft unterstützen sollen.¹¹⁹

Das Abkommen verpflichtet in Art. 2 Abs. 1 lit. a; Art. 3 S. 1; Art. 10 Abs. 2 PA die Vertragsstaaten zur Förderung der gemeinsamen Entwicklung und des Austauschs von Technologien, die Tierhaltungsemissionen mindern. Über den Agriculture Breakthrough schreiten einige Vertragsstaaten zur Erfüllung dieser Pflicht. Insoweit ist er als Fortschritt zu werten. Besonders die Betonung der Suche nach alternativen Proteinen überrascht positiv, da die Vertragsparteien in ihren NDCs noch kaum von Ernährungsumstellungen

¹¹⁴ COP26 World Leaders Summit – Statement on the Breakthrough Agenda, <<https://web.archive.nationalarchives.gov.uk/ukgwa/20230311221206/https://ukcop26.org/cop26-world-leaders-summit-statement-on-the-breakthrough-agenda/>>, zuletzt besucht 6. März 2025.

¹¹⁵ COP26 World Leaders Summit – Statement on the Breakthrough Agenda (Fn. 114).

¹¹⁶ Agriculture Breakthrough: Priority International Actions for 2023, <<https://breakthroughagenda.org/#targets>>, zuletzt besucht 24. Juli 2024, S. 1, 5.

¹¹⁷ Agriculture Breakthrough: Priority International Actions for 2024, <<https://breakthroughagenda.org/#targets>>, zuletzt besucht 24. Juli 2024, S. 7.

¹¹⁸ Agriculture Breakthrough: Priority International Actions for 2023 (Fn. 116), S. 1 f.; Agriculture Breakthrough: Priority International Actions for 2024 (Fn. 117), S. 2 ff.

¹¹⁹ Summary of Global Climate Action at COP27, <https://unfccc.int/sites/default/files/resource/GCA_COP27_Summary_of_Global_Climate_Action_at_COP_27_1711.pdf>, zuletzt besucht 6. März 2025, S. 8.

sprechen.¹²⁰ Jedoch fällt negativ ins Gewicht, dass der Agriculture Breakthrough derjenige Breakthrough mit den zweitwenigsten Unterstützerländern ist. Zum Beispiel fehlen als sehr bedeutende Nationen für die Tierhaltung die USA, China, Russland und Brasilien.¹²¹

5. COP-Entscheidung Outcome of the First Global Stocktake

Auf der COP28 in Dubai wurde die COP-Entscheidung Outcome of the First Global Stocktake beschlossen.¹²² Die Vertragsstaatenkonferenzen des Pariser Abkommens führen gem. Art. 14 Abs. 1 S. 1 PA in regelmäßigen Abständen eine weltweite Bestandsaufnahme (Global Stocktake) durch, um den gemeinsamen Fortschritt der Vertragsparteien bei der Verwirklichung des Zwecks und der langfristigen Ziele des Übereinkommens zu bewerten. Das Pariser Abkommen sah in Art. 14 Abs. 2 PA den ersten Global Stocktake für das Jahr 2023, mithin für die COP28 vor. Im Vorfeld dieser UN-Klimakonferenz wurden Informationen zum gemeinsamen Fortschritt gesammelt und wissenschaftlich bewertet. Auf der UN-Klimakonferenz in Dubai wurden diese Ergebnisse betrachtet und in einer COP-Entscheidung, die das politische Abschlussdokument des ersten Global Stocktake darstellt, berücksichtigt.¹²³ COP-Entscheidungen sind nur rechtlich verbindlich, wenn die UNFCCC oder das Pariser Abkommen dies ausdrücklich anordnen.¹²⁴ Dies ist bei der Entscheidung Outcome of the First Global Stocktake nicht der Fall. Sie ist lediglich Soft Law.¹²⁵

¹²⁰ Siehe oben unter IV. 2.

¹²¹ Breakthrough Agenda, <<https://breakthroughagenda.org/#targets>>, zuletzt besucht 24. Juli 2024.

¹²² COP28, 'Outcome of the First Global Stocktake', 13. Dezember 2023, Decision FCCC/PA/CMA/2023/L.17.

¹²³ Zu den verschiedenen Phasen des Global Stocktake COP 24, 'Matters Relating to Article 14 of the Paris Agreement and Paragraphs 99-101 of Decision 1/CP.21', 14. Dezember 2018, Decision FCCC/CP/2018/L.16, Rn. 3, 19 ff.; Alexander Zahar, 'Collective Progress in the Light of Equity Under the Global Stocktake', *Climate Law* 9 (2019), 101-121 (114); Jamal Srouji und Deidre Cogan, *What is the 'Global Stocktake' and how Can it Accelerate Climate Action?* (World Resources Institute 2023), <<https://www.wri.org/insights/explaining-global-stocktake-paris-agreement>>, zuletzt besucht 24. Juli 2024.

¹²⁴ Bodansky, Brunnée und Rajamani (Fn. 42), 90 f., 142 f.; Lavanya Rajamani, 'The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations', *M.L.R.* 78 (2015), 826-853 (839 f.).

¹²⁵ Vgl. zur Einordnung nicht bindender COP-Entscheidungen als Soft Law Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', *ICLQ* 48 (1999), 901-913 (905); Edith Brown Weiss, 'The Rise or the Fall of International Law?', *Fordham L. Rev.* 69 (2000), 345-372 (352); kritisch zur Qualifizierung nicht bindender COP-Entscheidungen als Soft Law Annecoos Wiersema, 'The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements', *Mich. J. Int'l L.* 31 (2001), 231-287 (259 ff.).

Die Entscheidung differenziert in ihren Ausführungen zwischen Maßnahmen zur Emissionsreduktion und Maßnahmen zur Anpassung an den Klimawandel.¹²⁶ Sie erwähnt die Tierhaltung an keiner Stelle ausdrücklich. Der Themenbereich Landwirtschaft und Ernährungssysteme wird in der Entscheidung zwar behandelt, findet allerdings nur in den der Klimaanpassung und nicht auch den der Emissionsreduktion gewidmeten Teilen Berücksichtigung.¹²⁷ Der Abschnitt zur Emissionsreduktion betont die Wichtigkeit, natürliche Ökosysteme als Kohlenstoffsenken zu erhalten und die Entwaldung zu beenden.¹²⁸ Hierbei handelt es sich immerhin um tierhaltungs- und landwirtschaftsnahe Bereiche.¹²⁹ Insgesamt wird die Tierhaltung aber in der Entscheidung unter dem Aspekt der Emissionsreduktion nahezu vollends ausgeblendet. Die Ausführungen der Entscheidung zur Emissionsreduktion im Energiesektor sind dagegen relativ detailliert.¹³⁰ Das Ergebnis des Global Stocktake dient gem. Art. 4 Abs. 9 und gem. Art. 14 Abs. 3 PA unter anderem dazu, die Vertragsparteien für die auf nationaler Ebene zu entscheidende Aktualisierung und Verstärkung ihrer Klimaschutzmaßnahmen zu informieren.¹³¹ Der Global Stocktake ist damit ein wichtiges Mittel des Pariser Abkommens, um die Klimaschutzbemühungen der Vertragsstaaten stetig zu verstärken und die Ziele des Abkommens zu erreichen.¹³² Viele Staaten berücksichtigen die Tierhaltung in ihren NDCs gegenwärtig nicht in einem Umfang, der der von Art. 2 Abs. 1 lit. a PA geforderten Reduktion von Tierhaltungsemissionen hinreichend Rechnung trägt.¹³³ Daher war das politische Abschlussdokument des ersten Global Stocktake eine wichtige Gelegenheit, um die tierhaltungsbezogenen Klimaschutzbemühungen zu verstärken. Somit enttäuscht die COP-Entscheidung. Angesichts der aufgezeigten Bedeutung

¹²⁶ COP28, 'Outcome of the First Global Stocktake' (Fn. 122), Rn. 18 ff. und Rn. 43 ff.

¹²⁷ COP28, 'Outcome of the First Global Stocktake' (Fn. 122), Absatz 8 der Präambel, Rn. 55, 63 lit. b; Lei Win (Fn. 92), 3.

¹²⁸ COP28, 'Outcome of the First Global Stocktake' (Fn. 122), Rn. 33 f. Die COP-Entscheidung orientiert sich an dieser Stelle am Wortlaut der Glasgow Leader's Declaration on Forests and Land Use.

¹²⁹ Vgl. oben unter V. 2.

¹³⁰ COP28, 'Outcome of the First Global Stocktake' (Fn. 122), Rn. 28 f.

¹³¹ Bodansky, Brunnée und Rajamani (Fn. 42), 245.

¹³² COP 24, 'Matters Relating to Article 14 of the Paris Agreement and paragraphs 99-101 of decision 1/CP.21' (Fn. 123): 'Recognizing that the global stocktake referred to in Article 14 of the Paris Agreement is crucial for enhancing the collective ambition of action and support towards achieving the purpose and long-term goals of the Paris Agreement'; Jennifer Huang, 'What Can the Paris Agreement's Global Stocktake Learn from the Sustainable Development Goals?', *Carbon & Climate Law Review* 2018, 218-228 (227); Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics', *ICLQ* 65 (2016), 493-514 (503 f.).

¹³³ Siehe oben unter IV. 3.

des Global Stocktake unter dem Pariser Abkommen sind die Defizite der COP-Entscheidung ein besonders starkes Indiz dafür, dass der „Pariser Rahmen“ durch die Übereinkünfte auf folgenden UN-Klimakonferenzen hinsichtlich der Tierhaltung ungenügend ausgefüllt wurde.

6. COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate Action

Ebenfalls auf der COP28 wurde die COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate verabschiedet. Es handelt sich um ein Gentlemen's Agreement, an dem sich die Staats- und Regierungschefs aus 158 Staaten und der Europäischen Union beteiligt haben.¹³⁴ Indien blieb der Erklärung fern mit der Begründung, Ernährungssicherheit sicherstellen zu müssen.¹³⁵ Die beteiligten Staats- und Regierungschefs erkennen in der Erklärung an, dass die Ziele des Pariser Abkommens nur unter Einbeziehung der Landwirtschaft und Nahrungsmittelsysteme erreicht werden können.¹³⁶ Daher erklären sie ihre Absicht, kollektiv und zügig daran zu arbeiten, die Landwirtschaft von Praktiken mit hohem Treibhausgasausstoß auf nachhaltigere Produktionsmethoden umzustellen.¹³⁷ Zum Erreichen dieses Ziels verpflichten sich die Staats- und Regierungschefs, die Einbeziehung der Landwirtschaft in ihre Klimaschutzmaßnahmen zu beschleunigen.¹³⁸ Hierzu wollen sie bis 2025 ihre Anstrengungen dafür verstärken, dass der Themenbereich Landwirtschaft und Ernährungssysteme in die NDCs aufgenommen wird.¹³⁹

Die Erklärung erwähnt die Tierhaltung nur einmal ausdrücklich. Sie fordert von den Staaten, Aktivitäten zu fördern, die zu einer besseren Tier-

¹³⁴ COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate Action, <<https://www.cop28.com/en/food-and-agriculture>>, zuletzt besucht 24. Juli 2024.

¹³⁵ Sarah Zimmermann, *Over 130 Countries Sign COP28 Pledge to Integrate Food into Climate Action* (Agriculturediver 2023), <<https://www.agriculturediver.com/news/food-agriculture-declaration-cop28-uae-india-climate/701445/>>, zuletzt besucht 6. März 2025. Siehe zur vertraglichen Basis für derartige Argumente unter dem Pariser Abkommen III. 4.

¹³⁶ COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate Action (Fn. 134), 'We, Heads of State and Government', Absatz 9.

¹³⁷ COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate Action (Fn. 134), 'We declare our intent to work collaboratively and expeditiously to pursue the following objectives', Nr. 5.

¹³⁸ COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate Action (Fn. 134), 'We declare our intent to work collaboratively and expeditiously to pursue the following objectives', a. E.

¹³⁹ COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate Action (Fn. 134), 'In fulfilling this commitment, by 2025 we intend to strengthen our respective and shared efforts to', Nr. 1.

gesundheit beitragen.¹⁴⁰ Zugunsten der Erklärung fällt aber ins Gewicht, dass sie die Verbindung von Landwirtschaft und Klimawandel eindeutig anerkennt sowie von einer Wende hin zu einer nachhaltigeren Landwirtschaft spricht.¹⁴¹ Alle landwirtschaftsbezogenen Aussagen und Ankündigungen der Erklärung implizieren auch Änderungen für die Tierhaltung, da diese nach Daten der FAO über ein Drittel der globalen Landwirtschaftsemissionen ausmacht.¹⁴² Gleichzeitig hat die Erklärung eine sehr hohe Zahl an Unterstützern. Die beteiligten Staaten sind für über 75 % der weltweiten landwirtschaftsbezogenen Emissionen verantwortlich.¹⁴³ Die Staats- und Regierungschefs aus China, Russland, Brasilien, den USA und der EU, den fünf größten Fleischproduzenten der Welt, waren allesamt an der Erklärung beteiligt.¹⁴⁴ Folglich schafft die Erklärung ein Momentum für die bessere Integration der Landwirtschaft und damit auch der Tierhaltung in die internationalen Klimaschutzbemühungen.¹⁴⁵ Da sich bislang viele Staaten in ihren NDCs nicht hinreichend zu Tierhaltung und Landwirtschaft äußern, ist die Ankündigung, bis 2025 Landwirtschaft und Ernährungssysteme verstärkt in die NDCs aufzunehmen, besonders wertvoll. Sie wird voraussichtlich die Staaten, die in ihren NDCs Tierhaltung und Landwirtschaft erwähnen, vermehren und auf die anderen Staaten den Druck erhöhen, gleichzuziehen. Diese Wirkung der Erklärung ist wegen der beschriebenen Defizite in der COP-Entscheidung Outcome of the First Global Stocktake besonders wichtig. Daher ist die Erklärung ein bedeutender Fortschritt für die Steigerung der tierhaltungsbezogenen Klimaschutzbemühungen im „Pariser Rahmen“.

7. Zwischenbilanz

Die Bilanz hinsichtlich der auf den Vertragsstaatenkonferenzen nach dem Pariser Abkommen geschaffenen Soft-Law-Dokumente fällt gemischt aus. Einerseits stellen sie teilweise wichtige Fortschritte und einen Versuch dar,

¹⁴⁰ COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate Action (Fn. 134), ‘In fulfilling this commitment, by 2025 we intend to strengthen our respective and shared efforts to’, Nr. 2.

¹⁴¹ Lei Win (Fn. 92), 2.

¹⁴² FAO (Fn. 2), 4, 7.

¹⁴³ Press Release COP28 Presidency Puts Food Systems Transformation on Global Climate Agenda as more than 130 World Leaders Endorse Food and Agriculture Declaration, <https://www.cop28.com/en/news/2023/12/COP28-UAE-Presidency-puts-food-systems-transformation?fbclid=IwAR0jwsz1vm-c81LP7itp4oug9LyG_TyucUq9ltGFJHJ-7jArtpwROUdk8N8>, zuletzt besucht 24. Juli 2024.

¹⁴⁴ COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate Action (Fn. 134).

¹⁴⁵ Lei Win (Fn. 92), 5.

die in den NDCs der Staaten bestehenden Mängel auszubessern. Beispielsweise wird die COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate Action dazu beitragen, dass mehr Staaten in ihren NDCs die Tierhaltung und die Landwirtschaft adressieren. Obgleich die Vertragsstaaten in ihren NDCs kaum von Ernährungsumstellungen sprechen, wollen sie im Rahmen des Agriculture Breakthrough die Suche nach alternativen Proteinen angehen. Die Glasgow Leaders' Declaration on Forests and Land Use und der Global Forest Finance Pledge können dazu beitragen, dass durch die Tierhaltung ausgelöste Entwaldungsprozesse beendet werden.

Andererseits findet sich in den Soft-Law-Dokumenten zum Teil die aus den nationalen Ordnungen der Vertragsstaaten stammende Tendenz wieder, effektiven tierhaltungsbezogenen Klimaschutz in verschiedener Art und Weise zu vermeiden. Das aus den nationalen Rechtsordnungen stammende Muster, die Tierhaltung im Rahmen des allgemeinen „Agricultural Exceptionalism“ zu privilegieren, taucht auch in Übereinkünften auf Vertragsstaatenkonferenzen des Pariser Abkommens wie dem Global Methane Pledge auf. In der COP-Entscheidung Outcome of the First Global Stocktake werden Emissionsreduktionen in der Tierhaltung nahezu ausgeblendet. Wie der Global Methane Pledge und der Agriculture Breakthrough zeigen, liegt der Fokus der Staaten gegenüber der Tierhaltung auch im völkerrechtlichen Klimaschutzsystem oft auf einem „Pay-The-Polluter“-Ansatz und auf Innovationen. Bislang werden in den Soft-Law-Dokumenten keine Ansätze benannt, die ausreichen, um die Tierhaltung mit dem Temperaturziel des Pariser Abkommens aus Art. 2 Abs. 1 lit. a PA in Einklang zu bringen. Daher wurde insoweit der „Pariser Rahmen“ durch die Übereinkünfte auf folgenden UN-Klimakonferenzen ungenügend ausgefüllt.

„Harte“ völkerrechtliche Verträge, die für die Tierhaltung drastischere Klimaschutzmaßnahmen wie einen „Peak Livestock“ oder Ernährungsumstellungen vorsehen, erscheinen zwar geboten, aber politisch gegenwärtig nicht realisierbar. Daher bleibt abzuwarten, ob die Staaten immerhin durch zusätzliche Soft-Law-Dokumente ihre Zusammenarbeit bei der Reduktion von Tierhaltungsemissionen besser koordinieren. Etwa könnte man an eine „Sustainable Livestock Systems Declaration“ denken, in der Staaten gemeinsame Verhaltensstandards für Klimaschutz in der Tierhaltung setzen. Da das Treibhausgas Lachgas in der Tierhaltung eine bedeutende Rolle spielt,¹⁴⁶ wäre auch ein „Nitrous Oxide Pledge“ denkbar. Hier könnte vor allem die Gülleentsorgung näher in den Blick genommen werden. Eine Vereinbarung zum Abbau oder der klimafreundlichen Umgestaltung von Tierhaltungssubven-

¹⁴⁶ Siehe oben unter II. 1.

tionen wäre zudem förderlich, um die hierzu aus Art. 2 Abs. 1 lit. c; Art. 3 S. 1; Art. 9 Abs. 3 PA folgende Pflicht weiter auszugestalten und zu konkretisieren. In der COP-Entscheidung Outcome of the First Global Stocktake wurde vereinbart, ineffiziente klimaschädliche Subventionen für fossile Brennstoffe schrittweise abzuschaffen.¹⁴⁷ Das Fehlen einer derartigen Übereinkunft für Landwirtschafts- und Tierhaltungssubventionen kann als weiterer Ausdruck des „Agricultural Exceptionalism“ im völkerrechtlichen Klimaschutzsystem gesehen werden.

VI. Bilanz und Ausblick

1. Pariser Abkommen als adäquater, aber unzureichend ausgefüllter Rahmen für tierhaltungsbezogenen Klimaschutz

Die Untersuchung hat ergeben, dass das Pariser Abkommen zwar nicht explizit, aber implizit Pflichten zu Klimaschutzbemühungen in der Tierhaltung normiert. Das Abkommen verpflichtet die Vertragsparteien gem. Art. 2 Abs. 1 lit. a; Art. 3 S. 1; Art. 4 Abs. 2 PA, in ihren NDCs die deutliche Reduktion von Tierhaltungsemissionen anzustreben und zur Umsetzung dieser NDCs bona fide Klimaschutzmaßnahmen zu ergreifen. Gem. Art. 2 Abs. 1 lit. c; Art. 3 S. 1; Art. 9 Abs. 3 PA müssen die Staaten langfristig ihre Subventionen für die Tierhaltung abschaffen oder zu Klimaschutzsubventionen umgestalten. Die Vertragsstaaten trifft gem. Art. 2 Abs. 1 lit. a; Art. 3 S. 1; Art. 10 Abs. 2 PA eine Pflicht, die gemeinsame Entwicklung und den Austausch von Technologien für Emissionsreduktion in der Tierhaltung zu fördern. Sie können sich auch mit dem Einwand, die Ernährungssicherheit sowie Nahrungsmittelerzeugung i. S. d. neunten Absatzes der Präambel und i. S. d. Art. 2 Abs. 1 lit. b PA sicherstellen zu müssen, Klimaschutzbemühungen in der Tierhaltung nicht generell entziehen. Angesichts der genannten Pflichten erscheint das Pariser Abkommen als geeigneter Rahmen, um eine Reduktion tierhaltungsbezogener Emissionen durch internationale Zusammenarbeit anzugehen.

Entscheidend für wirksamen internationalen Klimaschutz ist aber vor allem, wie dieser Rahmen durch die NDCs sowie Übereinkünfte auf weiteren Vertragsstaatenkonferenzen ausgefüllt wird. Hier fällt die Bilanz negativ aus. Der Umfang, in dem die Staaten die Tierhaltung in ihren NDCs adressieren, ist sowohl quantitativ als auch qualitativ für eine Begrenzung der Erderwär-

¹⁴⁷ COP28, 'Outcome of the First Global Stocktake' (Fn. 122), Rn. 28 lit. h.

mung auf deutlich unter 2°C unzureichend. Die NDCs werden den normativen Erwartungen, die das Pariser Abkommen an sie in Art. 4 Abs. 3 PA stellt, nicht gerecht. Einige der Soft-Law-Dokumente, die auf den UN-Klimakonferenzen nach der Verabschiedung des Pariser Abkommens entstanden sind, stellen Schritte in die richtige Richtung dar. Gleichzeitig findet sich in den Soft-Law-Dokumenten und damit im völkerrechtlichen Klimaschutzsystem die aus den nationalen Ordnungen der Vertragsstaaten stammende Tendenz wieder, effektiven tierhaltungsbezogenen Klimaschutz zu vermeiden. Sowohl im nationalen Kontext als auch im völkerrechtlichen Klimaschutzsystem wird die Tierhaltung im Rahmen des allgemeinen „Agricultural Exceptionalism“ privilegiert. An vielen Stellen, an denen dies sachgerecht wäre, wird sie unter dem Gesichtspunkt der Emissionsreduktion überhaupt nicht berücksichtigt, etwa in der COP-Entscheidung Outcome of the First Global Stocktake. In wiederum anderen Dokumenten, wie dem Agriculture Breakthrough oder dem Global Methane Pledge, wird zum Klimaschutz in der Tierhaltung vor allem auf Anreize sowie Innovationen anstatt auf eine transformative Strategie gesetzt. Daher sollten die Vertragsstaaten in ihren NDCs und auf den nächsten Vertragsstaatenkonferenzen dringend nötige Schritte anstreben, um die Tierhaltung stärker in die internationalen Klimaschutzbemühungen zu integrieren. Die COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems and Climate gibt Anlass zur verhaltenen Hoffnung, dass hier im Laufe der nächsten Jahre Nachbesserungen erfolgen werden.

2. Bedeutung eines globalen Tierschutzrechts für den Klimaschutz

Ein Aspekt, der bei der besseren Integration der Tierhaltung in die internationalen Klimaschutzbemühungen beachtet werden sollte, ist der Schutz des Tierwohls. Da die Massentierhaltung neben erheblichen Treibhausgasemissionen gleichzeitig Tierleid verursacht,¹⁴⁸ müssen Klimaschutz und Tierschutz in der Landwirtschaft ganzheitlich betrachtet werden.¹⁴⁹ Gegenwärtig existieren auf internationaler Ebene keine flächendeckenden Tierschutzvor-

¹⁴⁸ Siehe etwa die Darstellung bei Bert Herbrich, *Das System Massentierhaltung im Verfassungsrecht* (Duncker & Humblot 2022), 173 ff.

¹⁴⁹ Darüber hinaus müssen auch Klimaanpassung und Tierschutz im Zusammenhang betrachtet werden, da Tiere nicht nur Emittenten von Treibhausgasemissionen, sondern auch Opfer des Klimawandels sind. Diesbezüglich ist bemerkenswert, dass die Klimaaußenpolitikstrategie der Deutschen Bundesregierung ein One-Health-Konzept verfolgen will, das nicht nur die Auswirkungen des Klimawandels auf die menschliche Gesundheit, sondern auch auf die Tiergesundheit berücksichtigt. Vgl. Bundesregierung, *Klimaaußenpolitikstrategie* (2023), 43.

gaben. Die wenigen tierschützenden Dokumente im Völkerrecht, wie der Terrestrial Animal Health Code der Weltorganisation für Tiergesundheit, sind reines Soft Law.¹⁵⁰

Ein stärkerer Schutz der Tiere im Völkerrecht und im nationalen Recht wäre einerseits ein Mittel tierhaltungsbezogenen Klimaschutzes. Die globale Massentierhaltung ist in ihren heutigen Ausmaßen nur möglich, weil weitgehend keine artgerechte Haltung der Tiere erfolgt. Daher würden strengere Tierschutzstandards die Massentierhaltung erschweren und insoweit dem Klimaschutz nützen. Etwa würden bei flächendeckend verbesserten Haltungsbedingungen die Preise für Tierprodukte steigen und der Konsum sinken.¹⁵¹ Für manche Klimaschutzmaßnahmen bestünde sogar eine höhere gesellschaftliche Akzeptanz, wenn sie zugleich mit Tierwohlerwägungen gerechtfertigt würden. In Deutschland wäre etwa die öffentliche Zustimmung zu einer Fleischsteuer höher, wenn diese durch Tierwohl- anstatt durch Klimaschutzabwägungen gerechtfertigt würde.¹⁵² Insoweit wären strengere Tierschutzvorgaben im Völkerrecht und im nationalen Recht ein Mittel tierhaltungsbezogenen Klimaschutzes.

Andererseits wären sie auch ein Gegengewicht zu lauter werdenden Rufen nach einer Effizienzsteigerung der Tierhaltung aus Klimaschutzgründen. Da Tiere, die ihr Schlachtgewicht schneller erreichen, kürzer emittieren und weniger Futter verbrauchen,¹⁵³ wird zum Teil als Klimaschutzmaßnahme vorgeschlagen, die Effizienz der Tierhaltung zu erhöhen, etwa jüngst von der FAO in ihrer auf der COP28 vorgestellten Global Roadmap.¹⁵⁴ Manche Maßnahmen, die die Effizienz der Produktion von Tiererzeugnissen steigern, dienen zugleich dem Tierwohl, beispielsweise die Vermeidung von Nutztierkrankheiten. Andere Maßnahmen beeinträchtigen dagegen das Tierwohl.

¹⁵⁰ Anne Peters, 'Global Animal Law: What It Is and Why We Need It', *Transnational Environmental Law* 5 (2016), 9-23 (13-15).

¹⁵¹ Vgl. Zum umgekehrten Effekt, d. h. zur Verbesserung des Tierschutzes durch höhere Umweltstandards: Bruce Myers und Linda Breggin, 'Tackling the Problem of CAFOs and Climate Change: A New Path to Improved Animal Welfare?', in: Randall Abate (Hrsg.), *What Can Animal Law Learn from Environmental Law?* (Environmental Law Institute 2015), 117-146 (126).

¹⁵² Grischa Perino und Henrike Schwickert, 'Animal Welfare is a Stronger Determinant of Public Support for Meat Taxation than Climate Change Mitigation in Germany', *Nature Food* 4 (2023), 160-169 (160).

¹⁵³ Ferry Leenstra, *Intensification of Animal Production and Its Relation to Animal Welfare, Food Security and Climate Smart Agriculture* (Wageningen UR Livestock Research 2013), 7.

¹⁵⁴ FAO, *Achieving SDG 2 without Breaching the 1.5°C threshold: A Global Roadmap Part 1*, FAO 2023, 12; zur Kritik hieran etwa World Federation For Animals (World Federation for Animals 2023), *A Collective Call for a Holistic Food Systems Approach in FAO's Roadmap*, <<https://wfa.org/a-collective-call-for-a-holistic-food-systems-approach-in-faos-roadmap/>>, zuletzt besucht 6. März 2025.

Etwa sorgt ein hoher Anteil von Getreidefutter bei Schweinen zwar für eine schnelle Gewichtszunahme, erhalten Schweine jedoch zu viel Getreidefutter und zu wenig Raufutter, erleben sie Stress und zeigen abnormales Verhalten.¹⁵⁵ Insoweit ist zu befürchten, Klimaschutzmaßnahmen in der Tierhaltung könnten zu Lasten des Tierwohls gehen. Ein einseitiger Fokus auf Effizienzsteigerungen droht zu vernachlässigen, dass in der Reduktion des Konsums von Tierprodukten ein deutlich größeres und für die Einhaltung der Ziele des Pariser Abkommens wichtigeres Einsparpotenzial für Emissionen liegt.¹⁵⁶ Folglich bedarf es eines globalen Tierschutzrechts nicht nur als Mittel des Klimaschutzes, sondern auch, um zu verhindern, dass für tierhaltungsbezogenen Klimaschutz einseitig auf Effizienzsteigerungen gesetzt wird.

Summary: Meat on the Negotiating Table – Animal Agriculture in the International Climate Protection System of the Paris Agreement

This article analyses which requirements the international climate protection system of the Paris Agreement sets for climate protection measures in animal agriculture. In line with its character as a framework regulation, the Paris Agreement contains several implicit and general obligations relating to livestock farming. For example, the obligation to take measures in support of the Paris Agreements's temperature goal pursuant to Art. 2 para. 1 lit. a; Art. 3; Art. 4 para. 2 PA also implies an obligation to take climate protection measures in animal agriculture. However, the framework of the Paris Agreement has been filled in by the Nationally Determined Contributions (NDCs) and by agreements at subsequent Conferences of the Parties (COPs) in a disappointing manner. The extent to which countries are addressing animal agriculture in their NDCs is insufficient to limit global warming to well below 2°C, both in terms of the number of countries doing so and the quality of the measures envisaged. Moreover, in the agreements adopted at subsequent COPs, including COP28, Parties continued their problematic tendency of excluding livestock from mitigation efforts from the outset, or they relied solely on innovation or incentives for livestock-related mitigation. The article argues for a global animal welfare

¹⁵⁵ Sara Shields und Geoffrey Orme-Evans, 'The Impacts of Climate Change Mitigation Strategies on Animal Welfare', MDPI Animals 5 (2015), 361-394 (373, 375 f.).

¹⁵⁶ Azevedo, Clark und Colgan (Fn. 39), 705 f.; Ekardt, Garske, Stubenrauch u. a. (Fn. 27), 8; Hedenus, Wirsenius und Johannsson (Fn. 39), 89; siehe auch IPCC (Fn. 18), 1285.

law, both as a means of climate protection and as a counterweight to the numerous calls for greater efficiency in animal agriculture that have been raised on the grounds of climate change.

Keywords

Livestock – Climate Protection – Paris Agreement – International Environmental Law – Agricultural Exceptionalism

Buchbesprechungen

Roscini, Marco: International Law and the Principle of Non-Intervention. Oxford: Oxford University Press 2024. ISBN 978-0-19-878689-4. xxxv, 460 pp. £140.00

Non-intervention has been described as the most potent and elusive of international legal principles. Yet, as Marco Roscini's well-researched and well-presented book makes clear, the non-intervention principle remains topical, and its contours continue to be the subject of much debate. It is worth recalling at the outset the International Law Commission's important observation in relation to its 1949 draft Declaration on Rights and Duties of States (which included an article on the duty of every State to refrain from intervention in the internal or external affairs of any other State) that '[t]he articles of the draft Declaration enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules' (ILC Yearbook 1949, p. 290).

The 'principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State' is included in the Friendly Relations Declaration of 1970 as one of seven principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations. Yet the principle has only a shadowy presence in the Charter itself, being a corollary of the principle of sovereign equality in Article 2, paragraph 1, and reflected in Article 2, paragraph 7. The latter provision refers only to intervention by the United Nations itself. To speak of a 'principle' of non-intervention, as opposed to a prohibition of intervention, still less of specific legal prohibitions traceable to the principle, implies some overarching concept of non-intervention. But is there such a thing? Is the principle indeed a self-standing rule beyond the *jus ad bellum*? Is the law in this field as clear as Roscini suggests, or is it largely composed of 'grey areas', with States taking very different views? The International Court of Justice, the International Law Commission, and the United Nations General Assembly have shed relatively little light. There even seem to be differing views about what it should be called (a 'principle'; non-intervention/non-interference; domestic affairs/internal affairs/external affairs). And where practice is unclear, it is tempting to turn to writers. This book contributes to the renewed academic engagement with the prohibition of intervention that we have seen over the last few years.

The author is Professor of International Law at Westminster Law School (London); Swiss Chair of International Humanitarian Law at the Geneva Academy of International Humanitarian Law and Human Rights; and Visit-

ing Professor of International Law at the University of Trento. His book offers a wealth of detail on all major aspects of non-intervention. His stated objective is to identify what the customary principle of non-intervention specifically prohibits, and what it does not (p. 1). It may indeed be asked whether to do so is possible, given that non-intervention is an essentially relative question, depending upon the ever-changing state of international law and upon developments in international relations, and given also the great variety of bilateral and other relationships between individual States (which the author brings out well, especially in Chapters V, VI and VII). Even if he does not attain his objective, the author elucidates many things; it is not his fault if there are no definitive answers.

The book deals systematically with a range of issues arising in connection with the non-intervention principle, which are captured in the sub-title 'History, Theory, and Interactions with Other Principles' – to which one might add 'Practice'. The importance of practice and *opinio juris* is obvious, and central to the author's project. He has done an excellent job of collecting relevant materials, even if on occasion one might question the weight given to certain of them, for example, the reference (at p. 249) to an oft-cited 1984 United Kingdom Foreign Office 'Planning Staff Paper' ('Is Intervention Ever Justified?'). This paper in fact began with a statement to the effect that, being a planning paper, it does not represent the views of the United Kingdom Government. This caveat was unfortunately not recorded in 'United Kingdom Materials on International Law' in the 1986 *British Year Book of International Law*.

The book has a broad sweep, discussing non-intervention in connection with major and difficult areas of international law. These include the threat or use of force, intervention by invitation (military action with consent, to use the term recently adopted for an International Law Association committee), and internal and external self-determination, as well as the sources of international law, *jus cogens* norms, and obligations *erga omnes*. The book is the more interesting for that, even if, given the inherent vagueness of the principle, readers may find some of the author's more definitive conclusions challenging and challengeable.

Despite the complexity of the subject-matter, the book is systematic and easy to navigate. Following a brief Introduction (helpfully dealing with scope and methodology), the book is divided into eight substantive and substantial chapters; it ends with a brief Conclusion.

As with most questions of international law, it is difficult to grasp the current significance of the non-intervention principle without understanding its historical development. Chapter I deals with the history of the principle and does so in considerable detail, adopting a largely chronological approach.

The chapter ends, appropriately, with an extended section focusing on intervention and non-intervention in the Americas. Nevertheless, given the current limited role of writers in international law, some may find it a little surprising that, following what used to be a tradition among international lawyers, so much attention is paid throughout the chapter to great names from a very different past.

The book then moves from a period when the principle was mostly considered in the context of the use of force, a matter now regulated by specific Charter provisions and customary international law, to the post-1945 era and the status of the principle today. Chapter II looks in turn at treaty provisions and at customary international law, and at the significance of the prohibition being a 'principle'. It then briefly considers whether, beyond the prohibition of the use of force or aggression, the principle creates an *erga omnes/erga omnes partes* obligation and whether it is a *jus cogens* norm. The author's answer in both cases, after carefully reviewing the evidence and writings, is 'no'. Some of the 'post-1945 scholarship' is next touched on, mainly in relation to 'intervention by invitation' (to which the author returns in Chapter IV). Chapter II concludes: 'it is undeniable that, as demonstrated by this chapter's survey of scholarship, the exact normative content of the principle of non-intervention has remained the object of contention' (p. 143).

Chapter III seeks to analyse 'the content of the principle of non-intervention'. It shows how general (and vague) principles like non-intervention tend to be applied in light of the overall political context. Thus, both sides during the Cold War invoked the principle of non-intervention (or non-interference) in a way that coincided with their ideological aims. Ambiguity made it possible to agree a text in the Friendly Relations Declaration, adopted at the height of the Cold War well over 50 years ago. In one sense that instrument belongs to a different era, but it remains fundamental to any consideration of each of the seven principles covered therein, including non-intervention. One of the many merits of the present book is that it enquires deeply into certain aspects of the Declaration's *travaux* (e. g., at pp. 173-174). The careful work in this regard confirms that an overall study of all the Friendly Relations Declaration's *travaux*, which are not particularly easy to locate, would make a great contribution to our understanding of important aspects of modern international law.

Chapter IV begins the treatment of what may be seen as a key issue: intervention in 'civil strife'. This chapter goes over well-trodden ground but does so with an unusual degree of clarity. Chapters V and VI turn to the interaction between the principle of non-intervention and 'internal' and 'external' self-determination. Closely related is Chapter VII, which considers the relationship between non-intervention and respect for both international

human rights law and international humanitarian law. These four chapters raise difficult legal and political issues; neither time nor space permits them to be discussed in this review. They will be considered within the current International Law Association Committee on 'Military assistance with consent'; its members and other readers will benefit from the book's thoughtful discussion.

The final chapter, Chapter VIII, turns to 'non-intervention in the information age'; cyber operations can be, in the author's words, 'a new means of coercion in the domestic affairs of States'. The discussion is inevitably largely speculative and may be overtaken by future events; it is nevertheless a useful (and extensive) contribution to the ongoing debate.

As noted above, intervention initially focused on the use of force, but that is now fully covered by the rules of the *jus ad bellum* (or *jus contra bellum*, as the author prefers). More recently, 'intervention by invitation' has been a major object of debate; but it is most often dealt with in works on the *jus ad bellum*. More challenging, more nuanced perhaps, are current debates about the application of the principle of intervention beyond the *jus ad bellum*, for example, when it involves political, economic or cultural pressure. It may be that generalisations are not possible; that any assessment depends on weighing a large range of elements; and that the outcome is very much in the eye of the beholder. But this is not unusual with international law and does not detract from the legal quality of the principle and the need to apply it when necessary or appropriate to a given set of facts. The International Court of Justice can be expected to find ways to apply the principle in specific cases, however much writers or even those representing States may speculate. The relativity of the prohibition of intervention does not diminish its binding character.

Writers on international law nowadays tend to over-theorise, when what is needed by students and especially practitioners is solid information. This tendency is doubtless encouraged by universities which seem interested in pursuing novelty above all, perhaps at the instance of their funders. The author strikes a careful balance: he does not ignore the theories underlying the rules, and his command of the literature in a wide range of languages is much to be welcomed. At the same time, a large part of the book is devoted to presenting the reader with useful information.

With its wealth of detail, and its careful scholarship, Roscini's book will surely remain an important resource for anyone seeking to understand the principle of non-intervention. It is highly recommended, for lawyers, for international relations specialists, and for anyone interested in the history and current state of international law.

Sir Michael Wood, London

Cheng, Chia-Jui (Hrsg.), *New Trends in International Law. Festschrift in Honour of Judge Hisashi Owada*. Leiden/Boston: Brill/Nijhoff 2024. ISBN 978-90-04-68344-0, LXII, 481 S. € 279,95

Festschriften haben sich als Zeichen der Anerkennung für verdiente Wissenschaftler und Wissenschaftlerinnen (z. T. aber auch über diese Berufsgruppe hinausgehend) fest etabliert. Wer die Gelegenheit hatte, solche Werke zu organisieren bzw. mit zu gestalten,¹ weiß, wie herausfordernd diese Aufgabe ist, wenn man das Ziel verfolgt, sowohl der geehrten Person gerecht zu werden als auch damit einen nützlichen und interessanten Beitrag für die Wissenschaft zu leisten. Die vorliegende Festschrift zu Ehren des japanischen Völkerrechtlers Hisashi Owada (geboren 1932), von 2003-2018 Richter am Internationalen Gerichtshof in Den Haag und von 2009-2012 dessen Präsident, gehört zweifelsohne zu der Kategorie von Festschriften, die diese Herausforderung bestens erfüllen.

Das Leitmotiv dieser Festschrift lautet „New Trends in International Law“: In ruhigem Ton wird damit angekündigt, was in den einzelnen Beiträgen im Detail umgesetzt wird. Durchwegs renommierte Autorinnen und Autoren analysieren eine Vielzahl von Teilgebieten des Völkerrechts und zeigen neue Entwicklungen auf, die geeignet sind, wichtige Weichenstellungen für die Zukunft darzustellen. Besonders wertvoll an vielen dieser Beiträge ist, dass sie gleichzeitig eine Gesamtschau der behandelten Materie bieten und damit auch als äußerst nützliche Dokumentation für den Universitätsunterricht herangezogen werden können.

Beispielhaft sei hier auf folgende Beiträge kurz Bezug genommen:

Im ersten Teil zum allgemeinen Völkerrecht bietet Kenneth J. Keith einen interessanten Überblick über die Entwicklung des Kriegs- und Humanitätsrechts, wobei dieser Prozess an herausragenden Persönlichkeiten und an internationalen Vereinbarungen festgemacht wird. Ein Leitmotiv seiner Ausführungen ist die Überlegung, dass dieses Rechtsgebiet, das vielfach auf Kritik stößt, da es nicht unmittelbar den Krieg ächtet, nach wie vor von großer Bedeutung ist. Krieg bleibt nämlich ein Faktum und der Schutz sowohl der Kombattanten als auch der Zivilbevölkerung damit von essenzieller Bedeutung. Im Mittelpunkt steht hier der Schutz des Individuums und der Versuch, unnötiges Leid zu vermeiden, weshalb auch eine Unterscheidung zwischen „gerechten“ und „ungerechten“ Kriegen in diesem Zusammenhang nicht getroffen werden darf, wie der Autor zutreffend hervorhebt.

¹ Der Rezensent kann auf die Mitherausgabe der Festschriften für Ernst-Ulrich Petersmann, *Reflections on the Constitutionalisation of International Economic Law* (Martinus Nijhoff 2013), Heinrich Neisser, *Rechtsstaatlichkeit, Grundrechte und Solidarität in Europa* (Facultas 2021) und Gilbert Gornig, *Band I: Europäisches Minderheitenrecht, Band II: Völkerrecht – Europarecht – Deutsches Recht* (Facultas 2023), verweisen.

Masahiko Asade setzt sich mit der gerade gegenwärtig so wichtigen Sanktionsthematik auseinander und geht dabei u. a. auf die Frage ein, ob unilaterale Sanktionen durch nicht unmittelbar selbst verletzte Staaten bei Verstößen gegen erga omnes-Bestimmungen zulässig sind. Bekanntlich wurde diese Frage durch die International Law Commission Draft Articles on State Responsibility (DASR) des Jahres 2001 nicht geregelt (siehe Art. 54 DASR). Sie ist aber gerade im Gefolge der russischen Aggression gegen die Ukraine akut geworden. Asade verweist hier auf eine widersprüchliche Staatenpraxis, hinsichtlich welcher eine Klärung noch aussteht.

Besonders aktuell ist auch der Beitrag von Simon Chesterman mit dem Titel „Artificial Intelligence and International Law: Structural Challenges and Institutional Possibilities“. Es kann kein Zweifel daran bestehen, dass die künstliche Intelligenz (KI) enormes positives Potenzial für die ganze Menschheit bietet, dass aber gleichzeitig damit auch einzigartige Gefahren verbunden sind. Chesterman zieht hier einen Vergleich mit der Nutzung der Atomenergie, die – angesichts eines ähnlichen Gefahrenpotenzials – verschiedenen internationalen Regulierungsregimen unterworfen worden ist, wobei insbesondere der internationalen Atomenergiebehörde (IAEA) eine tragende Rolle eingeräumt wurde. Tatsächlich liegen in diesem Zusammenhang auch schon Vorschläge, die in Richtung einer „International Artificial Intelligence Agency“ (IAIA) gehen könnten, vor, welcher eine ähnliche Funktion wie der IAEA zugeordnet werden könnte. Dies sind sicherlich wertvolle Überlegungen, doch Chesterman verweist diesbezüglich auch auf die Unterschiede der Regelungsmaterie und der internationalen Gesamtumstände hin: Die Gründung der IAEA gelang vor dem Hintergrund eines einzigartigen und akuten Bedrohungspotenzials, während in Bezug auf die KI die damit verbundenen Gefahren vielfach noch nicht hinreichend präsent sind.

Der zweite Teil der Festschrift mit Abhandlungen zum Beitrag des Internationalen Gerichtshofs (IGH) zur Entwicklung des Völkerrechts beginnt mit einer Studie von Abdulqawi Ahmed Yusuf mit dem Titel „The Inner Workings of the World Court for the Production of its Decisions“. Yusuf, selbst Richter am IGH, liefert in diesem Beitrag interessante Einblicke über das Zustandekommen von IGH-Entscheidungen in einem „iterativen und diskursiven Entscheidungsprozess“ (S. 132), der aber gerade durch die wachsende Zahl an Fällen mit immer größerer, auch technischer Komplexität Kapazitätsgrenzen aufzeigt.

Giorgio Gaja prüft den Beitrag des IGH zur Feststellung von zwingendem Recht (*jus cogens*). Er führt dabei aus, dass die diesbezüglich erzielten Ergebnisse – insbesondere im Lichte der Relevanz des zwingenden Rechts – noch

unbefriedigend seien und fordert die Entwicklung einer geeigneten Methode zur Feststellung von zwingendem Recht durch den IGH.

Marcelo Kohen analysiert die Entwicklung des Selbstbestimmungsrechts der Völker und geht dabei auf das – auch an anderer Stelle in dieser Festschrift angesprochene – IGH-Gutachten aus 2019 zum *Chagos*-Fall ein, in dem der IGH u. a. feststellte, dass das Selbstbestimmungsrecht der Völker schon vor 1960 Völkergewohnheitsrecht darstellte. In diesem Gutachten hat der IGH allerdings den spezifischen Rechten der von den Briten deportierten Einwohnern (den „Chagossians“) wohl zu wenig Beachtung geschenkt, da er die Anspruchsberechtigung für die Wahrnehmung des Selbstbestimmungsrechts gesamthaft bei Mauritius (einschließlich der Chagossians) sah.² Kohen verweist auch darauf, dass sich der IGH im Kosovo-Gutachten vom 22. Juli 2010 gegenüber einem „Sezessionsrecht als Notwehrrecht“ distanziert gezeigt hat. Zu Recht, wie dieser Rezensent schon seit langem argumentiert.³

Teil 3 dieser Festschrift betrifft „The Contribution of Political Organs and Specialized Agencies of the United Nations System to the Development of International Law“. Dort ragt der Beitrag von B. C. Nirmal mit dem Titel „Expanding Horizons of International Criminal Law“ hervor. Es ist dies eine sehr ansprechend geschriebene Kurzdarstellung zur Entwicklung des Völkerstrafrechts von den historischen Anfängen bis zur Gegenwart. Dabei werden auch die vielen Herausforderungen angesprochen, vor denen im Speziellen der 1998 eingerichtete und seit 2002 operative Internationale Strafgerichtshof steht. Der Autor erwähnt aber auch die verschiedenen in der Literatur vorgeschlagenen Reformvorschläge, sowohl was die Verbesserung der internen Abläufe angeht als auch in Hinblick auf eine Neuausrichtung der Anklage, die nach Ansicht einiger verstärkt aus dem politischen Fahrwasser gelenkt werden sollte. Sein Urteil über den Stand der Entwicklung des Völkerstrafrechts fällt insgesamt positiv aus. Doch der Autor regt auch eine breitere Perspektive an, die nur zu begrüßen wäre, vorausgesetzt, die internationale Staatengemeinschaft ist bereit, die dafür nötigen Ressourcen zur Verfügung zu stellen:

„As the matter stands now, international criminal law has very rudimentary criminology, penology, and victimology. International jurists and judges should therefore not only focus on the substantive and procedural aspects of

² So auch Peter Hilpold, ‘Humanizing the Law of Self-Determination – the Chagos Island Case’, *Nord. J. Int’l L.* 91 (2022), 189-215.

³ Siehe Peter Hilpold, ‘Sezession und humanitäre Intervention – völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte?’, *ZÖR* 54 (1999), 529-602, aber auch die Beiträge in Peter Hilpold (Hrsg.), *Kosovo and International Law. The ICJ Advisory Opinion of 22 July 2010* (Brill 2012).

International Criminal Law but also give thought to the development of criminology, penology and victimology of ICL.“

Sehr lesenswert ist auch der nachfolgende Beitrag von Shinya Murase zu den International Law Commission (ILC)-Berichten zum „zwingenden Völkerrecht“ samt dem abschließenden Entwurf mit dem Titel „The Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)“.⁴

Murase – selbst Mitglied der ILC – äußert in seinem Beitrag sehr deutliche Kritik am vorläufigen Endbericht, und zwar einmal in Bezug auf die nach seiner Sicht tautologischen Deutung des Begriffs des zwingenden Völkerrechts (ein Problem, das wir schon von Art. 53 der Wiener Vertragsrechtskonvention her kennen), insbesondere aber hinsichtlich der Aufnahme einer (nicht abschließenden) Liste an Beispielen für zwingendes Recht. Murase ist nicht grundsätzlich gegen einen solchen Ansatz (bzw. befürwortet ihn sogar ausdrücklich). Doch äußert er die Überzeugung, dass es gegenwärtig noch zu früh sei für die Aufnahme von Beispielfällen für zwingendes Recht wie „Aggression“, „Sklaverei“ oder „Selbstbestimmungsrecht“, da diese Konzepte völkerrechtlich noch in vielem weiter präzisiert und abgegrenzt werden müssten. Wie bereits oben in Bezug auf das Selbstbestimmungsrecht ausgeführt worden ist, hat diese Kritik einiges für sich. Zumindest ist damit aber ein Mindestmaß an Konkretisierung des Begriffs des zwingenden Völkerrechts erreicht. Auf dieser Grundlage werden nun die unter das „zwingende Völkerrecht“ subsumierten Konzepte – trotz ihrer Vieldeutigkeit und vielfach unscharfen Grenzen – pauschal dem zwingenden Völkerrecht zugerechnet. Die notwendigen Differenzierungen und Abgrenzungen sind dann im konkreten Einzelfall vorzunehmen – ein im Völkerrecht durchaus häufiger „dilatatorischer Formelkompromiss“.

Abschließend werden die Ausführungen von Murase sehr persönlich, wenn er auf Professor Evgeny Zagaynov verweist, der ebenfalls Mitglied der ILC ist, gleichzeitig aber auch Berater des russischen Präsidenten Vladimir Putin zum Zeitpunkt des russischen Überfalls auf die Ukraine war. Murase hält Zagaynovs fortdauernde Präsenz in der ILC für inakzeptabel und appelliert in diesem Zusammenhang an die moralische Verantwortung der Völkerrechtler.⁵

⁴ Berichterstatter Dire Tladi, Bericht von der UN Generalversammlung am 19. Dezember 2022 „zur Kenntnis genommen“ ((A/RES/77/103).

⁵ Vgl. dazu umfassend Peter Hilpold, ‘Teaching International Law in the 21st Century – Opening the Hidden Room in the Palace of International Law’ in: Peter Hilpold und Giuseppe Nesi (Hrsg.), *Teaching International Law* (Brill/Nijhoff 2024), 21-81.

Sein Urteil über das aktuelle Standing und die gegenwärtige Haltung und Arbeit der ILC fällt sehr kritisch aus, wobei er aber auch zugibt, dass die Schaffung einer Alternative gegenwärtig kaum möglich wäre.

Auch Teil 4 über „New Trends in International Economic Law“ enthält sehr spannende, äußerst lesenswerte Beiträge.

Frederick M. Abbott beschäftigt sich in seinem sehr informativen Beitrag mit der aktuellen Situation des Schutzes geistigen Eigentums im Völkerrecht. Er hebt dabei im Besonderen die fortbestehende Zersplitterung dieser Rechtsmasse im Spannungsfeld (älterer) multilateraler Abkommen, der World Trade Organization (WTO) (Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)-Abkommen), regionalen Integrationsabkommen und World Intellectual Property Organization (WIPO) hervor. Mit dem Inkrafttreten des TRIPS-Abkommens war die Hoffnung aufgekommen, dass nun auf WTO-Ebene die Fortentwicklung dieses Rechtsgebietes in zentraler und quasi-universeller Form vonstatten gehen könnte. Wie Abbott ausführt, wurden diese Hoffnungen durch das schwerfällige, aber für das WTO-Recht typische Konsensusverfahren de facto zunichte gemacht. Partiiell wurde diese Lücke durch regionale Integrationsabkommen geschlossen, doch geschah dies auch zum Preis einer weitreichenden Uneinheitlichkeit der Regeln. Spezielle Aufmerksamkeit widmet Abbott auch dem besonderen Zugang der Volksrepublik China zum Schutz geistigen Eigentums: Während ursprünglich ein solcher Schutz in diesem Land gänzlich abgelehnt wurde, blieb der Zugang Chinas zu dieser Frage auch nach dem Beitritt zur WTO prekär. Wenn der unzureichende nationale Schutz geistigen Eigentums durch Klagen im Ausland unterlaufen wird, antworten China (und mittlerweile auch andere Staaten) mit „Anti-Klage-Sanktionen“ („anti-suit injunctions“), denen ein unzulässiger Einschüchterungscharakter zugeschrieben wird – immer häufiger mit entsprechenden Gegenmaßnahmen durch Instrumente des nationalen Außenwirtschaftsrechts.

Moderne technologische Entwicklungen bringen erneut die Komplexität des Regelungsanliegens im Bereich des geistigen Eigentums zum Ausdruck. So schreibt Abbott, „ChatGPT may in a general sense be the greatest IP piracy machine ever created“. Dabei verleiht der Autor aber auch seiner Zuversicht Ausdruck, dass letztlich auch in Bezug auf ChatGPT ein Abgeltungsmechanismus für die Nutzung geistiger Rechte gefunden wird.

Rachel Brewster nimmt in Ihrem Beitrag mit dem Titel „Paths Forward in International Economic Law: The Restoration of the Appellate Body or a Return to the GATT“ Stellung zur aktuellen Krise des WTO-Streitbeilegungssystems sowie zu den wachsenden Beschränkungen des internationalen Handels aufgrund von Sicherheitsüberlegungen und der Konkurrenz zwischen den großen Handelsblöcken.

Tatsächlich hat die fehlende Nachbesetzung des Appellate Body das WTO-Streitbeilegungssystem in eine tiefe Krise gestürzt.⁶ Das Multi-Party Interim Arbitration Appeals Agreement (MPIA), das eine Art „Ersatzberufungsinstanz“ (mit verbindlicher Zuständigkeit) schafft, kann aufgrund der beschränkten Teilnehmerzahl nur partiell Abhilfe bieten. Die General Agreement on Tariffs and Trade (GATT)-Panels sind noch aktiv. Brewster sieht generell eine Rückkehr des WTO-Streitbeilegungssystems zur Situation, wie sie vor Errichtung der WTO bestand: Dies wäre somit ein großer Schritt zurück von der Verrechtlichung der Streitbeilegung hin zu einer Stärkung der diplomatischen Komponente. Im Übrigen werden die internationalen Handelsbeziehungen stark von der Rivalität der westlichen Marktwirtschaften mit China geprägt. Brewster beschreibt sehr anschaulich die rechtlichen Konsequenzen und Perspektiven dieser Situation.

Zahlreiche weitere Beiträge, die aus Platzgründen hier nicht berücksichtigt werden können, runden diesen Band ab. Insgesamt stellt diese Festschrift eine echte Bereicherung für die aktuelle völkerrechtliche Diskussion dar. In diesem Sinne erscheint es besonders bedauerlich, dass Festschriften regelmäßig publizistische Produkte mit besonders hohen Zutrittsbarrieren für die Leserschaft (auffallend hoher Preis,⁷ nur in wenigen Bibliotheken verfügbar) sind. Ein Band wie dieser sollte hingegen in jeder Völkerrechtsbibliothek stehen bzw. idealerweise online frei verfügbar sein!

Peter Hilpold, Innsbruck

⁶ Siehe dazu auch Peter Hilpold und Richard Senti, *WTO – System und Funktionsweise der Welthandelsordnung* (Facultas/Nomos/Schulthess 2024).

⁷ Der vorliegende Band kostet über 250 €!

Reece Thomas, Katherine: The Commercial Activity Exception to State Immunity. Cheltenham, UK: Edward Elgar Publishing 2024. ISBN 978-1-80392-345-1, x, 200 pp. £81.00

It is trite to say that most states nowadays recognise a rule of ‘restrictive immunity’ under international law, according to which foreign states are exempted from the jurisdiction of domestic courts with respect to acts performed in a ‘public’ or ‘sovereign’ capacity (*acta jure imperii*) but not with respect to acts performed in a ‘private’ or ‘non-sovereign’ capacity (*acta jure gestionis*).¹ There is however precious little consensus on where the line between these two categories of acts is to be drawn, despite decades of domestic court practice and scholarly debate on the issue.² Katherine Reece Thomas’s *The Commercial Activity Exception to State Immunity* is the latest addition to this rich scholarship, zooming in on the most widely accepted yet persistently contested exception to state immunity.

Curiously, Reece Thomas does not fully explain the rationale for focusing specifically on the commercial activity exception or clarify how this exception should be understood. The book’s stated focus is ‘on the move from absolute immunity to the restrictive doctrine’ (p. 1), with its goals including an exploration of ‘how sovereign and non-sovereign acts are distinguished’, the ‘history and scope of the commercial activity exception’, and an ‘analysis of the meaning of “commercial” as applied to immunity from suit and enforcement’ (p. 2). It also mentions ‘significant gaps in the restrictive doctrine that need addressing, notably in the context of claims involving accusations of gross violations of human rights’ (p. 2). However, these ‘gaps’ are not explicitly defined. References to human rights and, later, to ‘rule of law and access to justice’ suggest that the book aims to engage – and indeed does engage in later chapters – with ongoing debates about a potential exception to state immunity for human rights claims.³

At this point, one might reasonably question the connection between these issues and the ‘commercial activity exception’ referenced in the title. The book suggests that ‘the commercial use/activity test may assist with the human rights arguments’ (p. 2). However, the confusion that arises from the introduction appears to stem from a terminological ambiguity that remains

¹ China, one of the last states to explicitly adhere to a rule of absolute immunity, recently shifted to the restrictive approach adopted by most other countries with the enactment of its 2023 Foreign State Immunity Law; see William S. Dodge, ‘The Foreign State Immunity Law of the People’s Republic of China’, ILM 63 (2024), 312-319 (312).

² See Hazel Fox and Philippa Webb, *The Law of State Immunity* (Rev and Up 3rd edn, Oxford University Press 2015), 399.

³ See Roger O’Keefe, ‘State Immunity and Human Rights: Heads and Walls, Hearts and Minds’, Vand. J. Transnat’l L. 44 (2011), 999-1045 (999); Lorna McGregor, ‘State Immunity and Human Rights: Is There a Future after Germany v. Italy?’, JICJ 11 (2013), 125-145 (125).

unresolved throughout the book, at times creating uncertainty regarding the scope of the analysis and the conclusions reached.

As Yang pointed out, there are two ways to understand ‘commercial activity’ in the context of state immunity.⁴ In a narrow – and more precise – sense, it refers to specific situations, such as those outlined in Article 10 of the 2004 United Nations Convention on State Immunity (UNCSI), where a state cannot claim immunity from the jurisdiction of a foreign court if it engages in trading or other commercial transactions with a foreign party. In this sense, commercial activity constitutes a significant, though by no means the only, exception to state immunity.⁵

In a broader sense, ‘commercial activity’ is sometimes used to describe all acts that are not immune under the restrictive doctrine by virtue of not being ‘sovereign’ or ‘governmental’.⁶ However, this broader use of the terms is less than felicitous, as noted by Crawford:

[T]here are many difficulties with the notion of ‘commercial activity’ as the central or distinguishing concept in a regime of restrictive immunity [...] [a]s such a classification it is both simplistic and incomplete. Not all State activities can be described either as ‘governmental’ or ‘commercial’: indeed, very many cannot.⁷

To her credit, Reece Thomas does not claim that commercial activities are the only acts for which immunity should be denied and acknowledges that most jurisdictions with codified immunity laws provide exceptions for a broader range of activities (p. 16). However, the book does not settle on a clear definition of ‘commerciality’, and this ambiguity affects both the selection and analysis of relevant issues. This is not to suggest that commercial activity is unworthy of discrete analysis – in fact, it is arguably the most coherent exception to state immunity due to the relative autonomy of the concepts of trade and commerce.⁸ However, it is not always clear that the book confines its understanding of commerciality to these narrower parameters.

Following a chapter summarising the emergence of the restrictive doctrine more broadly, Chapters 3 and 4 focus on the commercial activity exception

⁴ Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012), 75.

⁵ Some widely accepted exceptions to immunity are not related to the commercial character of the acts, such as the exceptions for so-called ‘territorial torts’.

⁶ E. g., Section 1602 of the Foreign Sovereign Immunities Act 1976 (USFSIA) asserts that ‘[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned’.

⁷ James Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’, *BYIL* 54 (1983), 75–118 (91).

⁸ Crawford (n. 7), 90.

stricto sensu. Chapter 3 examines the development of this exception in the United Kingdom (UK) and the USA, with some comparative insights from other legal systems. The analysis reveals that, despite variations in the wording of relevant statutes, the key questions typically revolve around how broadly the activity underlying the claim is defined. This leads Reece Thomas to revisit the longstanding debate between nature and purpose, noting that, while statutes like the UK State Immunity Act (UKSIA) establish ‘a very clear “nature” test’ (p. 25), courts often reintroduce a purpose element by considering the ‘context’ of the transaction (p. 23). This outcome should not come as a surprise, given that the nature/purpose dichotomy has long been recognised as untenable.⁹ The grant of immunity often appears to hinge more on the proximity between the activity at the basis of the claim and the public purpose that ultimately underpins all state activities.¹⁰ Reece Thomas does not articulate the issue in these terms, but she is undoubtedly correct in concluding that the hybrid ‘nature in context’¹¹ test represents the approach on which most courts seem to converge (p. 53).

Here Reece Thomas also ventures into a proposal for law reform, rhetorically asking whether it is ‘not time to [...] draw up a list of immune transactions and property’ (p. 32). While not a new suggestion – it was included in a 1991 Resolution adopted by the *Institut de Droit international* following a proposal by its Rapporteur, Ian Brownlie¹² – it remains a thought-provoking idea that has found support in the literature.¹³ However, questions of commerciality are unlikely to be fully resolved by such a list,¹⁴ particularly given that ‘non-sovereign’ does not necessarily equate to ‘commercial’.

Chapter 4 sets out to explore ‘international law developments’ relating to the commercial activity exception, though its focus is primarily on relevant provisions of the European Convention on State Immunity of 1972 (ECSI) and of the UNCSI. The chapter offers some points of comparison between the UNCSI, UKSIA, and United States Foreign Sovereign Immunities Act

⁹ Crawford (n. 7), 95.

¹⁰ In a sense, this can be viewed as the flipside of the question courts consider when determining whether a claim ‘relates to’ (p. 32) or is ‘based upon’ (p. 41) a commercial activity.

¹¹ Lord Wilberforce in *I Congreso* established the test by assessing the nature of an act in its context, which allows courts to consider its purpose despite this being absent from the UKSIA’s relevant provisions; see House of Lords, *Owners of Cargo Lately Laden on Board The Marble Islands v. Owners of The I Congreso del Partido*, judgement of 16 July 1981, [1983] 1 AC 244, 267.

¹² Institut de Droit International, Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement (Session of Basel, 1991).

¹³ Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008), 61.

¹⁴ See Yang (n. 4), 81: ‘Realities are far more complex than can be reflected by any list, however exhaustive.’

(USFSIA), while also questioning the extent to which the UNCSI can be considered reflective of customary international law (p. 62). However, Reece Thomas stops short of conducting a detailed analysis of state practice and *opinio juris*, leaving the conclusion on this point unresolved (p. 63).

The remainder of the book is ostensibly not about the commercial activity exception, at least not in the narrow sense. That said, the concept of commerciality remains relevant to other rules of immunity, as illustrated in Chapter 5, which examines immunity from enforcement against state assets. These rules, often referred to as the ‘last bastion’ of sovereignty, are distinct from and narrower than the rules governing immunity from jurisdiction.¹⁵ Notably, as Reece Thomas observes, the only exception that enjoys some degree of acceptance among states is for property ‘in use for a commercial purpose’. This exception is significant not only because it is restricted to commercial use – as opposed to merely ‘non-governmental’ use¹⁶ – but also because it explicitly adopts a test of purpose rather than nature (p. 65).

Still, true to the book’s overall approach, Reece Thomas does not delve into the principles underpinning this legal framework but instead focuses on the practical challenges of identifying assets that fall within this exception. To navigate the complex and often inconsistent case law, Reece Thomas explains that English courts have adopted a ‘purpose in context’ test (p. 70), whereby they examine the broader context to determine whether immunity applies to state assets such as embassy bank accounts.¹⁷ Reece Thomas seems to approve this approach and suggests that the broader context should inform the treatment of a wider range of assets (p. 72). While this is intuitively persuasive, I find the explanatory power of the test less compelling. Property can serve multiple purposes, not all of which are readily apparent from its use, and all purposes are ultimately part of the broader context. How, then, should courts decide which purpose prevails? Reece Thomas herself acknowledges that some difficult questions remain unresolved in judicial practice, such as whether it is appropriate to distinguish between current use and origin in cases where definitive evidence of current use is lacking (p. 73).

As the book progresses, the emphasis on commerciality ebbs and flows. Chapter 6, which addresses the definition of a ‘state’ for the purposes of state immunity, illustrates this shift. The primary challenge here lies in determining when separate state entities, such as agencies and instrumentalities, should be granted immunity and whether their assets can be targeted in

¹⁵ ILC, ‘Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries’, (1991) ILCYB, Vol. II, Part Two, 56.

¹⁶ Note that UNCSI, Art. 19 adopts both terms.

¹⁷ See House of Lords, *Alcom Ltd. V. The Republic of Colombia*, judgment of 12. April 1984, [1984] AC 580, 603 (*per* Lord Diplock).

claims against the state. Reece Thomas observes that the UKSIA emphasises separateness, as these entities do not enjoy immunity under Section 14(1) unless the proceedings relate to actions undertaken in the ‘exercise of sovereign authority’ where the state itself would have been immune. However, establishing a test for what qualifies as an ‘exercise of sovereign authority’ is a significantly more demanding task than defining ‘commercial activity’, and the UKSIA offers no guidance on this point (p. 111). It might therefore be interesting to assess the extent to which courts revert to a test of commerciality to determine whether an activity falls outside the boundaries of sovereign authority. However, this is not a line of reasoning that Reece Thomas chooses to pursue. Instead, her focus shifts to demonstrating that domestic courts – even when operating under different statutory frameworks, such as the USFSIA – employ a multi-factor assessment to decide whether a separate entity is immune. This leads her to the conclusion that ‘maybe context is all’ (p. 114).

Chapter 7 is where the unifying thread of the book begins to fray. The chapter ostensibly focuses on the immunity of central bank assets, a topic that has gained prominence in light of recent sanctions against Afghanistan and Russia. These assets fall into a specific category of property in use for ‘government non-commercial purposes’ and, except in extraordinary circumstances, are recognised as immune by the UNCSI and most states.¹⁸ Reece Thomas acknowledges this and notes that no reasonable interpretation of the commercial use exception could encompass sanctions against central banks (p. 141). Rather than concluding the analysis at this point, however, Reece Thomas delves into whether recent sanctions involving the freezing and seizing of central bank assets can be reconciled with the rules of immunity. While this topic is undoubtedly interesting, given that commerciality plays no role in the discussion, one might question whether its inclusion is motivated more by its current prominence in academic discourse than by a substantive connection to the book’s central theme.

Finally, Chapter 8 explores how the commercial activity exception can have non-commercial applications, particularly in the context of human rights claims. This is a promising avenue for examining the pressure that recent litigation is placing on the commercial activity exception. The limited number of accepted exceptions to state immunity, coupled with the growing involvement of states in activities that blur the line between public and private spheres, and the International Court of Justice’s finding that no

¹⁸ See UNCSI, Art. 21(c); Ingrid (Wuerth) Brunk, ‘Immunity from Execution of Central Bank Assets’ in: Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019), 266–284 (280 f.).

customary exception exists for human rights violations,¹⁹ has created fertile ground for creative attempts to fit human rights claims into established exceptions, such as that for commercial activities. To what extent can this exception be stretched to accommodate such claims? At what point does the exception risk swallowing the rule? Having sidestepped foundational questions about the meaning of commerciality, the book is not ideally positioned to provide a definitive answer to these questions.

After summarising the debate on a human rights exception to state immunity, the chapter examines recent case law from the United States (US) and UK concerning the use of employment contracts to ground jurisdiction in cases involving modern slavery and human trafficking. Reece Thomas cites approvingly Philippa Webb's view according to which framing human rights violations as employment claims may offer a new pathway for holding states, diplomats, and international organisations accountable.²⁰ Yet, critical issues leading up to this conclusion are only touched upon. For instance, Reece Thomas notes that employment contracts are treated as a distinct exception under the UKSIA (p. 162),²¹ whereas under the USFSIA, they fall within the commercial activity exception (p. 167). This discrepancy raises questions about the extent to which these exceptions overlap and the appropriate test to be applied in employment cases: is profit the key factor? Should the focus be on whether a private person could enter into such contracts? Or does it hinge on whether the work performed is governmental in nature?²² Reece Thomas highlights these issues (p. 168) but does not provide definitive answers.²³

Instead, the book turns to cases involving individual foreign diplomats, where courts are increasingly more open to exercise jurisdiction in employment disputes (p. 164). Strictly speaking, however, these cases involve a different type of immunity, namely diplomatic immunity.²⁴ To be sure, commerciality also plays a role here, as the 1961 Vienna Convention on Diplomatic Relations (VCDR) deprives a diplomatic agent of immunity in civil proceedings for 'any professional or commercial activity exercised [...] outside his official functions'.²⁵ Still, the extent to which conclusions drawn

¹⁹ ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy), judgment of 3 February 2012, ICJ Reports 2012, 99 (139).

²⁰ Philippa Webb, 'The Immunity of States, Diplomats and International Organizations in Employment Disputes: the New Human Rights Dilemma?', *EJIL* 27 (2016), 745-767 (747).

²¹ The same distinction can be found in UNCSI, Art. 11.

²² See Yang (n. 4), 93.

²³ Compare and contrast the multi-factor framework in Webb (n. 20), 749.

²⁴ See Eileen Denza, 'Interaction Between State and Diplomatic Immunity', *Proceedings of the ASIL Annual Meeting* 102 (2008), 111-114 (111).

²⁵ Vienna Convention on Diplomatic Relations of 18 April 1961, 500 UNTS 95, Art. 31.

from this case law can and should be transferred to state immunity is not fully articulated.

The remainder of the chapter explores the applicability of the commercial activity exception in criminal cases, such as those involving terrorist financing. The commercial link in these contexts appears tenuous, and Reece Thomas acknowledges that such claims have largely failed. This includes UK cases on the recognition of US judgments against state sponsors of terrorism and a US case against a Turkish bank, where the Supreme Court avoided addressing the commercial activity exception altogether. The book concludes with an Appendix summarising recent developments on state immunity and human rights in Italian courts, although the commercial activity exception played no role in this context.

The picture the book presents is ultimately one of complexity and heterogeneity across different legal systems. The book does a good job in describing this complexity, providing a detailed account of the various areas where commerciality has influenced the application of immunity rules. However, it does not attempt to make sense of this complexity or reconcile the divergent approaches. From the outset, the book explicitly states that it 'is not going to examine the theoretical bases for [state] immunity' (p. 1). Consequently, it does not seek to develop a comprehensive theory of commerciality or critically evaluate the role this concept should play in the contemporary state immunity regime. Instead, the aim is to offer 'an introduction only' to 'state immunity in a commercial context' (p. 8), primarily through the mapping of domestic court practice and scholarly debates in this area.

On these terms, the book undoubtedly succeeds. Its broad scope allows Reece Thomas to tackle some of the most complex and topical issues of state immunity while occasionally critiquing existing inconsistencies and accountability gaps. It is easy to see this book becoming a valuable resource for scholars and practitioners addressing specific state immunity issues, particularly in the UK and US. Where the book is less effective, however, is in its limited efforts to synthesise and develop its findings. One is left wondering whether, despite nominal differences in their approaches, domestic courts in different jurisdictions might, in practice, often reach similar conclusions on comparable facts. Unfortunately, the book also lacks meaningful attempts to identify customary international law or critically assess domestic court practice in light of it.

In conclusion, it is worth considering whether an in-depth assessment of the commercial activity exception to state immunity can truly avoid engaging with the fundamental principles underpinning the rules that govern it. As many have observed, the difficulties and uncertainties in the application of state immunity largely stem from the fact that its foundations remain, to this

day, ‘poorly articulated’.²⁶ While dispensing with theory has undoubtedly facilitated the development and codification of state immunity rules, it is widely recognised that the exceptions listed in immunity codifications are a matter of legislative convenience.²⁷ In hard cases, these statutory provisions offer limited guidance, and the absence of a deeper understanding of the principles at play is a recipe for inconsistency and confusion.

Put simply, the danger of analysing state immunity on a granular level without an overarching framework is missing the forest for the trees. While it may be true that differing domestic court approaches cannot always be reconciled, this raises a broader question: to what extent does international law permit a margin of appreciation at the boundaries of the restrictive doctrine?²⁸ This is not merely a doctrinal issue. As Reece Thomas emphasises (p. 151), the right of access to justice, which serves as a counterbalance to state immunity, raises significant concerns about whether granting immunity in cases not warranted by international law could expose the forum state to liability for breaching its human rights obligations. This is a complex question that, in some respects, lies beyond the scope of Reece Thomas’s book. However, given the increasing pressure on state immunity in domestic court practice,²⁹ it is an issue that cannot be easily set aside.

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²⁶ See Crawford (n. 7), 77; Van Alebeek (n. 13), 47.

²⁷ Christoph H. Schreuer, *State Immunity: Some Recent Developments* (Grotius 1988), 7.

²⁸ For example, activities traditionally regarded as governmental, such as the state’s issuance of bonds to private individuals, have recently been recognised as commercial; see Fox and Webb (n. 2), 404. This raises the question of whether courts recognising immunity in such circumstances would exceed what is required by international law.

²⁹ See Régis Bismuth, Vera Rusinova, Vladislav Starzhenetskiy and Geir Ulfstein, *Sovereign Immunity Under Pressure* (Springer 2022).

Avbelj, Matej (ed.): The Future of EU Constitutionalism. Modern Studies in European Law, vol. 116. Oxford/London/New York/New Delhi/Sydney: Hart Publishing 2023. ISBN, 978-1-5099-6290-7 (paperback), 256 pp. \$ 40.56

Introduction

The Future of EU Constitutionalism is an excellent collection of essays discussing the potential and challenges of the EU's constitutional setting. The volume offers a refreshing account of European Union (EU) constitutionalism through an analysis of EU common values, its formal, economic, and social constitution and sovereignty in light of challenging events of the past decade such as Brexit's strike against European integration, the Covid-19 pandemic, threats to EU core values of rule of law and Russia's invasion of Ukraine.

The book's reflection leans against the backdrop of the 2021 Conference on the Future of Europe. The Conference's methodology combined a digital platform with in person events hosting debates held by Citizens' Panels¹ (European and National) and civil society. The European panels were organised through lottery selections of residents weighted by criteria to ensure accurate representation of EU diversity from a gender, geographical, educational and socio-economic standpoint. One third of the 200 panellists was between 16 and 25 years of age.² National panels were organised by Member States. The Panels held their discussions in small groups and plenary sessions and, in the end, produced a final report.³

In June 2022, the Commission adopted a Communication to follow up on the Conference's recommendations. Some panels' ideas require reforms to be implemented.⁴ In November 2023, the European Parliament adopted a resolution asking the European Council to call a convention for the revision of the Treaties, pursuant to Art. 48 TEU.⁵ As of early 2024 the item was not yet on the Council's agenda.⁶ The Parliament's reform proposal includes

¹ European Citizens' Panels, <<https://wayback.archive-it.org/12090/20230417170950/https://futureu.europa.eu/en/assemblies/citizens-panels>>, last access 21 January 2025.

² Conference on the Future of Europe: European Citizens' Panels Panels' Guide, <Guide link>, last access 21 January 2025.

³ Conference on the Future of Europe, 'Report On The Final Outcome' (May 2022), <report link>, last access 21 January 2025.

⁴ European Commission, 'Conference on the Future of Europe Putting Vision into Concrete Action', 17 June 2022, COM(2022) 404 final, at 3.

⁵ European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, 2022/2051(INL).

⁶ Ralf Drachenberg, Annastiina Papunen, Rebecca Torpey and Christoffer Nielsen, 'Key Issues in the European Council: State of Play in March 2024', European Parliamentary Research Service, March 2024, at 24, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2024/757805/EPRS_STU\(2024\)757805_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2024/757805/EPRS_STU(2024)757805_EN.pdf)>, last access 21 January 2025.

creation of conditions for some of the Conferences' panels' recommendations to be implemented (e.g. in the area of public health an expansion of EU competences would be needed)⁷ and institutional reforms to empower the Parliament, increase the Council's transparency and the Commission's accountability as well as strengthening the role of social partners.⁸ Additionally, it 'calls for the strengthening of instruments for citizens' participation in the EU decision-making process within the framework of representative democracy'.⁹

Meanwhile, the Commission committed to support Citizens panels as a regular method of deliberation, albeit at its discretion. Since December 2022, five panels have taken place on food waste, virtual world, learning mobility, energy efficiency, and tackling hatred in society.¹⁰

To sum up, the Conference left a legacy in terms of Europeans' engagement, and a lukewarm strengthening of participatory democracy is part of a Treaty Change proposal. Paul Craig admonished us against dismissing the 2003 Convention as a failure because 'the Constitutional Treaty never attained legally binding status, but its substance lives on through the Lisbon Treaty'.¹¹

Irrespective of the fate of the Treaty Change proposal, the Conference left open questions that constitutional scholarship is thrilled to address. This is where *The Future of European Constitutionalism* intervenes.

Despite lacking a constitutional ambition, the Conference was an experiment – the first of its kind in the EU – of supranational level deliberation, allowing EU residents to advance proposals for legislative reforms in key EU law areas such as health, climate change, environmental protection, social fairness, digital transformation, Rule of Law, migration challenges, security, and EU's democratic foundations and processes.¹² This is probably why the authors decided to use it as the volume's symbolic starting point. In this sense, *The Future of EU Constitutionalism* inherits the spirit of *The Rise and*

⁷ European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, 2022/2051(INL), at 14.

⁸ European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, 2022/2051(INL), para. 11.

⁹ European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, 2022/2051(INL), para 12.

¹⁰ 'European Citizens Panel, Citizens Engagement Platform, <https://citizens.ec.europa.eu/european-citizens-panels_en>, last access 21 January 2025.

¹¹ Paul Craig, 'Treaty Amendment, the Draft Constitution and European Integration' in: Nick Barber, Maria Cahill, Richard Ekins (eds), *The Rise and Fall of the European Constitution* (Hart Publishing 2019), 51-72 (67).

¹² Joint Declaration of the European Parliament, the Council and the European Commission on the Conference on the Future of Europe of 10 March 2021, 'Engaging With Citizens For Democracy – Building a More Resilient Europe', 2021/C 91 I/01, (4).

Fall of the European Constitution,¹³ a widely read work that offered a reflection on EU's Constitutional aspirations against the backdrop of the unratified Draft European Constitution.

Whereas the 2003 Convention was a defining Constitutional moment, the 2021 Conference's mandate was void of references to 'an explicit big C project', as the volume's editor Matej Avbelj points out (p. 3). Nonetheless, it represented the 'latest attempt to reset the European project' as Neil Walker points out (p. 13). The book answers the question of what future does EU constitutionalism have, considering the delicate balance it managed to achieve until now notwithstanding the lack of a proper constitutional arrangement? Given its unique nature, EU Constitutional ambitions are at the same time an allure and a burden as argued by Walker. However, to fully embrace its Constitutional ambition the EU must first address underlying political questions and activate social processes, as policy generation typically precedes explicit constitutionalisation (p. 24). The substantive part of the book, summarised in the following paragraph, does just that. It is composed by seven chapters dealing with EU common values, the formal, social and economic constitution, and sovereignty.

The Past and Present of European Constitutionalism

Alun Gibbs and Matej Avbelj start by exploring EU's common values.

Gibbs wonders whether the EU can cultivate common values (p. 25) to solve the uncertain status of its political form (p. 29). The 'political sense of sovereignty' (p. 31), connected with the material conditions of the Constitution, was suppressed in favour of a legalistic account of sovereignty and this for Gibbs is at the core of EU's legitimacy crisis, showing post-sovereignty claims are ill adapted to describe the EU's reality (p. 30). Early Court of Justice of the European Union (CJEU) case law echoed the development of the modern state and a conception of sovereignty (pp. 32-33), but the EU's political form remained undetermined. Consequently, EU common values have not been construed around a shared political experience (p. 33). Changing this requires 'imagination, dialogue and reflection' (p. 34).

Matej Avbelj details the deep fissures within European common values (p. 36). The migration crisis and the rule of law crisis exposed a lack of solidarity within the EU and showed how fragile it can be (p. 45). In turn, the Covid-19 pandemic crises brought Member States closer together (p. 45). The EU thus requires a 'deepening of its social, economic, security, defence, public health, and therefore political and democratic foundations' (p. 48) through a

¹³ Craig (n. 11), 67.

formal constitution making process, that would allow to overcome value fissures by openly debating, and solving, them.

Mattias Wendel, Giuseppe Martinico, Sacha Garben address the EU's formal, social and economic constitution.

The contributions by Mattias Wendel and Giuseppe Martinico analyse constitutional conflicts within the EU through the lenses of the ruling by the German Federal Constitutional Court on the European Central Bank's Public Sector Purchase Programme of 2020 (PSPP). For Mattias Wendel the case was an instance of 'badly tempered constitutional pluralism' (p. 68) where political dialogue eventually served as a tool to resolve conflicts whose legal answer was missing. However, it may not be viable during a crisis of EU's core values, such as the rule of law (p. 69). In turn, Giuseppe Martinico argues that the PSPP episode was a confirmation of EU's federal nature. Leveraging American federalism theory, the author argues that the conflict was a healthy example of EU's cooperative federalism (p. 85).

Sacha Garben argues that before the EU drafts a 'big C' constitutional settlements, it ought to address three problems; the public support for the core constitutional authority claim upon which EU law is based, currently taken for granted; the status of social rights that, albeit having the same legal status as the Treaties, are left behind¹⁴ (p. 99); the erosion of democratic legitimacy of EU legislation caused by the rise of intergovernmental decision making outside the ordinary legislative procedure of EU law (p. 100), especially when it involves fundamental rights of vulnerable persons (e. g. the Dublin Regulation) (p. 103).

Federico Fabbrini addresses the impact on Europe's Economic and Monetary Union of Next Generation EU, that required an enlargement of the European Commission's fiscal, borrowing and spending powers (p. 117) that would have been impossible without the pressure of responding to the Covid 19 crisis. While it is difficult to tell whether these changes will be institutionalised – e. g. the German Federal Court has ruled that NextGenerationEU (NGEU) cannot lead to the creation of a permanent instrument (p. 121) – path dependency theory opens the possibility that they may (p. 122).

Finally, Cormac Mac Amhlaigh, Daniel Augenstein and Katarina Vatovec focus on sovereignty.

¹⁴ Social rights protection challenges lie in implementation as well, argued by Cristina Fasone and Marta Simoncini, 'Fighting with Hands Tied? The European Social Fund and the Promotion of Social Inclusion', *Italian Journal of Public Law* 13 (2021), 478-510 (500). For a review of the implications of the CJEU case law on the freedom of movement, healthcare, higher education, collective labor law vis a vis an area like gambling see Vilija Velyvyte, *Judicial Authority in EU Internal Market Law: Implications for the Balance of Competences and Powers* (Hart Publishing 2022).

Cormac Mac Amhlaigh explains the resilience of EU constitutionalism despite the crisis. He does so through a political realist account of legitimacy, better than the traditional political moralist approach to EU legitimacy (p. 133). This account links legitimacy to the non-coercive capacity to respond to a demand of ‘securing of order, protection, safety, trust and the conditions of cooperation’ (p. 134), leaving room for disagreement, for example around models of liberal democracy (p. 137). In sum, it allowed the EU to resist through crisis because despite the challenges, it satisfies this supranational question.

Daniel Augenstein analyses how EU’s functional sovereignty connects with economic globalisation through sustainability requirements in EU’s internal market (p. 154) and human rights promotion by the EU through the global markets (p. 156). These instruments localise EU sovereignty internally and impose EU sovereignty externally. European citizens should reclaim the constitutional character of EU sovereignty to avoid the weakening of their States’ social protection system. Foreign citizens’ rights to claim democratic accountability in EU courts should be constitutionalised to balance EU’s expansion into foreign countries’ sovereignty (p. 158).

Katarina Vatovec closes the book mapping the historical development of the EU’s sovereignty. She illustrates how the Blocking Statute, EU’s response to extraterritorial application of foreign legislation providing secondary sanctions (p. 172), shows the importance of an affirmative EU sovereignty. Member States acting alone would not have been able to implement a similar legal measure domestically or have enough international influence (p. 178).

Is Deliberative Democracy in the Future of the EU Constitution?

Two points emerge as common themes, reading the volume. The need for grounding European Constitutional claims deeper into democratic legitimacy, and optimism in EU’s Constitutional future. I find plenty to agree with the authors on both points. However, I believe the book could have engaged more robustly with the topic of furthering deliberative democracy in EU constitutionalism, albeit its value remains unscratched by this mild point.

The volume does touch upon the relevance of deliberative constitutionalism for the European constitutional ambition in some points. Walker illustrates the unresolved tensions in the 2021 Conference, between its institutional and its bottom-up nature (p. 22), Mateji advocates for a Constitutional process that is ‘open, deliberate, explicit and inclusive’ (p. 49) and Garben proposes that after the Conference, a ‘reform movements should take the process of a constitutional project once again but this time with the EU’s core constitutional authority claim at the core of the public deliberation’ (p. 93). But, on the whole, I believe the book lost an opportunity to offer concrete

proposals on how to structure such a deliberative Constitutional Convention.

There is an established literature on deliberative democracy and constitutionalism¹⁵ that address important questions such as: how to deal with conflicts in deliberative processes?¹⁶ What is the role of civic and political actors?¹⁷ Should we foresee a combination of deliberative and participatory tools?¹⁸ How to promote agency for participants experiencing marginalisation?¹⁹ Should involvement be compulsory?²⁰ These and more questions would arise in thinking about applying deliberative methods to constitution drafting at the EU level. A scholarly effort around a European constitutional process can start from this body of knowledge and develop it further.

Conclusions

This book is a magnificent contribution to the EU constitutionalism commentary. Reading it is an opportunity to nurture scholarly thinking on the European Union as an aspirational constitutional project. Notwithstanding the uncertainty surrounding a Convention in EU's future, the book offers a refreshing suggestion that it is possible to embrace the spirit of incrementalism and adaptiveness that characterised the journey of EU Constitutionalism so far, without abandoning aspiration to a proper Constitutional arrangement.

Elena de Nictolis, Rome

¹⁵ Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (1st edn, Cambridge University Press 2018).

¹⁶ Amandine Crespy, 'Deliberative Democracy and the Legitimacy of the European Union: A Reappraisal of Conflict', *Pol. Stud.* 62 (2014), 81-98.

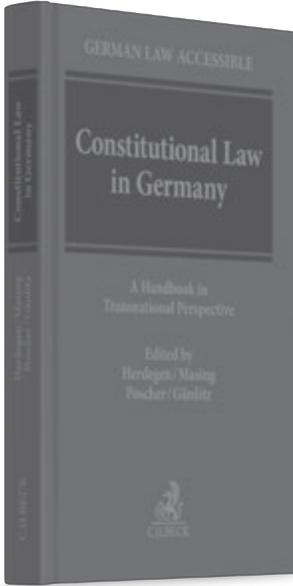
¹⁷ Wojciech Ufel, Leszek Tadeusz Koczanowicz, Piotr Ferenski and Agata Tokarek, 'State of Democracy Debate', August 2022, EUARENAS.

¹⁸ Proposed by Silvia Suteu and Stephen Tierney, 'Squaring the Circle? Bringing Deliberation and Participation Together in Processes of Constitution-Making' in: Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (1st edn, Cambridge University Press 2018), 282-294.

¹⁹ Nicole Curato, 'Asserting Disadvantaged Communities' Deliberative Agency in a Media-Saturated Society', *Theory and Society* 50 (2021), 655-677.

²⁰ Eoin Carolan and Seána Glennon, 'The Consensus-Clarifying Role of Deliberative Mini-Publics in Constitutional Amendment: A Reply to Oran Doyle and Rachael Walsh', *I.CON* 22 (2024), 191-203.

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