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Issue II
Climate Change and Human Rights

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In this issue
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University of Tartu Journal of International Law and Human Rights

This year's Journal edition embarks on a dual exploration that delves into Environmental Challenges and General International Law. This approach allows us to examine the complexities of environmental issues and their interaction with the broader framework of International law.

In the first section, we delve into the pressing Environmental Challenges of our time. The focus is on issues such as climate change, pollution, and ecological preservation. Central to this exploration is the Paris Agreement, a pivotal international treaty aimed at addressing climate change. We also discuss topics like the legal implications of environmental damage and the responsibilities of nations in safeguarding our planet.

Transitioning to the second part of the Journal, we broaden our perspective to General International Law. Here, we revisit foundational principles such as the Universal Declaration of Human Rights and the Vienna Conventions. We also analyze the case law of the International Court of Justice, examining how these legal frameworks shape the global landscape.

Guided by dedicated master's students from the University of Tartu, our Journal continues the tradition inspired by Delphine Saint-Martin. It offers a platform for thoughtful analysis, fostering a deeper understanding of the intricate connections between environmental challenges and the broader tapestry of International law.

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Advisory board

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Editorial

Dear readers,

It is my utmost honour to introduce to you the second edition of The University of Tartu Journal of International Law and Human Rights. I founded this Journal last year with the vision that students of all levels, professionals and experts would be able to publish a paper on topics of International Law and human rights with a legal and thorough analysis. I am extremely pleased to see that this vision is 'en route' to be accomplished with this new issue on Climate Change and Human rights

This topic is all the more relevant and topical now that the United Nations General Assembly adopted the Resolution A/RES/77/276 referring to Article 65 of the Statute of the Court, it requested the International Court of Justice to give an advisory opinion on "the obligations of States in respect of climate change".

In its Resolution the United Nations General Assembly referred to the unprecedented and civilisational dimension that climate change has. This can be seen in the various consequences of climate change be it extreme weather events intensification, on set effects aggravation, and biodiversity loss.

Climate change impacts environmental law, human rights, and International Law in general. Therefore, it is a wide issue with far reaching consequences and impacts. Hence the broad spectrum of papers that are gathered on the first half of this issue.

Nevertheless, this Journal aims to also include analysis on International Law and human rights. Therefore, a significant number of papers on various topics on International Law and human rights are followed by the second half of this issue.

In conclusion, it is my honour and pleasure to introduce to you the present issue, in the hope that you find it enlightening and thought provoking.

Sincerely,

Delphine Saint-Martin
Founder of the University of Tartu Journal of International Law and Human Rights
Member of the Advisory Board

Introduction

There is no denying that climate change impacts and threatens human rights (HR). Arguably, the most fundamental HR to be threatened and violated by it is the right to life. Climate change takes many forms of environmental destruction, as the Human Rights Committee (HRC) notes in the Teitiota case[1] it can be « both sudden onset environmental events, such as storms, and slow onset processes, such as sea-level rise ».[2] The impact of climate change is widespread, therefore States obligations to reduce its impact on HR have to be broad to encompass all the possible harm. These are analysed by the Inter-American Court of Human Rights (IACtHR) in its advisory opinion[3] on State obligations.

The right to life may be protected by the recognition of States' obligations to protect the environment, and the right to a healthy environment. This ensures that man-made and natural environment destruction will be taken into account, prevented and remedied. Environmental protection can ensure the protection of the right to life, and vice versa. The recognition of a right to a healthy environment as a HR encompasses this dynamic.

I pose the question, how is the right to life protected in the context of climate change?

I will be comparing the HRC case and of the IACtHR Advisory Opinion on the protection of the right to life and the potential recognition of a right to a healthy environment.

[1] HRC Teitiota v New Zealand, 2015 (subsequently referenced to as HRC)
[2] HRC §2.7; see also §9.11
[3] IACtHR Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia (subsequently referenced to as IACtHR)

I. Right to life

A. A Fundamental Right

The right to life is the most fundamental HR « whose effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights ».[4] Justified by the fundamentality of the right to life, the HRC places a high threshold to the violation of this right.[5] The two dissenting members urged for easier access to HRC and for sharing the burden of proof with the State.[6] In this case, the complainant claimed that his right to life had been violated by New Zealand because it refused to grant him refugee status and sent him back to Kiribati. However, in Kiribati, the land is gravely threatened by sea-level rise, impacting all areas of life. The HRC admitted the claim but not the violation or the substantial, personal and imminent risk on the right to life, because of the unreasonably high and unattainable threshold and the lack of evidence.[7] This puts into question the reason behind the high threshold and the burden of proof placed on the individual, which disadvantages complainants, and discourages changes by jurisprudence.

The HRC has recognised that there can be a violation of the right to life even if the victim is not deprived of their lives, this is linked to the concept of dignity.[8] Even though the HRC used the concept of dignity in its decision,[9] the living conditions of Kiribati did not fulfil that right.[10] This is because of the fluid nature of dignity, which may be used to justify and extend HR[11] or counterbalance HR, as everyone can agree on its minimum core.[12] Interestingly, the IACtHR uses the concept of dignity directly and indirectly through the right to personal integrity.[13] Therefore, I argue that the further interpretation of the right to life and decent life as encompassing environmental protection could be done through the concept of dignity, and the broad interpretation of the right to life.[14]

[4] HRC General Comments No36 (2018) on article 6 of the ICCPR, §2
[5] HRC, §9.3
[6] Ibid, Vasilka Sancin (Dissenting), §5
[7] Ibid, Laki Muhumuza (Dissenting), §5
[8] HRC GC No 36 on Right to life
[9] HRC, §9.4
[10] Ibid, Duncan Laki Muhumuza (Dissenting), §4-5
[11] Oxford Handbook of IHRL, Ch14 Human Dignity, by Paolo G Carozza, p.358
[12] Ibid, p.349
[13] IACtHR, §112
[14] HRC, §9.4

B. States Obligations

To ensure the right to life, IACtHR defines and details the States obligations and the HRC cites positive measures. In keeping with international law (IL), the IACtHR detailed the obligations in the face of potential environmental damage to respect and to ensure the rights to life and personal integrity as being the obligation of preventing, cooperation, the precautionary principle, and procedural obligations. As primary subject of IL, States are placed as « responsible for protecting the fundamental [HR] of their citizens ».[15]

The IACtHR was able to detail States obligations and its interpretation because it is an advisory opinion answering the questions of Colombia, which is conscious of the environmental degradation impact. Thus, it is more thorough than the HRC case, because even if the questions are focused on the States obligations, the court is not limited by narrow facts or evidence, nor trying to find a solution to a dispute.[16] Thus the Court even established a right to a healthy environment with state obligations. Whereas the HRC is more limited, therefore it recognised that the right to life may be impacted by climate change and a potential right to a healthy environment, but did not go further. The HRC recognised that Kiribati was taking measures to protect the right to life and face climate change, especially sea-level rise, it deduced that it is not unable nor unwilling to protect the HR. It respected state sovereignty by not placing substantial and detailed obligations on States, and by leaving the state and international community to take measures to relocate the population,[17] without taking into consideration that the population does not want to be relocated but the fulfillment of its HR.[18]

[15] A Personal appeal from the UN High Commissioner for Refugees
[16] IACtHR, §26
[17] HRC, §9.12
[18] Atoll Nations Make A Collective Stand For Their Right To Remain In Their Islands In The Face Of Climate Change

C. Future

As for the future, the question is how will these decisions be applied and taken into account by the member states and the international community, as climate change intensifies. The decisions of the HRC are not automatically binding but a significant amount of weight has been put on its interpretation,[19] and the advisory opinion of the IACtHR only has to be respected in the Organisation of American States (OAS). In fact, the « [c]challenges to the Inter-American system include a lack of political will from OAS members states ».[20] However, the mere fact that the HRC admitted the complaint communication and that the IACtHR decided that it had jurisdiction to answer these questions are important steps towards the recognition and consideration of the right to life in the context of environmental protection. Furthermore, advisory opinions' purpose is to be directed at member states and the international community, which means it may be used as a reference, as the HRC did.

One of the central question in the IACtHR Advisory Opinion is that of the jurisdiction concerning States obligations. The court decides that even if the jurisdiction is broader than the State's territory with obligations in regional treaty areas, for the State to have jurisdiction the State has to have effective control or authority over the person,[21] which is the general approach taken in IL. Even if the Court recognises that States have an obligation of preventing and avoiding causing transboundary damage or harm,[22] and that « States have the obligation *erga omnes* to respect and guarantee protection standards and to ensure the effectiveness of [HR] »[23] I argue that this interpretation could have been taken further. In line with the erga omnes obligation, a group right to the right to life and healthy environment could have been recognised. These rights would be to grant a right to life to vulnerable groups of people (indigenous peoples, tribes, women, children) and humanity as a whole, as its future is at risk.

[19] ICJ Guinea v Congo, §66
[20] Oxford Handbook of IHRL, Ch28 Universality and the growth of regional systems, by Christof Heyns and Magnus Killander, p.679
[21] IACtHR, §104
[22] Ibid, §104
[23] Ibid, §115

II. Right to healthy environment

A. Right to a healthy environment

Another significant change is the recognition by the IACtHR of the right to a healthy environment[24] and the HRC referring to that very paragraph in its 22nd footnote. The IACtHR acknowledge the relation between the protection of the right to life and a healthy environment, in line with the Protocol of San Salvador,[25] and the regional protection of forests, rivers and seas.[26] The reasoning is that States have to fulfill HR, because HR are endangered by environmental degradation, therefore States have obligations for environmental protection. The IACtHR notes that there is a clear relation between the two and that climate change negatively limits the « real enjoyment of [HR] ». The Court notes that all these HR are part of a whole, therefore the court links all the rights back to the notion of human dignity. The Court puts aside the differentiation made during the Cold War between these two so called first and second generation rights, and justifies its approach based on human dignity (cf. above on the use of dignity).

By referring to this paragraph, the HRC is acknowledging this approach of the American Court, without necessarily adopting it. It recognises that the environment should be protected, that States have obligations to further that goal, and that environmental degradation may impact HR.[27] As recognised by the HRC « environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life ».[28] Moreover, HR Council recognises the right to a healthy environment as being impacted, with the right to life, by climate change,[29] and referring to the IACtHR advisory opinion acknowledging its approach.[30] Thus there is a trend towards recognising the threat posed by environmental degradation and climate change and the need to recognise a right to a healthy environment, which is crucial as small islands are particularly threatened.[31]

[24] IACtHR, §47
[25] *Protocol of San Salvador*, Article 11
[26] IACtHR, §62
[27] HRC, §9.4 and 9.5
[28] HRC, §9.4 and HRC GC No. 36, §62
[29] HR Council 46/28, §25
[30] Ibid, §36
[31] Ibid, §19

B. Judicial interpretation

There is a clear evolution of the IACtHR approach to HR protection in the context of climate change, from the refusal of the 2005 Inuit Petition to the Inter-American Commission on HR.[32] So the recognition of the right to a healthy environment has been analysed by the two concurring opinions of the Advisory Opinion as being going further than what the Court should and can recognise. They deemed it to be judicial activism, that judges are taking the place of the legislator. However, it can be argued that not only has the right to a healthy environment previously been recognised,[33] but the role of the court also ensures the protection of the HR.

There are two main ways of interpreting a treaty, the textual approach and the evolutive approach. While treaties are to be interpreted following the text and the ordinary meaning of the wording, it is also important to keep in mind the object and purpose of the treaty,[34] to protect HR. Judicial bodies have a duty to ensure the right to life are up to date and that HR are nor short of content, ensuring the concept of effect utile.[35] I argue that it is also important to keep in mind that the law must be able to adapt and evolve with the contemporary world it regulates. Hence as IACrHR argued,[36] treaties are living instruments, taking into account climate change.

This plays into the question of universality and regionalism. It might be easier for a regional body to reach an extensive decision since the HR conceptions and law are similar and it impacts the specific region. One can see that the trend in the judicial approaches of the HRC and IACHR are confirmed in these two cases. Mainly that the HRC takes a more restrictive and conservative approach, compared to the IACtHR which tends to be more creative in its interpretation and approach.

[32] Threatened Island Nations, p.200
[33] HR Council 37/59, Report of the Special Rapporteur, §15
[34] *1969 VCLT*, Section 3
[35] Oxford Handbook of IHRL, Ch27: The Role of International Tribunals: Law-making or creative interpretation? Cecilia Medina, pp.662-663
[36] IACtHR, §43

C. Future

In the future, HR protection will have to take into account the protection of the environment and the right to a healthy environment if it is to remain an effective way to protect HR and preserve human lives, quality of life and future life. This change has been taking place throughout evolution of the HR interpretation, especially through the judicial system.

One could say that the judicial system is not to make swift decisions that change the interpretation of the treaty overnight, but to make sure that there is a reasoning and a thought through process. While I cannot disagree, I am also of the opinion that the urgency created by climate change urges an interpretation of HR that is in keeping with the core idea of protecting individuals and groups against violations of rights. One can observe that there is a call for change, in the rising number of cases brought by new generations on the behalf of them and future generations calling for environmental protection, such as against Colombia,[37] based on the right to life and healthy environment. In that case, the Court recognised the claim, and ordered for the government of Colombia to take measures to mitigate and counteract the deforestation of the Amazon Forest, taking into account climate change. As Cecilia Medina notes,[38] almost every new case is a precedent, allowing a renewed HR interpretation.

In the case of the right to life being threatened and breached by environmental degradation and climate change, the impact is too broad, long lasting and potentially irreversible not to be taken into account. As the IACtHR noted the right to a healthy environment has individual and collective connotations,[39] I argue to recognise a common right to a healthy environment. This links to the IACtHR's interpretation that: « a healthy environment is a fundamental right for the existence of humankind ».[40] Climate change threatens the environment at the earth scale, impacting the right to life of humanity, the protection of these rights should be at the same scale.

[37] Supreme Court of Justice of Colombia, Future Generations vs. Ministry of Environment and Others, 2018
[38] Oxford Handbook of IHRL, Ch27: The Role of International Tribunals: Law-making or creative interpretation?, Cecilia Medina, p.652
[39] IACtHR, §59
[40] Ibid, §59

Conclusion

There is a relation between the protection of the right to life and the right to a healthy environment, in the context of climate change. The HRC and the IACtHR recognise that HR can be impacted by environmental degradation, but the protection of the right to life is different in both cases. The HRC establishes a high threshold for violating the right to life, and does not establish a right to a healthy environment, even if it admits the possibility. While the IACtHR recognises that to protect the right to life and the environment, a broad understanding must be taken of the right to life and the right to a healthy environment, to ensure both rights.

I argue that the recognition of both a community's right to life and right to a healthy environment are necessary to protect to the fullest extent humankind, future generations and the environment.

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NEW DEVELOPMENTS IN HUMAN RIGHTS-BASED CLIMATE LITIGATION: CASE ANALYSIS OF TORRES STRAIT ISLANDERS

Rusudan Shashikadze

Abstract

The article examines the new decision delivered by the Human Rights Committee in the case of Daniel Billy et al v. Australia, also known as the Torres Strait Islanders case. The article touches upon the historic developments in regard to the climate change litigation in international human rights law. Furthermore, it addresses the shortcomings and problematic aspects of the decision. Most importantly, the article highlights the possible implications and influence of this case on other international and regional human rights courts, namely, the European Court of Human Rights, and pending climate change-related cases before it.

Key words: Climate change; Human rights law; Torres Strait Islanders; Environmental degradation; Right to life; International Covenant on Civil and Political Rights; The European Convention on Human Rights; The Human Rights Committee.

Introduction

Nowadays, climate change has been accepted as an urgent threat to human security. The UN Human Rights Committee (HRC or the Committee) and other UN human rights treaty bodies have, in the past, on many occasions, addressed pressing environmental issues.[1] Nevertheless, the Committee had never dealt with the violations directly stemming from the lack of government actions to adequately fight climate change. However, things have taken a different turn. Recently, on 22 September 2022, the HRC adopted its landmark decision regarding the case of *Daniel Billy et al.* v. *Australia*, also known as the Torres Strait Islanders case.[2] The decision of the Committee holds significance for various reasons.[3] To begin with, it is the first occasion when a state has been held responsible for violating human rights by an international human rights monitoring body as a consequence of inadequate climate policy.[4] It is also the first time the Committee ruled that a state was in violation of international human

[1] UNHRC, Ioane Teitiota v. New Zealand (2016) Communication No. CCPR/C/127/D/2728/2016; UNHRC, Norma Portillo Cáceres *et al.* v. Paraguay (2016) Communicatio No. CCPR/C/126/D/2751/2016; CESCR Committee Statement on 'Climate Change and the CESCR' (31 October 2018) UN Doc. E/C.12/2018/1; CEDAW, CESC, CMW, CRC, CRPD Committees' Joint Statement on 'Human Rights and Climate Change' (14 May 2020) UN Doc. HRI/2019/1.

[2] UNHRC, Daniel Billy *et al*. v. Australia (2019) Communication No. CCPR/C/135/D/3624/2019.

[3] ClientEarth 'Torres Strait Islanders win historic human rights legal fight against Australia', (2022) available at <https://www.clientearth.org/latest/press-office/press/torres-strait-islanders-win-historic-human-rights-legal-fight-against-australia/> accessed on 2 December, 2022.

[4] Ibid.

rights law for its greenhouse gas emissions.[5] The decision is additionally vital in the sense that it established that the right to enjoy one's culture enshrined in Article 27 of the International Covenant on Civil and Political Rights[6] (ICCPR or the Covenant) could be violated by the harmful effects of climate change. However, the case also entails several shortcomings, for example, the one where the Committee refrained from finding a violation of Article 6 of the ICCPR by the Australian Government.

The case of Torres Strait Islanders is a considerable development in the field of climate change and human rights. As demonstrated above, by this decision, the HRC made novel rulings, which can set a precedent for the future jurisprudence of the Committee. Therefore, this article critically analyses the case and examines its positive outcomes, shortcomings, and implications. For these purposes, section one of the essay provides a brief description of the factual circumstances of the case and discusses the positive developments and shortcomings of the decision. Section two addresses the implications of the decision on the future of climate change litigation. Due to the recent pending cases, this section will only concentrate on the European Court of Human Rights.

1. Overview of the Case: Positive Developments and Shortcomings

The eight authors of the communication were Australian nationals representing an indigenous minority group of people from the Torres Strait Islands living on the four islands of Boigu.[7] The authors argued that the state party failed to adopt an effective adaptation programme 'to ensure the long-term habitability of the islands.'[8] The authors submitted that they had numerous attempts to request assistance and funding from the government, but Australia has not adequately responded to it.[9] The authors also alleged that the state party failed to adopt adequate mitigation measures and referred to the fact that in 2017 Australia's greenhouse gas emissions per capita were the highest in the world.[10] Therefore, the authors complained that Australia violated Articles 2, 6, 17, 24, and 27 of the Covenant. The Committee, in this case, concluded that Australia, by not taking adequate and timely adaptation measures, violated Articles 17 and 27 of the Covenant.

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[5] Ibid.
[6] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereinafter ICCPR).
[7] Daniel Billy *et al.* v. Australia, supra note 2, at 1.1, 2.1.
[8] Ibid, at 2.7.
[9] Ibid.
[10] Ibid, at 2.8.

1.1. Positive Outcomes of the Decision

The case of Torres Strait Islanders sets new precedents. The decision was, in many ways, a positive development for fighting climate change through the lens of human rights. However, this part will only focus on three main positive outcomes of the case. Firstly, one of the most significant aspects is that the Committee declared the case admissible. It is a serious impediment for climate change litigants to prove that the victims were 'directly and seriously' affected by the adverse effects of climate change and that the risk stemming from climate change is 'reasonably foreseeable.'[11] Australia, in its defence, also challenged the admissibility of the communication for the reasons that the impact caused by climate change 'invoke[s] a risk that has not been yet materialised.'[12] By declaring the case admissible, the Committee proved this wrong. The HRC highlighted that contrary to the respondent Government's claims, the Torres Strait Islanders have already suffered substantial harm as a result of climate change and would be themselves incapable of mitigating the potential damage to their livelihoods.[13] Accordingly, the Committee underscored that the negative effects of climate change experienced by the authors of the communication were not mere 'theoretical possibility' but rather posed a serious threat to the vulnerable indigenous communities.[14] This is indeed a considerable development for climate change related cases as states now cannot avoid the responsibility for their inaction or absence of adequate action to effectively address climate change.[15]

Secondly, another core outcome is the Committee's decision regarding the indigenous people's right to their culture. It was affirmed in the decision that the authors' cultural integrity was 'closely linked to their land and surrounding area.'[16] Thus, the Committee concluded that providing deficient or delayed adaptation measures to minority groups, whose everyday life and culture are threatened by the harmful effect of climate change, can also amount to a violation of Article 27 of the Covenant. This aspect of the decision is pivotal for the reason that the Committee has, for the first time, acknowledged the state's responsibility

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[11] Benoit Mayer, 'Climate change mitigation as an obligation under Human Rights treaties,' 115 (3) American Journal of International Law (2021) 409 at 421.
[12] Daniel Billy *et al.* v. Australia, supra note 2, at 4.2.
[13] Ibid at 7.9.
[14] Ibid.
[15] Monica Feria-Tinta, 'EJIL: Talk! - Torres Strait Islanders: United Nations Human Rights Committee Delivers Ground-Breaking Decision on Climate Change Impacts on Human Rights' (2022) available at <https://www.ejiltalk.org/torres-strait-islanders-united-nations-human-rights-committee-delivers-ground-breaking-decision-on-climate-change-impacts-on-human-rights/ > accessed 5 December 2022.
[16] Daniel Billy *et al.* v. Australia, supra note 2, at 8.14.

to safeguard the 'distinct and additional' right of a highly vulnerable population from the negative effects of climate change.[17] Therefore, this finding is particularly important as it underlines the essential need to protect minority groups, who are at greater risk of being affected by climate change.[18]

Thirdly, it is worth noting that the Committee gave careful consideration to the international legal instruments regarding climate change. The authors in the communications have relied on certain environmental treaties, such as the Paris Agreement, arguing that Australia did not comply with its provisions. Even though the Committee declared that it was not within its competence to adjudicate whether a state was in compliance with such treaties, it used such agreements to determine the scope of human rights obligations of a state.[19] This is a crucial component of the decision as it may serve as an authoritative interpretation for how in the future other international institutions or courts can approach and evaluate relevant human rights treaties or conventions within their jurisdictions.[20]

1.2. Shortcomings of the Decision

The major drawback of the decision is the fact that the Committee did not declare the violation of Article 6, the right to life, in this case. The HRC held that although the changing weather patterns caused by climate change placed the indigenous communities and their livelihoods in a vulnerable situation, the authors failed to demonstrate that their lives or health was under a 'real and reasonably foreseeable risk' of danger.[21] This aspect of the decision has been subject to criticism by various commentators, including the dissenting opinions of numerous members of the Committee. The Committee member Duncan Laki Muhumuza opined that there was, in fact, a violation of right to life in this case.[22] He invoked the decision of the Supreme Court of the Netherlands in the case of *Urgenda Foundation v. The Netherlands*, where it was stated that a country has 'an obligation to prevent a foreseeable loss of life from the impacts of climate change, and to protect the authors' right to life with dignity.'[23] The fact that the Committee itself stated that the 'right to

[17] Christina Voigt, 'EJIL: Talk! - UNHRC is Turning up the Heat: Human Rights Violations Due to Inadequate Adaptation Action to Climate Change' (2022) available at < https://www.ejiltalk.org/unhrc-is-turning-up-the-heat-human-rights-violations-due-to-inadequate-adaptation-action-to-climate-change/> accessed 5 December 2022.
[18] Ibid.
[19] Daniel Billy *et al* v. Australia, supra note,, at 7.5.
[20] Feria-Tinta, supra note 15.
[21] Daniel Billy *et al.* v. Australia, supra note 2, at 8.4.
[22] Duncan Laki Muhumuza individual opinion on the case of Daniel Billy *et al.* v. Australia, supra note 2, at 10.
[23] Urgenda Foundation v. The State of Netherlands case [2019] C/09/456689/ HA ZA 13-1396.

life cannot be properly understood if it is interpreted in a restrictive manner'[24] makes its decision regarding the Torres Strait Islanders more dubious, as the approach taken in this case regarding the right to life indeed provides a 'restrictive interpretation' and sets an unreasonable burden of proof for future cases.

The HRC, in its General Comment No. 36, gave due regard to climate change and underlined how it threatens the right to life.[25] It stated that the right to life 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.'[26] One of the leading cases where the Committee discussed the violation of the right to life is the case of *Portillo Caceres et al.* v. *Paraguay* (Portillo Caceres case).[27] The case concerned environmental pollution, where the government failed to protect individuals from harmful effects of environmental degradation, which according to the Committee, amounted to the violation of Article 6 of the Covenant. Moreover, the Committee in this decision famously held that the duty of a state to 'respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.'[28] Therefore, the Committee found a violation of Article 6 of the Covenant not only with regards to the deceased Mr Portillo Caceres, but also to his surviving family members.[29]

Hence, it is ambiguous why the Committee, in the case of Torres Strait Islanders, chose to depart from its approach developed in the Portillo Caceres case. Authors submitted extensive evidence substantiating the damage already caused by the effects of climate change as well as the future threats. According to the evidence provided, Torres Strait Islanders faced water temperature rises, a shortage of food supplies, floods, and the high likelihood that the islands would become unsuitable for proper living conditions in 10-15 years. Contrary to the Committee's conclusions, a comprehensive examination of the evidence indicates that it does indeed constitute a "reasonable and foreseeable threat" to the life of Torres Strait Islanders. It appears that the HRC, at this stage, is reluctant to find state parties responsible for the violation of the right to life in relation to the adverse effects of anthropogenic climate change. It is noteworthy that this was not the only case involving climate change where the HRC set

[24] Daniel Billy *et al.* v. Australia, supra note 2, at 8.3.
[25] UNHRC 'Article 6: right to life' (3 September 2019) UN Doc. CCPR/C/GC/36, at 3.
[26] Ibid.
[27] Norma Portillo Cáceres *et al.* v. Paraguay, supra note 1.
[28] Ibid, at 7.5.
[29] Ibid, at 7.3.

an unreasonably high standard of proof for applicants to prove the violation of Article 6 of the Covenant. Back in 2019, the Committee also had to deal with the case of *Ioane Teitiota v. New Zealand* regarding climate refugees,[30] in which the HRC did not consider the evidence provided by the author sufficient to constitute a reasonably foreseeable threat to life.

It can be concluded that the present case has immense value in the field of environmental and climate change law. Notwithstanding its shortcomings, it should still be considered a breakthrough achievement, as it may influence other cases pending before regional human rights systems, which will be explored further in the following chapter.

2. Implications of the Torres Strait Islanders' Case for the Pending and Future Cases before Human Rights Courts

After the decision of the Committee was rendered, one of its members, Hélène Tigroudja, stated that this decision 'created a pathway' for the people to lodge claims in instances where their national government fails to provide appropriate measures 'to protect those most vulnerable to the negative impacts of climate change on the enjoyment of their human rights.'[31] Indeed, this decision has the potential to provide an added impetus to human rights-based climate litigation at both national and international levels. However, the key question is whether this case will also influence the decision-making process of other international or regional human rights systems. This question at the moment mainly relates to the European Court of Human Rights (ECtHR) as there are individual applications pending before it.[32]

Nevertheless, as with any other climate change-related case, these applications also face a number of challenges. The first and the most challenging part is the admissibility criteria, namely whether the claimants meet the status of a victim under Article 34 of the European Convention on Human Rights (ECHR).[33] In other words, applicants must demonstrate that there is a 'sufficiently direct' link between them and the harm they believe

[30] Ioane Teitiota v. New Zealand, supra note 1.
[31] UN, 'Australia: Groundbreaking decision creates pathway for climate justice on Torres Strait Islands' *UN News*, (2022) available at < https://news.un.org/en/story/2022/09/1127761 > accessed 5 December 2022.
[32] ECtHr, Duarte Agostinho and Others v. Portugal and Others, App. no. 39371/20; ECtHR, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App. no. 53600/20; ECtHR, Greenpeace Nordic and Others v. Norway, App. no. 34068/21; ECtHR, Carême v. France, App. no. 7189/21; ECtHR, Mex M. v. Austria, application filed on 25 March 2021, not yet communicated.
[33] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 34.

they have suffered from the alleged violation.[34] As previously noted, the Human Rights Committee also had to deliberate on this matter and concluded that the admissibility criteria were fully met. The Committee famously stated that the likelihood of violations of rights by the detrimental consequences of climate change 'have already occurred and are ongoing' and that it is 'more than a theoretical possibility.'[35] When discussing certain matters related to the legal aspects of the case, the ECtHR examines not only its well-established case law, but also the general developments in international law and decisions of other international or regional courts. The Court also takes into account the emerging trends of international law that may influence the decision-making process. For example, in the cases of *Margus v. Croatia* and *Mamatkulov and Askarov v. Turkey*, the Court has given particular weight to the developments by other international human rights courts or human rights treaty bodies.[36] With the landmark decision of the HRC, the prospects for the pending cases before the ECtHR seem more promising. Although it is not evident whether a single decision is enough to suggest that there is an emerging trend in international human rights law regarding climate change cases, it is likely that the HRC's interpretations may be taken into account by the ECtHR.

It must also be noted that the ECtHR has already developed a substantial body of case law in regard to environmental issues. For instance, in the cases of *López Ostra v. Spain*,[37] *Dubetska and Others v. Ukraine*,[38] and *Cordella and Others v. Italy,*[39] the Court dealt with the individual applications relating to the violation of the Convention rights as a result of environmental harm. Despite the fact that the Court has repeatedly stated in its judgements that 'no provision of the Convention guarantees the right to preservation of the natural environment as such,'[40] it still recognised that environmental harm could undermine the exercise of certain rights. For instance, in the landmark case of *Lopez Ostra v. Spain*, the Court found a violation of Article 8 (right to respect for private and family life) due to the Spanish authorities' failure to limit industrial pollution.[41] The case law developed by the

[34] Tim Eicke, 'Climate Change and the Convention: Beyond Admissibility' 3 (1) European Convention on Human Rights law review (2022), at 9.
[35] Daniel Billy *et al.* v. Australia, supra note 2, at 7.10.
[36] ECtHR, Margus v. Croatia, App. no. 4455/10, Judgement of 27 May 2014; ECtHR, Mamatkulov and Askarov v. Turkey, App. nos. 46827/99 and 46951/99, Judgement of 4 February 2005.
[37] ECtHR, López Ostra v. Spain, App. no. 16798/90, Judgement of 9 December 1994.
[38] ECtHR, Dubetska and others v. Ukraine, App. no. 30499/03, Judgement of 10 February 2011.
[39] ECtHR, Cordella and Others v. Italy, App. nos. 54414/13 and 54264/15, Judgement of 24 January 2019.
[40] ECtHR, Fadeyeva v. Russia, App. no. 55723/00, Judgement of 9 June 2005, at 68; ECtHR, Dubetska and others v. Ukraine, supra note 38, at 105; ECtHR, Kyrtatos v. Greece, App. no. 41666/98, Judgement of 22 May 2003, at 52.
[41] López Ostra v. Spain, supra note 36.

Court illustrates that it found room to adjudicate on the issues which are not explicitly enshrined in the Convention but may be deduced through evolutive interpretation. Therefore, the Court's existing case law recognizing the correlation between human rights and environmental harm coupled with the current legal developments in the Human Rights Committee's jurisprudence may positively influence the pending climate change cases in the ECtHR. It is noteworthy that even if only one case proceeds to the examination on the merits, it will be enough to set another historical precedent for human rights-based climate litigation.

Conclusion

Over the past decades, anthropogenic climate change has had adverse effects on the everyday life of many individuals. Today it is widely accepted that to effectively combat climate change, it is essential that each and every state incorporates adequate and effective adaptation and mitigation measures. Not adopting such measures can cause the infringement of numerous human rights, including the right to life, security, private and family life and the right to enjoy one's culture. Unfortunately, states have been reluctant to undertake adaptation or mitigation measures voluntarily. Despite the Paris Agreement being the first binding set of rules requiring comprehensive efforts from states to tackle climate change, its effectiveness has been limited in practice. Therefore, the victims who have suffered from the negative effects of climate change have turned to the domestic and international courts to remedy the violation of their rights.

The case of Torres Strait Islanders was the first successful instance at the international level when the state was found responsible for the violation of human rights by not taking timely and effective adaptation measures to fight climate change. Although the decision had its shortcomings, such as ambiguous reasoning regarding the right to life, it was crucial in many regards. Three main aspects can be highlighted, namely: accepting the admissibility of the claim; granting greater protection to the indigenous people who are facing graver risks from climate change and acknowledging the importance of binding environmental treaties for determining the human rights obligations of states.

The decision of the Committee is indeed significant, and it hopefully will have a positive impact on the future of litigating climate change before different international and regional human rights courts. As of now, all eyes are on the European Court of Human Rights and its pending cases.

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NATIONALLY DETERMINED CONTRIBUTIONS UNDER THE PARIS CLIMATE AGREEMENT 2015: PROSPECTS AND PITFALLS

Chisom Ngozi Nworgu
Awajigbana Paul Alfred

Abstract

Climate change represents one of the most daunting challenges on a global scale affecting the environment. Climate change which consists of a change in temperature, precipitation, and wind pattern, is primarily driven by the concentration of greenhouse gases in the atmosphere. Human activities such as the burning of fossils, deforestation and industrial processes are the major culprits of climate change. This has continued to negatively impact the environment, resulting in floods, storms, droughts, and heat waves. The development of effective mechanisms to address climate change at the global level has remained elusive. Current international climate action under the Paris Agreement 2015 is hinged on the framework of nationally determined contributions (NDCs). Employing textual analysis, this paper examined the prospects and pitfalls of the NDCs framework under the Paris Agreement. It focused on four critical areas: equity, common but differentiated responsibility, global peaking of greenhouse gas emissions, climate finance and transparency mechanisms. The paper found that NDCs have several prospects for addressing climate change but that their lenient approach makes the framework unduly weak. It concluded that under the NDCs, the success of climate action would depend on the good intentions of the Parties.

Key words: climate change, paris agreement, nationally determined contributions, environment.

Introduction

The Paris Agreement is an instrument under the United Nations Framework Convention on Climate Change (UNFCCC).[1] The Agreement was adopted in December 2015 by a decision of the 21st Conference of the Parties to the UNFCCC in Paris. It entered into force in November 2016 after meeting the dual condition for entry into force: ratification by 55 Parties representing 55% of global emitters of greenhouse gases (GHG).[2] The objectives of the Agreement are generally to limit the increase in the global average temperature to well below 2° C above pre-industrial levels, increase the ability to adapt and make finance flows consistent with a pathway towards low GHG emissions.[3]

A. Nationally Determined Contributions (NDCs)

Generally, NDCs are written statements of the efforts a Party intends to pursue towards tackling climate change.[4] Article 4(2) of the Agreement provides:

> Each Party shall prepare, communicate, and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

For each Party, what the NDCs should contain are 'nationally determined contributions that it intends to achieve,' this simply means intentions determined at the national level. Although the Agreement does not provide specific contents of NDCs, it is evident that its contents will relate to the intended contributions of the Parties on the key aspects of climate action, like peaking, mitigation, adaptation, climate finance, and technology transfer. It is because article 3 refers to NDCs as ambitious efforts as defined in articles 4, 7, 9, 10, 11 and 13. On each of these key aspects, Parties are to prepare their intended contributions.

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[1] Paris Agreement 2016, 155 UNTS 3 (Paris Agreement).
[2] Van Assel, Harro, and Stefan Bossner, 'The Shape of Things to come" Global Climate Governance after Paris' 1 *CCLR* (2016) 46, at 56-57.
[3] Paris Agreement, *supra note* 1, Article 2(1).
[4] Kat, Bora, Sergey Paltsev, and Mei Yuan, 'Turkish Energy Sector development and the Paris Agreement Goals: A GCE Model Assessment' 122 *Energy Policy* (2018) 84, at 84.

B. NDCs: Prospects and Pitfalls

I. Equity, Common but Differentiated Responsibilities

The first and widely acknowledged prospect of NDCs is that it avoids the controversy of equitable imposition of climate obligations under the UNFCCC and the Kyoto Protocol.[5] It is because since each Party is to nationally determine its contributions, equity and common but differentiated responsibility are left at the discretion of the Party.[6] This way, the controversy over equity is almost entirely eliminated.[7] Meanwhile, within the same framework, developing country Parties are to take the lead, including providing finance to developing country Parties. The NDCs framework, therefore, cleverly tiptoes around one of the most contentious issues in international climate action.[8]

The Agreement strives to make NDCs consistent with its objectives. First, there is a principle against backsliding or stagnation. Article 3 provides that the aggregate efforts of all Parties will represent a progression over time. For this reason, Article 4(3) requires individual successive NDCs to represent a progression.[9]

After the preparation of the NDCs, the Party has an additional duty to maintain and communicate its NDCs. The communication of the NDCs is by filing a copy for recording with the Conference of the Parties at the Registry kept by the Secretariat.[10] Successive NDCs are to be communicated every five years.[11] In communicating the NDCs, Parties are to supply information necessary for transparency, clarity and understanding of the NDCs.[12] The communicated NDCs are kept in a public registry maintained by the Secretariat to allow for further public scrutiny.[13] While a Party may at any time adjust its NDCs, it can only be with a view to enhancing its level of ambition.[14] There is a further obligation on the Parties to

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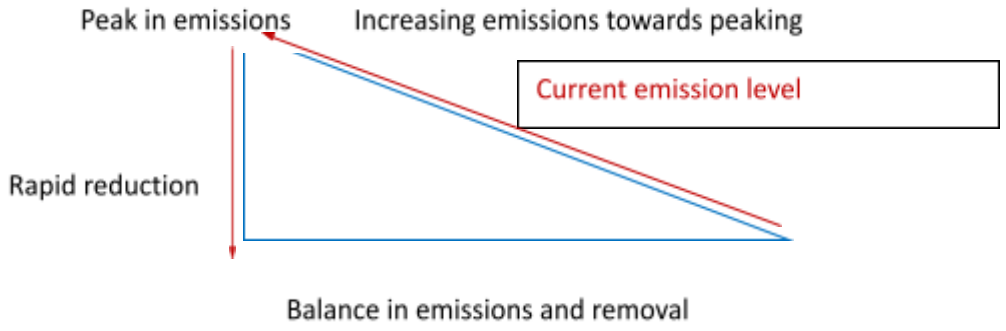
[5] Pauw, W. Pieter, et al. 'Beyond headline Mitigation Numbers: We Need More Transparent and Comparable NDCs to Achieve the Paris Agreement on Climate Change' 147 *Climate Change* (2018) 223, at 234.
[6] Paris Agreement, *supra note* 1, at Section 4(6).
[7] Paula Castro, 'Common but Differentiated Responsibilities Beyond the Nation State: How Differential Treatment Addressed in Transnational Climate Governance Initiatives' 592 *Transnational Environmental Law* (2016) 379, at 379-400.
[8] Olivia Woolly, 'Developing Countries under The International Climate Change Regimes: How Does the Paris Agreement Change their Position?' in Zeray Yihdego, Melaku Geboye Desta, Fikremarkos Merso (eds) *Ethiopian Yearbook of International Law* (2016) 179, at 179-200
[9] Lavanya Rajamani, and Jutta Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement' 29 *Journal of Environmental Law* (2017) 537, at 537-551.
[10] Paris Agreement, *supra note* 1, Article 4(12).
[11] *Ibid*, Article 4(9).
[12] *Ibid*, Article 4(8).
[13] *Ibid*, Article 4(12).
[14] *Ibid*, Article 4(11).

account for their NDCs in accordance with guidance adopted by the Conference of the Parties.[15] This is a strong prospect both for levelling up and for accountability for NDCs.

Nevertheless, allowing Parties to subjectively reflect equity and common but differentiated responsibility in their NDCs is not without setbacks. It is likely to negatively affect the level of ambitiousness of NDCs and even encourage free riding. The question of equity, upon which the doctrine of common but differentiated responsibility leans, has always been controversial in climate negotiations.[16] Shifting it to the Parties may underplay the controversy but serves to reduce ambitions. It is consistent with the findings of Tribett and others[17] that for most developing country Parties, their NDCs are made conditional on the provision of climate finance. Considering the current global fossil fuel economy and market, Parties are tempted to unduly rely on respective national circumstances to communicate less ambitious NDCs.[18] Thus as Dong and others note, many of the NDCs are conservative.[19]

II. Global Peaking of GHG Emissions

Article 4(1) of the Paris Agreement 2015 provides that to reach the temperature target under Article 2, Parties aim to reach global peaking in GHG emissions "as soon as possible" and then to undertake rapid reductions in emissions until there is a balance between anthropogenic emissions by sources and removal by sinks. It is illustrated in the diagram below:



[15] *Ibid*, Article 4(13).
[16] Vegard Torstad, and Håkon Saelen, 'Fairness in Climate Negotiations: What Explains Variations in Parties' Expressed Conceptions" 18 *Climate Policy* (2018) 642, at 643-645.
[17] Walter R. Tribett and et. al. 'Paris INDCs' in J Dodson (ed,) *Paris Agreement: Beacon of Hope* (Springer Nature, 2016) 115, at 118-119.
[18] Mark Cooper, 'Governing the Global Climate Commons: The Political Economy of State and Local Action, after the U.S. flip-flop on the Paris Agreement' 118 *Energy Policy* (2018) 440, at 448.
[19] Cong Dong and et. al. 'What is the Probability of Achieving the Carbon Dioxide Emissions Targets of the Paris Agreement? Evidence from the top ten Emitters' 622 *Science of the Total Environment* (2018) 1294, at 1295.

Clearly, Article 4(1) is expressed as an 'aim' and does not necessarily translate into a binding obligation. However, by Article 3, such aim is an inherent part of NDCs. Parties are, therefore, to undertake ambitious efforts under Article 3 to meet this aim of global peaking stated in Article 4(1). What Article 4(1) envisages, as shown in the diagram, is a continuous an increase in emissions from the current level. Such increase is arguably to allow for adaptations and developments until the increase reaches a peak. This is because Parties have the right to economic development, and there is a positive correlation between economic growth and an increase in carbon emissions, at least until non-fossil sources of energy have been well developed and deployed to become cost-effective. Thereafter, Parties are to undertake rapid reductions until a balance is reached between emissions by sources and removal by sinks. Such balance is achieved when there is a stabilization of GHG concentrations at a level that prevents dangerous anthropogenic interference with the climate system.[20]

What the article labours to evolve is a system of climate action that prevents economic shock by allowing Parties to adjust naturally over time in accordance with their peculiar national circumstances. This is to ensure that food production is not threatened and to allow development to proceed in a sustainable manner. Thus, peaking is still on the basis of equity and in the context of sustainable development and efforts to eradicate poverty. For this reason, it acknowledges that peaking may take longer for developing countries.[21] This is consistent with the recital of the UNFCCC 1992, which notes that the global share in emissions from developing countries will grow to meet their developmental needs.

However, upon closer interrogation, the liberal approach under Article 4(1) has several pitfalls which seriously undermine the temperature targets of the Agreement for the following reasons:

i. The Agreement does not define 'global peaking' of emissions or set a maximum level of emissions that Parties may reach under the global peaking window.

ii. There is no specific timeframe for Parties to reach global peaking except for the adjectival clauses 'as soon as possible' and 'in the second half of this century'. The last year of this century will still be within the contemplation of the Agreement.

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[20] Paris Agreement, *supra note* 1, Article 2.
[21] *Ibid*, Article 4(1).

iii. To further complicate the timeframe, the article acknowledges that the peaking of global emissions will take longer for developing countries.

iv. There is no clear provision on what will amount to 'rapid reductions' in emissions after peaking. While it conveys a sharp progressive reduction, there is no template for its assessment on case-by-case bases.

v. Though all of these are to happen in the second half of the 21st century, there are no intermediate targets or aims at specified intervals towards the achievement of the long-term target.

Very disappointingly, global peaking is stated as an 'aim,' not a binding obligation. Since Article 3 provides for NDCs as efforts defined inter alia in Article 4, it is beyond doubt that the specific provision of Article 4(1) overrides Article 3. Thus 'aim' must mean nothing less than 'aim'. The second half of the 21st century is too fluid a timeline for effective climate action. And in the entire circumstances of climate change, arguably, outrageously long.

III. Climate Finance

It should be recalled that one of the sub-objectives of the Paris Agreement is to make the flow of finance consistent with a pathway towards low GHG emissions and climate-resilient development.[22] It necessarily incorporates the flow of finance towards the pathway of the temperature goal of the Agreement.[23] Article 9 of the Agreement provides that developed country Parties shall provide financial resources to developing country Parties with regard to both mitigation and adaptation. This is in continuation of the already existing obligation under the UNFCCC 1992. For instance, under Article 4(3) of the Convention, developed country Parties have an obligation to provide new and additional finance to cover the full cost of compliance with Article 12(1) by developing country Parties.[24]

Other Parties are encouraged to provide or continue to provide such support voluntarily.[25] Developed country Parties 'should' continue to take the lead in mobilizing climate finance. The mobilization is to represent a progression beyond previous efforts.[26] Developed country

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[22] *Ibid,* Article 2(1)(c).
[23] Alexander Zahar, 'The Paris Agreement and the Gradual Development of a Law on Climate Finance' 6 *Climate Law* (2016) 75, at 81.
[24] Hao Zhang, 'Implementing Provisions on Climate Finance under the Paris Agreement' 9 *Climate Law* (2019) 21, at 22-23.
[25] Paris Agreement, *supra note* 1, Article 9(2).
[26] *Ibid*, Article 9(3).

Parties have a binding obligation to biennially communicate indicative quantitative and transparent information relating to the above. The information supplied shall also be considered at the global stock-take.[27] The financial mechanism under the Convention serves the financial mechanism under the Agreement.[28]

Under the Cancun Agreements of the COP, developed country Parties agree to jointly mobilize US $100 billion per year by 2020 to developing countries.[29] This timeframe was increased to 2025 by the decision to adopt the Paris Agreement. Under Article 100 of the Cancun Agreement, Parties decided that a significant share of the multilateral funding for mitigation would flow through the Green Fund established in Article 102.[30]

From the totality of the above, climate funding is a part of NDCs, although guided by the principles and specific obligations already highlighted and with regards to a minimum target amount. However, the approach has some setbacks. Whereas developing country Parties have a joint responsibility to contribute to the Fund, the absence of individual responsibility is disappointing. It follows that it is for each developed country Party to determine nationally what it intends to contribute to the fund. This will make it difficult to meet the financial goal. Not surprising, therefore, the State Bank of India noted that the contributions made by Parties to the green climate fund (GCF) were only US$ 9.9 billion as at 19 May 2016.[31] Similarly, Georges points out that the US in 2014 pledged 3 billion dollars but delivered only 1 billion and later abandoned the pledge.[32] The framework is, therefore weak as there is no quantified commitment or clarity as to how finance will actually be raised.

B. Transparency Mechanism for Implementation of NDCs

Article 13(1) of the Paris Agreement 2015 established an enhanced transparency framework. The framework is in order to build mutual trust and confidence and to promote effective implementation of the Agreement. Equitable sharing of responsibilities in international climate action has always been controversial. This is further reinforced by the attractiveness of fossil fuels in the global economy. There is also the risk of free riding by other countries.

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[27] *Ibid,* Article 9(6).
[28] *Ibid*, Article 9(5) and (7).
[29] Decision 1/CP.16 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, FCCC/CP/2010/7/Add.1, at 98.
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[31] Rosemary Lyster, 'Climate Justice, Adaptation and the Paris Agreement: A Recipe for Disaster?' 26 *Environmental Politics* (2017) 438, at 451-453.
[32] Georges Alexandre Lenferna, 'If you're "Still In" the Paris Agreement, then Show Us the Money' 21 *Ethics, Politics and Environment* (2018) 52, at 52-55.

Climate action has, therefore, often been slow due to mutual suspicion and mutual distrust. It is against this background that the article seeks to build mutual trust and confidence in the implementation of the Agreement. This is even more important where the achievement of the objectives of the Agreement depends largely on Intended Nationally Determined Contributions. Beyond doubt, mutual trust and confidence play a crucial role in the ambitiousness of both the NDCs and efforts of the Parties.

The purpose of the transparency framework is to provide a clear understanding of climate action undertaken by the Parties in light of the objective of the Agreement. This will include clarity to enable tracking of progress in achieving respective NDCs.[33] It extends to the clarity of support provided and received with regard to climate action under articles 4, 7, 9, 10 and 11.[34] Put differently, the framework is to enable understanding of the NDCs under the different categories of climate action. Article 13(7) creates a binding obligation on each Party to regularly provide the following information:

i. A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases.

ii. Information necessary to track progress made in implementing and achieving its NDCs under Article 4.

The Agreement provides three layers of review of the NDCs for transparency:

i. Technical Expert Review under Article 13(11).

ii. The Parties shall participate in a facilitative, multilateral consideration of progress made.[35]

iii. Global stock-take by the Conference of the Parties of the implementation of the Agreement under Article 14(1). The first global stock-take will take place in 2023 and thereafter every five years unless decided contrary to the Conference of the Parties.

[33] Paris Agreement, *supra note* 1, Article 13(5).
[34] *Ibid*, Article 13(6).
[35] *Ibid*, Article 13(11).

Parties INDCs are then to take into account global stock-take.[36] Savaresi writes that these mechanisms, when combined with the non-backsliding clause, ratchets up the level of ambition over time.[37]

The major pitfall of the framework is that it is to be implemented in a facilitative, non-intrusive and non-punitive manner.[38] It is doubtful if such a lenient and loose approach will be effective. It is because, as Sharma opines, it is easier for States to comply with international obligations when there is a system of reward and sanction. Also, if withdrawal from the commitment is costless and without consequences, it serves to further weaken the commitments. With regards to the Paris Agreement, he opines further that 'the Agreement is remarkable for its leniency'.[39] Such leniency may be politically convenient for the Parties but adversely affects the achievement of the objectives of the Agreement. In the final analysis, whatever the review mechanism brings to bear on the Parties is a mere peer and public pressure.[40] Though failure to meet NDCs may create for a Party what Fasoli calls 'reputational risk', the argument of this article remains that such reputational risks are an insufficient deterrent to compel compliance or even good faith in the light of climate politics.[41]

Conclusion

The framework of NDCs allows for flexibility in both contributions and implementations in light of national circumstances. The system of NDCs also downplays the controversy of equitable differentiation of climate change responsibilities. It is facilitative, cooperative, and non-intrusive. It allows for gradual progression of efforts in a way that does not threaten national development. Besides, the NDCs are further boosted by the principles of the highest possible ambition and successive progression. The above are very innovative provisions that make the NDCs including, their implementation and monitoring, promising. Thus, the Agreement represents a great prospect for tackling climate change. However, the leniency of the approach under NDCs raises concerns. There is a total absence of any specific

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[36] *Ibid*, Article 4(9).
[37]Annalisa Savaresi 'The Paris Agreement: A new beginning?' 34 *Journal of Energy and Natural Resources Law* (2016) 16, at 21.
[38] Paris Agreement, *supra note* 1, Article 13(3).
[39] Anju Sharma, 'Precaution and Post-Caution in the Paris Agreement: Adaptation, Loss and Damage and Finance' 17 *Climate Policy* (2017) 33, at 36-37.
[40] Ralph Bodle Lena Donat and Matthias Duwe, "The Paris Agreement: Analysis, Assessment and Outlook" 1 *CCLR* (2016) 5, at 9.
[41] Elena Fasoli, 'Review and Adjustment Procedures under the Climate Change Treaty Regimes' 3 *CCLR* (2017) 261, at 266.

responsibility for any of the Parties. There is equally no sanction for breach of any of the obligations under the Agreement. Therefore, NDCs become practical statements of good intentions. Much will therefore depend on the good faith of the Parties. Yet, good faith and good intentions are not sufficient to engineer an effective international climate action.

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RIGHT TO EDUCATION FOR REFUGEES AND STATE RESPONSIBILITY

Irini Kaci

Abstract

Education is a fundamental human right. The 1951 Refugee Convention and its 1967 Protocol (article 22) and the 1989 Convention on the Rights of the Child (article 28) guarantee the right to education. Still, nearly half of the displaced children globally remain out of school. Many barriers are faced by asylum-seeking and refugee children in accessing education, although it is considered a basic right. Because of the lack of documents, being wrongly assessed as adults, and not having proper facilities that permit them to attend school, children face a lack of access to education, and this poses a significant obstacle to successful social and economic integration. States have the duty to consider children that seek protection in their territory, entitled to the same basic rights as the citizens of the country. Though recognizing it as a right itself, the States should also implement focused policies that help children refugees by facilitating their path and fulfilling their special needs so that they can access education at the same level as everyone else.

With special needs including their frightening, exhausting and unsure journey; the gap in education during the journey and most of the times also in their country due to the conditions that made them flee; the lack of documents leading to longer processes of obtaining status in the country of arrival; the new language that they have to learn in order to integrate; and the discrimination, aggression and conflict they face as part of a different ethnic group, with different cultures and traditions.

Introduction

This paper aims to define and emphasize the challenges that refugees are facing nowadays in matters of education and the legal obligations of host States to facilitate those challenges. This paper will start with an overview of the international legal texts, focusing on where refugees are 2

defined and have their rights protected. A legal question will arise in this part on the obligations of the host States towards the protection and insurance of the right to education of refugees. It will continue in the second part with the main issues that refugees are facing, focusing especially on children's education. Then, an important part will be addressed to the States responsibility on this matter. This part will give answers to the main question of this research paper, which is given in the first part. How can they implement national and legal policies to solve the main issues that refugees are facing? What was done by the governments of different countries till now and what can be done, where the governments should base their measures, to have an inclusive, non-discriminatory, equitable education for everyone, at the end is a "work" towards protecting fundamental rights.

In conclusion, the importance of ensuring that the right to education of refugees is being implemented and protected will lead to their empowerment of them, making them able to rebuild their lives and protect their freedoms and for sure, it will build a better world.

1. International legal texts and refugees

The first part of this paper will be, as I mentioned, an overview of the international legal texts, in which we find the articles directed to the definition and rights of refugees. There are, globally, 26.6 million refugees, according to the refugee data finder of the UNHCR.[1] Unfortunately, only 68% of them are enrolled at the primary level, and 34% of them are enrolled at the secondary level of education. Meanwhile, only 5% of the refugees are enrolled in higher education.[2]

In the Convention and Protocol relating to the Status of Refugees, we find the definition of refugee, "A refugee is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[3] It is worth noting that the Convention of 1951 and it's 1967 Protocol is signed, both or one of them, by 147 States.[4] They define, as mentioned, the term refugee and outlines the rights of refugees, as well as the legal obligations of States to protect them. Nevertheless, it is important to mention that the right to education belongs to the "second

[1] Refugee data finder of the UNHCR. The UN Refugee Agency < https://www.unhcr.org/refugee-statistics/ > accessed 21 November 2021

[2] Critical gaps in refugee education, UN News https://news.un.org/en/story/2021/09/1099242 accessed 21 November 2021

[3] Art. 1 of the Convention Relating to the Status of Refugees. - UNTS, vol. 189, p. 137 and Protocol relating to the Status of Refugees. – UNTS, vol. 606, p. 267.

[4] Protocol relating to the Status of Refugees, Refugees and Stateless Persons, UN Treaty Collection, < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5 >.

generation of human rights,"[5] which are rights that are generally not directly owned by individual citizens but give room to the State to gradually implement and respect them with the resources it has. But actually, the "direct effect" does not apply in all the States, so the situation differs from one country to another.

Additionally, States may tend to limit their obligation to respect and protect only the rights of the individuals who are legally residing in the country, and refugees, in this case, may risk being excluded. If we analyze the second article of the European Convention on Human Rights of the First Protocol, "no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."[6] We will notice that the right to education is not absolute and may be subject to limitations.[7] However, from the other side the limitations must not impair the very essence of the right to education and its effectiveness. Still, this opens another broader topic, as it seems that it does not apply to refugees and is limited to the States' legal residents. However, the European Committee of Social Rights (ECSR), says that the restrictions a state can make, should not be read in such a way as to deprive foreigners present in a territory of fundamental human rights even though they are not legally present in that territory, especially when talking about the children right to education.[8]

It is important to mention article 13 of the ICESCR, "States recognize the right to everyone for education,"[9] and we have here, maybe for the first time, an obligation to a direct effect implement on the State legislation. The article states that "Education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.[10] "All" means "To everyone, including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."[11] Also, article 28 of the Convention on the Rights of the Child imposes an obligation to its Member States to provide education on the basis of equal opportunity.[12] Thus, in this case, it is given room for interpretation and reservations from States.

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[5] Kurt Willems, Jonas Vernimmen, 'The fundamental human right to education for refugees: Some legal remarks' 17 European Educational Research Journal (2018) 219, at 221.
[6] Art. 2 Protocol 1 of the European Convention on Human Rights.
[7] Willems and Vernimmen, *supra note* 5, at 222,
[8] EuropeanCommitteeofSocialRights https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights 23 November 2021
[9] Art. 13 International Covenant on Economic, Social and Cultural Rights 1966 UNTS 993.
[10] CESCR 'General Comment No. 13: The Right to Education (Art. 13)' (8 December 1999) at 3.
[11] CESCR 'General Comment no. 20 Non-discrimination in economic, social, and cultural rights (art. 2)' (2 July 2009) at 30.
[12] Art. 28 Convention on the Rights of the Child 1989 UNTS 1577.

2. Challenges that refugees face in host Sates towards education

Half of the world's refugees are children under 18 years of age.[13] The average length of time a refugee spends in exile is about 20 years, which is more than an entire childhood, and represents a significant portion of a person's productive working years.[14] While examining the recent situation of refugees, there are several challenges that they face in relation to access to education; these challenges that I chose to specify are based on reports from the United Nations High Commissioner for Refugees (UNHCR), a book by Samantha Arnold, "Children's Right and Refugee Law", where the children and many of the challenges mentioned below, are conceptualized within the Refugee Convention. And my personal experience as a volunteer in a refugee camp; a couple of years ago, when I finished my bachelor's degree, I decided to go some months in Serres, Greece, to volunteer with an NGO organization called "Lifting Hands International". The population (around 1200 at that time, 2019) situated in the camps there is Yazidi (coming from Iran) and I worked in the Children Education Program.

1. Language barriers: Language is one of the main problems when having to attend school in a new country. While maybe in primary education is easier because little children are keener to learn new languages, when it comes to secondary education it gets more difficult to learn a new language already at a more advanced level. I noticed this actually, little children had already learned Greek and English meanwhile the grown up were struggling more.

2. Lacking documents; Very often refugees do not go through an easy path to reach another country. By choice or by force they do not always have all the documents that prove their identity or their education. Or even if they have them, sometimes their education is not recognized.

3. Stress and pressure of displacement; This not really easy path that refugees go through, of course affect them also from an emotional perspective. Some of them go through traumas, losing everything they had, maybe also family, has a huge impact and the very first thing they are willing to do is not going to school to face maybe even more difficulties in a new country.

4. Cultural practices and priorities; Boys need to work in at early age and girls marry at an early age; it can be considered a cultural belief, I think. Families often think that for girls' primary education is enough, meanwhile boys need to provide money for the family, so they drop off

[13] UNICEF, 2016, Uprooted: The growing crisis for refugee and migrant children, http://weshare.unicef.org/Package/2AMZIFQP5K8 25 november 2021.
[14] UNHCR, 2016, Missing Out: Refugee education in crisis, http://www.unhcr.org/missing-out-state-of-education-for-the-worlds-refugees.html 25 november 2021.

school to go and work. Of course, there is a lack of understanding the benefits of education, maybe also because parents did not have one, or maybe a low-quality education.

5. Discrimination, aggression, national and ethnic conflicts; I think is the most common and problematic challenges that refugees face, and mostly children. Unfortunately, today a foreigner is still viewed as a threat to some people. Not accepted in the society, bullied and left-behind children have more difficulties to concentrate given the importance of the right to education.

6. Lack of teacher preparation specifically in relation to the refugee children. Coming from a different background they need to be treated in a more specialized way, concerning the language and their emotion. In my work with them, we paid particular attention to their past, we had specialist who knew how to interact with children that came through trauma in their life. This does not happen in schools and legislation of host States regarding this issue are rare.

3. What can host States do, in legal terms, to improve the situation of refugees' education

States, as duty-bearers, must consider refugee education as part of national education planning, programming, and funding. It is crucial that refugees' right to education is guaranteed by national legislation. So, in international and domestic human rights law, the role of the government is crucial. The reply of the main question of this research paper is given in the following part. States are not the only actors, though. International bodies are doing a good part of the job, and non-governmental organizations also have a crucial role. But what can host States do? The right to education implies that the national education systems of States must meet standards in four interdependent areas: availability, accessibility, acceptability, and adaptability, as was determined by the Committee on Economic, Social and Cultural Rights.[15] The "4 A-s "were written by K. Tomaševski for the "right to education", but in terms of refugees is considered to be a good solution also to give reply to the difficulties that refugees face. And governments have to make education available, accessible, acceptable, and adaptable.[16]

In terms of refugees, available stands for their inclusion in the national education system. In cooperation with the international community, the host authorities should be prepared to receive the

[15] Moumné, Rolla, Sakai, Leticia, 'Protecting the right to education for refugees' UNESCO (2017) at 22 < https://unesdoc.unesco.org/ark:/48223/pf0000251076 > 25 november 2021
[16] Katarina Tomasevski, "Human rights obligations: making education available, accessible, acceptable and adaptable" 3 Right to Education Primers (2001), at 11.

influx of refugees and invest in education infrastructure and programs. Accessible to everyone stands for non-discrimination and physical and economic accessibility. And facilitate their access when there is a lack of documentation. Or in the cases where refugees are living in rural or remote areas where transportation is not available or costs. Acceptable to the students refer to cultural and language challenges. There is cultural diversity, and multicultural education has an important role in the matter. They need to be supported and given the means to learn the new language of instruction. To adapt to the needs of changing societies, the host State should take all the measures to facilitate and give options to refugees to rebuild their lives and integrate into the new country.

Conclusion

"No one leaves home until home is a sweaty voice in your ear saying, - leave, run away from me now, I don't know what I've become, but I know that anywhere is safer than here."[17] This is a phrase of a poem that is dedicated to those who experience traumas during their journey to a safer place. This emphasizes the situation in which refugees and especially children refugees, are when they also need to face the difficulties that a country in which they are searching for a better life cannot solve. It is the responsibility of the host State to provide an equal education, but this is not always happening. From the statistics, refugee children are five times more likely to be out of school than their non-refugee peers. And I want to connect it really closely to their life experience because I think that the strongest weapon they can have to fight is education. For them, to be educated will lead to a better life, to more opportunities, to rebuild a future with economic stability and dignity for the host State but also for the international community. There will be a safer country with equal possibilities and, for sure fewer chances of criminality.

Where I wanted to put attention, raise the question, and give a certain answer, is the strong relationship between the refugee situation - the State - education. There are children in camps that pass-through traumas, violence, pain, and sexual assault, and these children do not consider education a priority. They do not even know it is a human right. And there are the host States, which obligation is to take all measures to make this process easier. Why are States not doing it? Most of the time, in my opinion, because they do not want to, the reasons are for sure political, but I do not focus on this question in my research paper. What I explained is the importance of the result, and the result will benefit both sides, even considering it from an "egoistic" perspective.

[17] "Home", Warsan Shire https://www.januarytwenty.net/wp-content/uploads/2017/03/Home-Poem-by-Warsan-Shire.pdf, accesed 26 November 2021.

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2. Katarina Tomasevski, "Human rights obligations: making education available, accessible, acceptable and adaptable", in Right to Education Primers no. 3, pg. 11-16 (https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf)

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11. "Home", by Warsan Shire

DISCRIMINATION AGAINST MIGRANT WORKERS FROM POST-SOVIET STATES: FACTORS CAUSING MIGRANT WORKERS' EXPLOITATION IN RUSSIAN FEDERATION

Rashidakhon Tukhtasinova

Introduction

The protection of migrant workers' rights is a critical issue addressed by various international legal instruments, including the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), and the fundamental conventions of the International Labor Organization (ILO). While the Russian Federation has ratified the CERD[1] and all eight fundamental ILO conventions[2], it has not yet ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) [3]. Against this backdrop, this paper aims to provide a comprehensive analysis of the lives of legal and illegal migrants in the Russian Federation.

Since the collapse of the Soviet Union in 1991, the Russian Federation has emerged as a significant destination for millions of migrants, particularly from former Soviet countries. According to recent reports by the United Nations, Russia hosts one of the largest migrant populations globally, ranking only after the United States, Saudi Arabia, and Germany.[4] Approximately 80 percent of these migrants originate from Commonwealth of Independent States (CIS) or post-Soviet countries, with a considerable number comprising men between the ages of 18 and 39 employed in the construction industry.[5] Nevertheless, as the number of migrants has increased, so too has the alarming rise in xenophobia and discrimination.[6]

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[1] OHCHR, Human Rights Bodies: Russian Federation.

[2] ILO, Ratifications for Russian Federation.

[3] Membership - OHCHR. https://www.ohchr.org/en/treaty-bodies/cmw/membership.

[4] UN, International Migration Report. 2017

[5] Human Rights Watch, "Are You Happy to Cheat Us?" Exploitation of Migrant Construction Workers in Russia. 2009

[6] Kislov, D.&Zhanaev, E. Russia: Xenophobia and vulnerability of migrants from Central Asia. 2017

This paper aims to delve into the legal and illegal migrants' experiences in the Russian Federation, examining the role of the government in relation to the violation of foreign workers' rights. Additionally, it will explore the pervasive racism and xenophobia faced by foreign laborers. Finally, this study will critically analyze the factors contributing to the exploitation of migrant workers in recent decades.

Chapter I: Why is Russia an attractive destination for workers from former soviet states?

1. Historical and Cultural Context:

To comprehend the attractiveness of Russia as a destination, it is essential to consider the historical ties and cultural similarities that exist between Russia and the former Soviet states. The shared history, common language, and cultural familiarity stemming from their Soviet past create a sense of affinity and comfort for individuals considering migration to Russia[7].

2. Economic Factors:

A primary driver for individuals from former Soviet states to seek employment in Russia is the prevailing high rates of unemployment and low wages in their countries of origin. To illustrate this point, it is worth examining specific data on unemployment rates and wage disparities among these countries. According to the graph below[8], which showcases the GDP differences among former Soviet republics, Russia remains the leading nation in terms of economic strength, followed by Kazakhstan and Ukraine.

[7] Zubacheva
[8] NationMaster

Table 1: Compared GDP among Former Soviet Republics.

3. Visa-Free Movement:

The Agreement on visa-free movement of citizens of the states of the Commonwealth of Independent States, established on October 9, 1992[9], grants individuals from former Soviet states the ability to enter Russia without a visa and seek employment. This arrangement provides convenience compared to the lengthy visa application process at embassies. As a result, many individuals opt for Russia as a destination due to the ease of access and reduced bureaucratic hurdles.

4. Geographical Proximity:

Russia's geographical proximity to most former Soviet states also contributes to its attractiveness as a destination for migrant workers. The relative ease and affordability of travel enable individuals to reach Russia quickly, making it a practical choice for those seeking employment opportunities.

5. Economic Interdependence:

[9] CIS Legislation

The International Labour Organization (ILO) reports that Russia's construction, motor transportation, manufacturing, and other sectors heavily rely on migrant labor[10]. Migrants from former Soviet states play a crucial role in meeting the labor demands of these industries. This interdependency strengthens the economic ties between Russia and the former Soviet states, presenting opportunities for mutual benefit.

Table 2: Distribution of migrant workers by occupation.

Occupation	Number of foreign workers, thousand
Manual workers	168
Bricklayers	104
Plasterers	71
Concrete workers	59
Carpenters	50
House painters	48
Car drivers	39
Vegetable farm workers	38
Steel fixers	32
Loaders	29
Managers	27
Assemblers	24
Tillers	19
Commercial agents	17
Electrical/gas welders	12
Sales managers	12
Cooks	12
Cleaners of production and office premises	10
Steel and concrete structure erectors	10
Salesmen	10
Roadworkers	9
Sweepers	9
Maintenance technicians	8
Steel fixers	8
Engineers	8
Plumbers	7
Sewers	7

Overall, while the appeal of Russia as a destination for workers from former Soviet states is evident, it is essential to critically examine the treatment of migrant workers in Russia and the actions, or lack thereof, taken by the ex-Soviet governments to protect their citizens' rights. The subsequent sections of this paper will delve deeper into these issues, providing a comprehensive analysis of the lives of migrant workers in Russia, the role of the Russian government, and the factors contributing to the exploitation of migrant labor in recent decades.

[10] ILO

Chapter II: Violations of migrant workers' rights.

This chapter focuses on the violations of migrant workers' rights within the Russian Federation. It highlights the disregard for the rights of non-local workers by both employers and private actors, while also shedding light on the government's apparent indifference to these issues. Additionally, it examines the various obstacles that prevent migrant workers from filing complaints against offenders and seeking justice.

1. Violations and Exploitation:

According to a report by Human Rights Watch[11], migrant workers in Russia experience a range of rights violations at the hands of employers and private actors. Instances of deception, threats, and forced labor are prevalent. This raises concerns about the lack of protection and support provided to migrant workers by both the government and society.

2. Factors Hindering Complaints:

Several factors contribute to the reluctance or inability of migrant workers to file complaints against offenders. The foremost reason is a lack of awareness regarding their rights and the Russian constitution. Migrants often possess limited knowledge of their liberties and the legal framework, leading them to believe that no one will protect them, forcing them to endure exploitative situations.

Another obstacle is the frequent absence of employment contracts or engagement in illegal work. Migrant workers may choose to work without a contract due to convenience or trust in the employer, but this leaves them vulnerable. They fear that seeking legal action against the company or manager may result in penalties imposed by the government for their illegal employment.

Furthermore, many migrant workers are unskilled and lack proper education, making it difficult for them to find legitimate employment opportunities. As a result, they often resort to using unofficial recruiters who may further exploit them[12]. This lack of viable alternatives leads to a situation where workers refrain from lodging complaints, or if they do, they face

[11] Human Rights Watch. 2009
[12] Human Rights Watch. 2009

penalties and potential expulsion from Russia. Local employers may even use bribery to influence officials and manipulate the outcome of legal proceedings[13].

In conclusion, the chapter highlighted the violations of migrant workers' rights within the Russian Federation and the obstacles that prevent them from seeking redress. It underscores the lack of knowledge about rights and the Russian legal system among migrant workers, their dependence on informal employment arrangements, and the resulting fear of reprisal. These factors contribute to a climate of exploitation and impunity, where migrant workers are left vulnerable and unprotected.

In the subsequent sections of this paper, we will delve further into the specific rights violations faced by migrant workers, explore the government's role in addressing these issues, and examine potential solutions to ensure the protection of migrant workers' rights within the Russian Federation.

Chapter III: Case Study.

This chapter presents a case study that sheds light on the human rights violations faced by migrant workers in Russia. The chosen case, "Uzbekistan-Orel," involves 40 workers from Uzbekistan and occurred in 2006 in the city of Orel, Russia. The significance of this case lies not only in the trafficking and forced labor experienced by the workers but also in their pursuit of justice through the legal system.

1. Case Background:

The Uzbekistan-Orel case[14] exemplifies the harrowing experiences endured by migrant workers in Russia. According to interviews conducted by Human Rights Watch, the workers were trafficked and coerced into working under exploitative conditions. Their testimony reveals the extreme hardships they faced, including excessive working hours, physical abuse, and a lack of basic living facilities.

2. Living and Working Conditions:

[13] UNDP 2009
[14] Human Rights Watch. 2009

The victims, including Fayzullo F. from Samarkand, Uzbekistan, recounted the unbearable conditions of their workplace. They were housed above a car wash center, where 40 men resided in cramped quarters without proper amenities. They had only one bathroom and no kitchen facilities. Moreover, the location was closely guarded, and the workers were not permitted to leave the premises after their long shifts, which lasted from 7 a.m. to 1 a.m. This restriction further intensified their isolation and vulnerability.

3. Non-Payment of Wages and Escalating Abuse:

Adding to the already dire circumstances, the workers were not paid as promised after a month and a half of work. Some of the workers who managed to escape the premises were subjected to even more severe mistreatment upon recapture. Fayzullo F. shared accounts of beatings, tooth loss, bruises, and a deteriorating work environment. As tensions escalated, the workers realized they would not receive their owed wages and began demanding the return of their documents.

4. Seeking Justice:

In their pursuit of justice, 24 workers from the group filed a lawsuit against the owner of the car wash center. While the specific outcome of the case is not clarified by Human Rights Watch, it is significant that the workers took legal action to hold the responsible parties accountable for their exploitation.

To sum up, the Uzbekistan-Orel case exemplifies the experiences of migrant workers subjected to human rights violations in Russia. The workers endured trafficking, forced labor, and abusive conditions in the car wash center. Their determination to seek justice through legal means highlights their resilience and the importance of addressing these issues within the legal system. Although further details regarding the case's outcome are not provided in the source material, the study serves as a stark reminder of the urgent need to protect the rights of migrant workers and hold perpetrators accountable for their actions. In the following sections, we will explore additional case studies and examine the broader implications and systemic factors contributing to the violation of migrant workers' rights in Russia. By presenting the case study in a clear and organized manner, this revised chapter effectively highlights the experiences of the Uzbekistan-Orel case and its significance in the context of migrant workers'

rights. It sets the stage for further exploration of similar cases and the underlying issues that perpetuate violations in subsequent sections of the paper.

Chapter IV: Racial discrimination and xenophobia

Racial discrimination and xenophobia against migrants in Russia represent significant challenges that persist despite the existence of international legal instruments prohibiting such practices. This chapter explores the prevalence of racial discrimination in the country and highlights some of the factors contributing to its escalation.

Public sentiment towards migrants in Russia is characterized by a significant level of hostility. According to a conducted poll, 65 percent of voters expressed a desire for fewer migrants in the country, and 75 percent believed that illegal workers should be deported[15]. These statistics reflect a negative perception of migrants among the local population.

1. Racist Attacks and Violence:

Racist attacks against migrants, particularly individuals from Central Asia, have been documented in Russia. From 2004 to 2012, a significant number of people from Central Asia were injured or killed in these racially motivated assaults, as reported by various non-governmental organizations (NGOs)[16]. These attacks underscore the alarming extent of racial discrimination and violence faced by migrants.

The diversity of culture, religion, race, and language among migrants contributes to the rise of racial discrimination in Russia. Differences in customs and traditions may fuel prejudice and biases among the local population. However, it is crucial to recognize that cultural diversity alone does not fully explain the extent of discrimination experienced by migrants.

2. Stringent Migration Laws and Regulations:

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[15] RadioFreeEurope, Russia's Muddled Policy Driving Migrant Workers Into Shadows. 2013

[16] Anti-Discrimination Centre MEMORIAL. Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination by the Russian Federation. 2013

In recent years, the Russian Federation has implemented stricter laws and regulations pertaining to migration. For example, since 2015, a new decree mandates that individuals seeking work permits must pass a Russian history and civic exam, in addition to a language proficiency exam[17]. The increasingly complex and stringent requirements for legal migration have made it more challenging for migrants to obtain legal status, inadvertently leading to an increase in illegal migration. This dynamic contributes to the exploitation and vulnerability of migrants.

3. Exploitative Practices by Employers:

Russian employers often view migrants as disposable labor rather than as fellow human beings. Many migrants have fallen victim to deceptive practices, such as employers confiscating their identification documents under the pretext of registration for new jobs and subsequently refusing to return them. Migrants are forced to work without receiving proper wages, and those who attempt to escape or seek help are threatened, beaten, or even arrested by authorities instead of receiving protection.

4. Government Role and Economic Considerations:

The role of the Russian government in perpetuating racial discrimination warrants examination. Corruption among officials is prevalent, and the protection of foreigners may not align with their personal interests. Additionally, the government's lax enforcement against human trafficking may contribute to the exploitation of migrants as a source of cheap labor, benefiting certain sectors of the economy. Moreover, the remittance of earnings by migrants to their home countries reduces the economic benefits that the government would accrue if the wages were spent within Russia.

To conclude, racial discrimination and xenophobia against migrants in Russia persist as significant issues, with the government's role and economic considerations playing a substantial part in perpetuating inequality. Stricter migration laws, exploitative practices by employers, and cultural diversity contribute to the prevalence of discrimination. To address these challenges effectively, it is essential for the government to prioritize the protection of migrants' rights, combat corruption, and promote inclusive policies that foster equality and respect for all individuals, regardless of their origin. Additionally, raising public awareness,

[17] Najibullah & Bobomatov, 2014

implementing comprehensive anti-discrimination legislation, and fostering social integration are crucial steps toward combating racial discrimination and xenophobia in Russia.

Conclusions and Recommendations

In conclusion, the mistreatment of migrant workers in Russia and the violation of their rights and liberties underscore the urgent need for action to foster equality among sovereign states. Throughout this paper, we have explored the various ways in which migrant workers in Russia face discrimination, exploitation, and abuse.

The fall of the Soviet Union created economic challenges for newly independent states, leading citizens to seek employment opportunities abroad. Russia, with its higher wages, lenient visa policies, and geographic proximity, became an attractive destination for job seekers from these nations. Initially, Russia welcomed migrants to fill labor gaps, particularly in demanding sectors like construction. However, over time, the treatment of foreign workers deteriorated, as evidenced by numerous reports from international organizations and NGOs. Regrettably, the governments of the ex-Soviet states have remained largely silent on this issue, likely due to their relative powerlessness compared to Russia. To address this grave situation, it is essential for the victims to bring their cases to international courts, such as the European Court of Human Rights (ECHR), where they can seek justice and compel Russia to uphold the rights and liberties of migrant workers. The involvement of international law and human rights frameworks is crucial in holding governments accountable and fostering a more equitable society.

In light of these findings, it is imperative to recommend actionable steps to rectify the mistreatment of migrant workers. First and foremost, there is a need for increased collaboration and cooperation among sovereign states to ensure the protection of migrant workers' rights. This could involve sharing best practices, exchanging information, and establishing mechanisms for joint oversight. Additionally, the Russian government should reassess its migration policies, strengthening labor laws, and ensuring their effective enforcement. Moreover, ex-Soviet states must break their silence and actively engage in addressing these issues, working together to protect the well-being and dignity of their citizens.

Ultimately, only through collective efforts, a commitment to international legal frameworks, and a relentless pursuit of equality can we bring an end to the mistreatment of migrant workers in Russia. Let us strive for a society where every individual, regardless of their background, is treated with dignity, respect, and fairness.

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GLOBAL PROGRESS AND LEGAL CHALLENGES: THE STATUS OF ABORTION RIGHTS IN INTERNATIONAL LAW

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Abstract

The debate on the accessibility of the right to abortion has revived recently following the overturning of *Roe v Wade* by the United States Supreme Court on 24 June 2022. Although the discussion has always been prevalent among scholars of the medical and legal fraternity, the recent incident of the US Supreme Court gained a global scope for debate. Advocates of access to safe and legal abortion have always argued that the decision of giving birth to a child is the sole choice of the concerned mother as her body and her personal and financial capacity to give birth and finally raise a child respectively is an undeviating concern. Moreover, the defenders also compare the right to abortion with other fundamental human rights recognized under the relevant instruments of domestic and international law. On the other hand, opponents of legalizing abortion argue that it is not only a violation of the right to life of the unborn child but also grave degradation of humanity to legalize "murder". This article aims to analyse the viewpoints of international law on the accessibility of legal and safe abortion, as well as its status as a human right in the same.

Keywords:

Abortion rights, International law, Women's rights, Human Rights, Gender equality

I. Background

The practice of deliberate termination of pregnancy, i.e., abortion, has been recognized since ancient times. Around the end of the nineteenth century, most states prohibited abortion legally in their jurisdiction.[1] However, the prohibition was subsequently terminated in various jurisdictions at different times. In modern days, the legal status of abortion varies from one jurisdiction to another. Many jurisdictions, such as Australia, Canada, Denmark, Germany, Nepal, etc., allow abortion and ensure medically and legally safe procedures for the concerned persons.[2] Some jurisdictions, on the other hand, prohibit abortion legally, such as Egypt, Iraq, Philippines, etc. Again, the jurisdictions which allow abortion may also have several degrees, such as gestational limits, age requirement, limitation on the duration of the pregnancy, reasonability of the request for an abortion, e.g., rape, incest, socio-economic status, medical concerns, etc. Furthermore, many societies view the subject of abortion from a religious, moral, ethical or political point of view.

According to the estimations of the World Health Organization (WHO), about 210 million women worldwide experience pregnancy every year, with over 135 million giving birth to live infants. The remaining 75 million pregnancies result in stillbirth, spontaneous abortion, or induced abortion.[3] Providers lacking the necessary qualifications and skills often perform unsafe abortions, and some abortions are self-induced. Unsafely induced abortions do not adhere to officially prescribed circumstances and safeguards, and they are exacerbated by unhygienic conditions, risky interventions, or incorrect medication administration.[4] Unsafe

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[1] *Infographic: Human Rights of Women,* UN Women, 6 December 2019

[2] Eve Chen, 'Where is abortion legal in the world?', *USA Today*, 6 May 2022

[3] *About good governance*, United Nations Human Rights, Marking the 75th anniversary of the Universal Declaration of Human Rights

[4] Women and Foreign Policy Program Staff, 'Abortion Law: Global Comparisons., *Council of Foreign Relations*, 24 June 2022

abortion is defined by the WHO as the termination of an unintended pregnancy performed by individuals without the required expertise or in an environment that does not meet minimum medical standards, or both. Despite being preventable, unsafe abortions persist, posing significant health risks to women and potentially jeopardizing their lives. Albeit, restrictions of the free choice of not giving birth derives from three basic reasons, namely- (i) the social stigma and lack of awareness on the importance of access to safe abortion facilities, (ii) the religious concept of abortion to be considered a sin and a mode of moral transgression, and finally (iii) the protection of the life of the unborn child from deliberate murder. As a result, the debate of access to abortion as a fundamental right of a person remains controversial.[5]

Interestingly, studies conducted by the WHO reveal that the abortion rate is similar in the countries having legalized abortion procedures and countries having the contrary and without adequate access to safe abortion and contraception, along with comprehensive support to empower women in making decisions about whether and when to have a child, it is probable that the incidence of unsafe abortions will continue to rise. It is crucial to establish and enhance these provisions in order to address the situation effectively. Therefore, the question remains whether all states should de-criminalize abortion to ensure access to safe and secure abortion facilities for women. The debate has recently been revived by the controversy of the decision of the US Supreme Court to overturn *Roe v Wade*, a landmark verdict of the Court which conferred the right to abortion as a constitutional right for the citizens of the United States. Although the decision of the US Supreme Court does not have extraterritorial prevalence, it certainly stirred up the global discourse on the matter.[6]

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[5] Lima V, Gomez M, 'Access to Justice: Promoting the Legal System as a Human Right' *Encyclopedia of the UN Sustainable Development Goals*, 2019

[6] Gila Stopler, 'Reproductive Rights' 24(3), *Max Planck Encyclopedia of Comparative Constitutional Law*, 2017

II. Some judicial landmarks upholding reproductive autonomy

Abortion laws exhibit significant diversity and often entail complexities, commonly imposing restrictions based on the gestational age of the pregnancy. However, there are instances where these laws include conditions that may contradict the intended purpose, resulting in minimal or nearly non-existent access to official abortions. One such example is found in Zambia, where the abortion procedure necessitates the approval of multiple doctors, including a specialist, despite the scarcity of doctors and specialists in the country. Additionally, further requirements related to consent and counselling can complicate and protract the application process, potentially causing the pregnancy to surpass the legally permitted timeframe for induced abortion.[7] Furthermore, there may exist disparities between the formal wording of the law (de jure) and its actual implementation (de facto), leading to variations in common practice that either facilitate or impede the attainment of safe and legal abortion. To further explore the complexities and variations surrounding abortion laws, it is essential to examine some landmark cases of abortion worldwide.[8] These cases shed light on the intricate interplay between legal frameworks, practical limitations, and the impact on women's access to safe and legal abortions.

In the United States, *Doe v. Bolton (1973)* was decided on the same day as *Roe v. Wade* and dealt with the definition of "health" in relation to abortion. The Supreme Court held that "health" is a broad and inclusive term that extends beyond the narrow medical definition and includes psychological, emotional, and familial factors.[9] In *Casey v. Planned Parenthood (1992)*, the right to abortion established in Roe v. Wade was upheld but modified the trimester

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[7] Ibid

[8] Radhika Rao, '*Abortion*' [2016] 43(2) Max Planck Encyclopedia of Comparative Constitutional Law

[9] "Abortion in U.S. History", (Planned Parenthood, nd)

framework allowing states to regulate abortion in the interest of women's health, as long as the regulations do not impose an undue burden on the right to abortion. *Whole Woman's Health v. Hellerstedt (2016)* dealt with two provisions of a Texas law that required abortion providers to have admitting privileges at a nearby hospital and mandated that abortion facilities meet the standards of ambulatory surgical centres. The Supreme Court held that both provisions imposed an undue burden on the right to abortion and were therefore unconstitutional.

In India, a recent ruling by its highest court affirmed that every woman, regardless of her marital status, possesses equal rights to access abortion.[10] The court acknowledged the significance of reproductive and decisional autonomy in upholding fundamental human rights. According to the court, the freedom for women to make choices regarding their reproductive health without unwarranted interference from the state is integral to the concept of human dignity. Denial of access to reproductive healthcare or the disregard for emotional and physical well-being also constitutes an infringement upon women's dignity.[11] It is important to acknowledge that India has a longstanding patriarchal society, where male values have traditionally exerted control and regulation over personal, social, and economic aspects of life.[12] Furthermore, India has a historical cultural preference for sons over daughters, resulting in the selective abortion of female fetuses. To combat this practice, stringent laws have been implemented to prohibit sex-selective abortion and criminalize female feticide. However, despite these legal measures, pervasive social and cultural norms persist, constraining women from realizing their full potential and pursuing aspirations beyond marriage.[13] Moreover, pre-

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[10] Deshmukh S, "A Comprehensive History of Abortion Laws in India: 1971 -2021" (FII 13 JULY 2022) <https://feminisminindia.com/2022/07/13/a-comprehensive-history-of-abortion-laws-in-india-1971-2021/>

[11] Ibid

[12] Aparajita Lath, 'The Supreme Court of India's Landmark Abortion Ruling', Bill of Health, 17 October 2022

[13] McHugh J, "How 343 Women Made History by Declaring They'd Had Abortions" (TimeNovember 26, 2018) <https://time.com/5459995/manifesto-343-abortion-france/>

marital relationships often face societal disapproval and are stigmatized as "illicit," with pre-marital sex being a taboo subject.[14]

In the case of *A, B and C v. Ireland (2010)*, the European Court of Human Rights addressed Ireland's stringent abortion law in relation to the European Convention on Human Rights (ECHR). While the Court did not find that Ireland's abortion law violated the ECHR, it did rule that the country had failed to meet its obligations under Article 8 of the ECHR, which guarantees the right to respect for private life. Specifically, the Court found that Ireland had not enacted legislation nor established a practical and accessible procedure for women to access lawful abortions in cases where a pregnancy poses a threat to the life of the woman. Consequently, this failure was deemed a violation of Ireland's positive obligations. As a remedy, the Court ordered Ireland to implement a legislative framework for its abortion law and adopt effective procedures to ensure women's access to legal abortion services.[15]

III. Abortion rights in international human hights instruments

International human rights bodies have been playing an active role in favour of the accessibility of safe abortion in recent times.[16] The guarantee of access to abortion is also considered a human rights concern and public health concern.[17] There have been numerous instruments and arrangements made in favour of safe abortion considering the broader impact of the right to abortion in the lives of women and young girls, as well as the effects of the currently existing laws. Comparisons have also been made between the existing rules and the international human

[14] Ibid
[15] Ibid
[16] Piero Tozzi, 'International Law and the Right to Abortion', series no. 1, *International Organizations Law Group Legal Studies* (2013)
[17] Sáez, M. (2022, July 6). The US Is Falling Behind Other Democracies When It Comes to ; Abortion. Human Rights Watch.

rights standard by interpreting the provisions of international human rights authoritatively.[18] Denial of the right to abortion is considered a form of discrimination and a threat to the protection of human rights as all countries are compelled to ensure the protection of the rights of women concerning sexual and reproductive health. Again, non-accessibility or partial accessibility of safe and legal abortion facilities poses a threat to the right to life, right to healthcare, right to information, and right to protection from torture or cruelty.[19] It can also be a threat to the right to privacy and liberty of the concerned women. Experts also assert that it is a violation of the right to conscience and religion of a woman. Each of these rights is an internationally recognized human right and is set out by different human rights instruments, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, The Beijing Declaration and Platform for Action, etc.[20]

a) The Universal Declaration of Human Rights (UDHR)

While not explicitly mentioning abortion, the UDHR encompasses several articles relevant to discussions on reproductive rights and autonomy.[21] Article 3 of the UDHR recognizes the fundamental right to life, which becomes central to the debates surrounding abortion as it involves balancing the rights to life and health of both the pregnant woman and the unborn child. Article 12 highlights the importance of safeguarding privacy and family life. This

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[18] 'Governing Mores: The Battle against Abortion, 1890-1950' (January 2017)

[19] *Promoting gender equality in sexual, reproductive, maternal, newborn, child and adolescent health: Programming guide*, United Nations Women (2019)

[20] Ibid

[21] Mariana Prandini Assis, Joanna N. Erdman, 'Abortion rights beyond the medico-legal paradigm', 17(10), *Global Public Health* (2021)

provision has been interpreted to encompass the right to make decisions regarding reproductive health, including access to contraception and abortion services. Furthermore, Article 16 emphasizes the freedom to choose a spouse and enter into marriage based on voluntary consent. The discourse surrounding abortion often intersects with issues related to family planning and reproductive decision-making within the context of marital or partnership dynamics. Lastly, Article 25 acknowledges the right to access healthcare services essential for the well-being of individuals and communities. This includes recognizing access to reproductive healthcare, including abortion services, as vital components of comprehensive healthcare.[22]

b) International Covenant on Civil and Political Rights (ICCPR)

The ICCPR encompasses a number of articles that hold significance in the context of abortion rights and reproductive autonomy.[23] Article 6 recognizes the right to life and the duty of states to protect it. Discussions surrounding abortion often involve the balancing of the right to life of the unborn child with the right to life and health of the pregnant woman. Article 7 prohibits torture and cruel, inhuman, or degrading treatment. It has been invoked to argue against restrictive abortion laws that may subject women to physical or mental suffering. Article 17 protects individuals from arbitrary interference with their privacy, family, home, or correspondence.[24] It has been interpreted to encompass the right to make decisions regarding reproductive health, including access to contraception and abortion services. Article 23 recognizes the right to enter into marriage with the free and full consent of both parties. Discussions on abortion can intersect with issues related to family planning and reproductive decision-making within the context of marriage or partnerships. The specific provisions and

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[22] United Nations General Assembly, *The Universal Declaration of Human Rights (UDHR)*, New York: United Nations General Assembly, 1948

[23] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

[24] Ibid

their implications may also be further elucidated through the jurisprudence of regional or national human rights courts and bodies.

Moreover, The United Nations Human Rights Committee in its General Comment on the Right to Life under the ICCPR (2018) recognised the right to access abortion as a human right.[25]

c) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The CEDAW recognizes the rights relevant to abortion in several provisions which highlight the importance of ensuring women's access to reproductive healthcare and their right to make decisions about their own bodies.[26] For instance, Article 2 requires states to take appropriate measures to eliminate discrimination against women and ensure their enjoyment of human rights on an equal basis with men. It is relevant to abortion rights as it calls for the elimination of discriminatory practices and barriers that restrict women's access to safe and legal abortion services. Article 12 emphasizes women's right to access healthcare services, including reproductive healthcare, and highlights the importance of ensuring women's right to family planning. It recognizes the significance of reproductive autonomy and the ability to make decisions about contraception and abortion. Article 14 addresses women's rights in rural areas, including their access to healthcare services, including reproductive healthcare. It highlights the need to ensure equal access to reproductive healthcare, including abortion services, for women living in rural areas.[27] Article 16 recognizes women's right to freely and fully consent to marriage and to enter into marriage on the basis of equality with men. It is relevant to

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[25] General comment no. 36: Article 6, Right to life: Human Rights Committee, *UN Human Rights Committee*, 2019 (CCPR/C/GC/36)

[26] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13

[27] Ibid

abortion discussions as it encompasses issues related to family planning, reproductive decision-making, and the ability to control one's own reproductive health.

d) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not directly address the issue of abortion.[28] However, it may have indirect relevance in certain cases related to abortion rights and reproductive health. As such, Article 2 requires states to take effective legislative, administrative, judicial, and other measures to prevent acts of torture and cruel, inhuman, or degrading treatment. While not explicitly addressing abortion, this article may be relevant in situations where women are denied access to safe and legal abortion services, resulting in potential risks to their health and well-being. And, Article 16 prohibits cruel, inhuman, or degrading treatment or punishment. While it does not specifically mention abortion, it can be invoked in cases where restrictive abortion laws or policies subject women to physical or mental suffering, which could be deemed as cruel, inhuman, or degrading treatment.[29]

e) The Beijing Declaration and Platform for Action

The Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women in 1995, addresses various aspects of gender equality and women's empowerment, including reproductive rights.[30] It emphasizes women's reproductive rights, including the right to make decisions regarding their own bodies, sexuality, and reproduction, free from coercion,

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[28] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

[29] Ibid

[30] United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995

discrimination, and violence. It recognizes the importance of ensuring women's access to quality reproductive healthcare services, including safe and legal abortion, as an integral part of reproductive rights. It calls for governments to review and revise laws and policies that restrict women's access to reproductive healthcare, including family planning and abortion services. It emphasizes the need to ensure that such services are safe, affordable, accessible, and of high quality by highlighting the importance of removing legal and regulatory barriers that restrict women's access to reproductive healthcare, including safe abortion services. It calls for the elimination of discriminatory practices and unequal treatment that hinder women's reproductive rights. It also recognizes the role of education in promoting reproductive health and rights.[31] It emphasizes the importance of comprehensive sexuality education to empower women and girls to make informed decisions about their reproductive health, including access to contraception and safe abortion services.

Furthermore, the rights relating to women's reproductive health have been recognized by the United Nations Population Fund at different times, which also addressed the importance of access to such rights and facilities for safe abortion as a matter of protection of reproductive health.[32] In addition, the rights are also recognized by numerous treaties at the regional level, such as the Inter-American Court of Human Rights, the European Court of Human Rights, and the African Commission on Human Rights and People's Rights, etc.

IV. Conclusion

The right to access safe and legal abortion is an internationally recognized human right and is protected by numerous human rights bodies and treaties. States parties to the instruments are

[31] Ibid

[32] 'Abortion is essential healthcare and women's health must be prioritized over politics', (OHCHR, 28 September 2021)

required to ensure access to safe abortion and relevant facilities to protect the human rights relating to it. It is an obvious assertion that many women are unable to carry a child due to socio-economic reasons.[33] As a result, a bar to their individual choice of not carrying a child is a threat to their right to conscience and liberty. Further, the World Health Organization recognizes abortion as one of the safest medical procedures and any complications relating to it can be avoided if the guideline authorized by WHO is maintained. Finally, since criminalization of abortion does not decrease the number of abortions, but rather increases the number of unsafe and illegal abortions, it is high time that the right is now recognized in all states to avoid such medical and socioeconomic hazards.[34]

[33] 'Access to Abortion is a Human Right', *Human Rights Watch*, 5 July 2022

[34] Ibid

THE ROLE OF THE CONCEPT OF STATES SOVEREIGNTY IN TIMES OF GLOBAL CRISIS

Johannes Borbe

Introduction

State sovereignty has been one of the central elements of international law since the first written international treaty on the peace of Westphalia. Although national law has since evolved and adapted new realities, sovereignty has remained virtually unaffected to this day. In contrast to state sovereignty, the influence of political decisions developed steady. At the time after Westphalian peace, most trade took place within the state[1] or, at best, with neighbouring states. Today we live in a world with a globalized economy that is now less strongly influenced by national borders. With the increasing globalization of the economy, the crisis also became more global. The development described above, or the lack of it, raises the question of extend to which sovereign states are still able to provide pragmatic solutions or whether it has to be rethought, if this has not already been done.

The aim of this research paper is to examine the impact of global crisis and state based international law, using climate change as an example. The underlying research question is, if the state sovereignty in international law needs to be rethought? And how can an interplay between national sovereignty and global responsibility succeed?

To address this question, the main part of this paper is divided into several parts. The first part of this paper deals with the question of what is state sovereignty and what is its function, followed by a discussion of the criticism of this concept in the context of globalisation. Finally, the paper debates on the question of whether or not it is necessary to revoke or reformulate the concept of state sovereignty on the basis of the sources, used in this paper.

1. State sovereignty in the context of globalisation

It is not only in recent years that we have seen an increase in global crisis, as the global financial crisis, the current Covid-19 crisis, the influence of the climate change, localised events and political decisions with global impact, as the deforestation of the rainforest in South America. Sometimes the intern political decisions of states even have global impact, for example, the decision of the Brazilian government to condone the slash and burn of the rainforest[2] has accelerated the progress of the climate crisis[3]. However, it should be noted in favour of the Brazilian government, that according to do principle of sovereignty in

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[1] Seppel, M, Tribe, K., Cameralisim in Practice- State Administration and Economy in Early Modern Europe, People, Markets, Goods: Economies and Societies in History V0ö 10. Woodbridge:The Boydell Press 2017, p.4 ff.

[2] Human Rights Watch , Rainforest Mafias, How Violence and Impunity Fuel Deforestation in Brazil's Amazon.17.09.2019, https://www.hrw.org/sites/default/files/report_pdf/brazil0919_web.pdf. , p.2

[3]Tinker, P.B., et al, Agriculture, Ecosystem and Environment 58 (1996), p.13-22(15)

international law, the government has the right to make decisions on the territory it governs which cannot be influenced or prevented by other states. "International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed."[4] In the case of S.S. Lotus, the permanent court of international justice, already 1927 made two statements that describe the legal relationship between states to the present day and therefore formulated an important basis for this paper. If states are allowed to make sovereign and independent decisions on their territory, when there is no treaty or customary norm limiting the right of states, two questions arise: Is there an international norm that can stop the Brazilian government from allowing the rainforest to be burned? And if so, is it binding on the Brazilian government?

2.1 The development of international Environmental Law and its influence on states sovereignty

The first question raised above is very easy to answer. Since the entry into force of the UNFCCC on 21 March 1994, following their development that began in 1987 with the Montreal Protocol, there have been many efforts to conclude new international treaties in the field of Environmental Law. With 197 member states, the UNFCCC is still one of the most widely accepted international treaties and therefore has almost universal status today.[5] The UNFCCC member states agreed on the system of general principles with the aim to slowdown climate change, including the following: "The overall objective of the regime, namely, to limit atmospheric concentrations of greenhouse gases (GHGs) to levels that would prevent dangerous anthropogenic climate change. Guiding principles, including the principles of common but differentiated responsibilities and respective capabilities (CBDR-RC), precaution, and cost-effectiveness. General obligations on all parties to develop policies to mitigate and adapt to climate change and to report on their emissions and policies."[6] The second stage in the development of international Environmental Law was the Kyoto Protocol

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[4] Klabbers, J., International Law, Second Edition, Cambridge, Cambridge University Press, 2017, p.25 ; S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept.7); para.44

[5] UN Climate Change UNFCCC secretariat, What is the United Nations Framework Convention on Climate Change?, 17.10.2021, https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change

[6] Bodansky, D., Paris Agreement, United Nations Audiovisual Library of International Law, 17.10.2021, https://legal.un.org/avl/ha/pa/pa.html, p.2

of 1997. Among other things, it contains a legally binding regulation for contracting states to limit CO2 emissions generated by the economy and compliance mechanism that includes an "enforcement" branch[7]. Due to the limited scope of this paper, the paper will refrain from describing the history of the Paris Agreement, which together with the UNFCCC and the Kyoto Protocol, is today the most important document for examining the legally binding nature of international climate protection law.

2.2 Legally binding nature of the Paris Agreement and its effect on states sovereignty

The second question posed above about the legally binding impact on the concept of state sovereignty, which is the main topic of this research paper, is somewhat less easy to answer. First of all, it should be noted that the UNFCCC demands, that the outcome of the negotiation should result in a "protocol, another legal instrument or an agreed outcome with legal force under the convention."[8] However, the legally binding nature of the Paris Agreement does not apply to all provisions of the treaty[9], as Raimani and Werksman state.[10] The USA in particular, which were not a member of the predecessor of the Paris Agreement, the Kyoto Protocol, welcomes the legal character of the Paris Agreement and even sees in its long- term goals the possibility of creating new international customary law and opinio juris.[11] Although Brazil signed the Paris Agreement on 22 April 2016 and ratified it on 21 September 2016[12], recognizing that the treaty is legally binding, it does not seem to have prevented the government from tolerating the burning of the rainforest and criminalising those who fight against its destruction, as described in this paper. It therefore seems necessary to discuss whether it still makes sense today to adhere to the concept of states sovereignty as described above or if, in the context of global crisis, it is necessary to rethink the concept in a way that will make sure that international treaties as the Paris Agreement will be fulfilled by its member states. In the following this paper will therefore look at texts by other authors who have examined the interplay between globalisation and state sovereignty from different

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[7] Ibid

[8] Rajamani, L., Werksman, J., Phil. Trans. R. Soc. A 376:
20160458, The legal character and operational relevance of the Paris Agreement's temperature goal., centre for policy research, New Dehli/ DG Climate Action, European commission, Brussels, 23.01.2018, p. 3

[9] Bodansky, D., Paris Agreement, United Nations Audiovisual Library of International Law, 17.10.2021, https://legal.un.org/avl/ha/pa/pa.html, p,2

[10] Rajamani, L., Werksman,, J., Phil. Trans. R. Soc. A 376:
20160458, The legal character and operational relevance of the Paris Agreement's temperature goal., centre for policy research, New Dehli/ DG Climate Action, European commission, Brussels, 23.01.2018, p.12

[11] Clark, K., Notre Dame Journal of International and Comparative Law, Vol. 8 Issue 2 Article 8, 06.10.2018, The Paris Agreement: Its Role in International Law and American Jurisprudence, p.116

[12] United Nations Treaty Collection, Chapter XXV Environment 7, d, Paris Agreement 26.10.2021 09:15:39 EDT:
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en

perspectives. Bleeding on these texts, an attempt will be made to extend these arguments to the field of international law to provide an answer to the question posed above.

3. Alternative concepts of sovereignty

3.1 Indigenous or local sovereignty

Indigenous or local sovereignty is a concept based on the fact that the legal position of people in general and minority groups in specific is becoming increasingly important in international law. Calls for more attention to be paid to the inter alia rights of minority groups are increasing. This concerns in particular the right of self-determination, cultural integrity, religion and the freedom of indigenous people to govern over their environment and its natural resources.[13] Many authors mentioned the fields of environmental law and human rights law in this context and even see the direct link between these two fields from the of human rights and environmental legal claims arise.[14]

3.2 Transfer of sovereign powers to supranational bodies

This is probably the most commonly used alternative to the traditional concept of state sovereignty. States decide to conclude treaties in supranational communities of states to which they then confer certain sovereign rights.[15] The author quoted last identifies in his text another alternative to traditional sovereignty: the privatisation or institutionalisation of sovereign rights. In this process, states transfer parts of their sovereign rights to international organisations, such as the so-called Bretton Woods Institutions.[16]

3.3 Environmental Law as Human Right

Since there are so many publications that classify Environmental Law as part of human rights, it seems to be appropriate to describe this idea in more detail. The purpose of this part of the paper is therefore to briefly outline whether or not an orientation of International Law

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[13] Schrijver, N., The Changing Nature of States Sovereignty, British Yearbook of International Law, Volume 70, Issue 1, 1999, p. 65-98(76)

[14] See for example: Held, David (2003) The changing structure of international law: sovereignty transformed? In: Held, David and McGrew, Anthony, (eds.), The Global Transformations Reader: an Introduction to the Globalization Debate. Polity Press, Cambridge, UK, pp. 162-176. (172f.)

[15] Schrijver, N., The Changing Nature of States Sovereignty, British Yearbook of International Law, Volume 70, Issue 1, 1999 , p. 65-98(76 f.)

[16] Schrijver, N., The Changing Nature of States Sovereignty, British Yearbook of International Law, Volume 70, Issue 1, 1999 , p 65-98(77 f.)

towards the needs of the people, rather than toward states, can lead to a solution of the dilemma in which climate change law finds itself. Climate change is a substantial threat to Small Island Development States (SIDS). They are the first to be affected by climate change, such as rising sea levels, because of their low altitude. This threatens their right to self-determination, right to life in connection with food, health, shelter, education and participation in the cultural life.[17] In his article on climate change and human rights, Caney also identifies three human rights that are threatened by climate change: the human right to life, the human rights to health and human right to subsistence.[18] In the following, this paper will follow the breakdown into the three most threatened human rights made by the author just quoted.

3.3 a Right to live

The human right to live is stated in the art. 6.1 of the 1976 ICCPR.
The minimum core obligation associated with this right is not to deprive another human being of his right to live without legal justification.[19] Caney identifies in his article two different ways in which this right gets violated. There are projections that climate change will lead to an increase in the number of extreme weather events, such as floods, hurricanes and droughts, as a result of which people lose their life. The author sees a further violation of the right to live when people die as a result of droughts due to lack of water or when they get respiratory diseases due to the high proportion of CO2 Carbon in the air.[20]

3.3 b Right to health

The human right to health is the second right Caney describes as being threatened by climate change. The right to health is stated under art. 24.1 of the ICESCR from 1976." The right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[21] According to Caney the obligation of the right to health can be understand in a way "that persons should not act in such a way as to create an unhealthy Environment."[22] Two possible

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[17] Willcox, S., Essex Human Rights Review Vol. 9 No.1, June 2012,
A Rising Tide: The Implications of Climate Change Inundation for Human Rights and State Sovereignty; p.1-19(2)
[18] Caney, S., Climate Change, Human Rights and moral thresholds, Humphrey, S. (Edit.), Human Rights and Climate Change, Cambridge University Press, Cambridge 2009, p. 69-90 (75)
[19] UN Human Rights Committee, General comment No 36 on Art 6 Right to live from 3.September 2019 CCPR/C/GC/36, para 4
[20] Caney, S., Climate Change, Human Rights and moral thresholds, Humphrey, S. (Edit.) Human Rights and Climate Change, Cambridge University Press, Cambridge 2009, p. 69-90 (77)
[21] Caney, S., Climate Change, Human Rights and moral thresholds - Humphrey, S. (Edit.) Human Rights and Climate Change, Cambridge University Press, Cambridge 2009, p. 69-90 (78)
[22] Caney, S., Climate Change, Human Rights and moral thresholds - Humphrey, S. (Edit.) Human Rights and Climate Change, Cambridge University Press, Cambridge 2009, p. 69-90 (79)

health impacts of climate change have already been outlined in the last section of this paper. The Correlation between climate change and health problems is therefore not further investigated.

3.3 c Right to subsistence

Here Caney refers to the right of access to food which is stated in many human rights documents as for example under art 11.2 of the ICESCR, "the fundamental right of everyone to be free from hunger" He argues further that the right to fulfill these basic human needs like eating and drinking gets violated for various reasons. For example, the increasing temperature can cause draughts which will endanger the foot security. The ascending temperature also will have an effect on the raising of the sea level which will damage agriculture.[23] He also points out two more effects to which this paper will not further refer.

4. Conclusion

The present work shows that the principle of sovereign states seems to be obstructive today, when it comes to achieving effective binding results to solve global problems. Using Brazil as an example, this work shows that adherence to the concept of state sovereignty leads to states on the one hand being able to conclude legally binding international treaties while on the other hand, with reference to independence and sovereignty within their own national borders, being able to make domestic policy decision that jeopardise the achievement of the agreed objective. The concept of local or indigenous sovereignty seems to be promising because it focuses not only on states but also on their citizens and their human rights. The human rights approach to climate change also makes sense, if climate change poses a whole new threat to human rights. An approach based on human rights, and thus not only on rights of states but also on the obligations of states towards their populations, could help states to take their obligations under treaties more seriously in the future then it was the case in the area of climate protection.

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[23] Caney, S., Climate Change, Human Rights and moral thresholds - Humphrey, S. (Edit.) Human Rights and Climate Change, Cambridge University Press, Cambridge 2009, p. 69-90 (81)

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United Nations Treaty Collection, Chapter XXV Environment 7, d, Paris Agreement 26.10.2021 09:15:39 EDT: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en

UN Human Rights Committee, General comment No 36 on Art 6 Right to live from 3.September 2019 CCPR/C/GC/36, para 4

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A Rising Tide: The Implications of Climate Change Inundation for Human Rights and State Sovereignty

THEORISING ABOUT PEACE: INTERNATIONAL LAWYERS DURING THE INTER-WAR PERIOD

Laçin Idil Öztig

Abstract

The liberal internationalist tradition has its roots in Enlightenment philosophy with its emphasis on reason, equality, liberty, and the individual. Many liberal theorists during the interwar period explained World War I by focusing on aggressive nationalism and held that the principle of sovereignty prevented peaceful inter-state relations and deteriorated human welfare. This study analyses and compares six legal scholars who theorised about peace during the interwar period: Georges Scelle, Nicolas Politis, Hersch Lauterpacht, Walther Schücking, and Hans Wehberg.

INTRODUCTION

Liberalism emerged in the 17th century in concomitant with the abolishment of feudalism and birth of capitalism. Liberal ideas were first propagated by Protestants who opposed secular and religious authorities to promote individual rights.[1] Liberalism challenged pessimistic accounts of the "state of nature" by offering a more positive view on "pre-civic human sociability" which translated into "a liberal conception of the modern, sovereign, civic state and its relations with other such entities."[2] Liberalism promotes values such as individualism, egalitarianism, universalism, meliorism,[3] freedom, tolerance, the rule of law, and reason.

John Locke (1632–1704) and Immanuel Kant (1724–1804) were the most influential philosophers who influenced the tradition of liberal internationalism. Liberal internationalism is rooted in Enlightenment philosophy, which emphasises the possibility of resolving conflicts

[1] Stephanie Lawson, *Theories of International Relations: Contending Approaches to World Politics*. Cambridge: Polity, 2015, p. 118
[2] Lawson, p. 144
[3] James Richardson, "Contending Liberalisms: Past and Present," European Journal of International Relations 3 (1), p. 4. See also John Gray, Liberalism, 2nd ed. Minneapolis: University of Minnesota Press, 1986.

through rational arguments, equality and individual freedom. [4] Enlightenment philosophers believed in the benevolence of human nature and "saw war not as part of the natural order or a necessary instrument of state power, but as a foolish anachronism, perpetuated only by those who enjoyed or profited by it".[5] The liberal internationalist tradition developed in Europe following the French Revolution, giving rise to ideas of peace and an international order built upon justice.[6]

The intertwinement of liberalism and internationalism took place during the 19th century.[7] During this time, many liberals recognized the need for social and economic changes in the international arena for the advancement of peaceful interstate relations.[8] Liberal and internalist ideas were compounded with the objective of "reaching relevance and acknowledgment outside the borders of the nation-state on the international level."[9] Liberal internationalism during this period aimed at transforming the international system so as to stymie "unpredictable power play of governments".[10]

Many liberal theorists during the interwar period explained World War I with aggressive nationalism and held that the principle of sovereignty precluded peaceful inter-state relations and consequently deteriorated human welfare. This article analyses six international lawyers who were engaged in liberal international theorising during the interwar period: Georges Scelle, Nicolas Politis, Hersch Lauterpacht, Walther Schücking, and Hans Wehberg.

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[4] Michael Joseph Smith, 'Liberalism and International Reform', in David Mapel and Terry Nardin (eds.) *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992), p. 202.
[5] Michael Howard, *The Invention of Peace* (London: Profile Books, 2001), p. 26.
[6] Paul Rich, "Reinventing Peace: David Davies, Alfred Zimmern and Liberal Internationalism in Interwar Britain," *International Relations*, 16(1) 2002, p. 117
[7] Richardson, p. 10
[8] Howard, *The Invention of Peace*, p. 44.
[9] Howard, p. 97.
[10] Madaleine Herren, 'International Organizations, 1865– 1945', in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds.) *Oxford Handbook of International Organization* (Oxford: Oxford University Press, 2016), p. 101.

INTERNATIONAL LAWYERS DURING THE INTERWAR PERIOD

Georges Scelle (1878-1961)

George Scelle, a French theorist of international law (and a member of the French delegation to the League of Nations in 1924) supported the idea of internationalism. Scelle moved away from the dichotomy between positive and natural law, advocated the formalization of international law through scientific and objective methods, and opposed the separation of law and ethics. He held optimistic view of progress. [11] In examining the dynamics in the interwar period, Scelle concluded that traditional concepts such as "states" and "sovereignty" became outdated.[12] He defined sovereignty as the "modern expression of the old ideology of tribal nationalism"[13].

Scelle described the League of Nations as a federation of liberal and democratic states.[14] He saw old diplomatic methods and exaggerated forms of nationalism as factors that would hamper the success of the League.[15] According to Scelle, in addition to the the League of Nations, private societies such as the international movement of workers and the Catholic Church would also be instrumental in increasing solidarity on an international scale.[16]

Scelle envisaged the establishment of an international legal system built upon unity and coherence and emphasized the importance of morality in international relations.[17] He rejected the traditional argument that accords legal personality to states in the international arena. He envisioned that the law of the world society would be the highest legal system.[18] He

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[11] Rene-Jean Dupuy, 'Images de George Scelle', *European Journal of International Relations*, Vol. 1, No. 1 (1990), p. 238.
[12] G. Scelle, Précis *de droit des gens; principes et systematique* (Paris: Librairie du Recueil Sirey, 1932), pp.viii–ix.
[13]George Scelle, 'Le phenomene juridique du dedoublement fonctionnel', in Walter Schätzel, Hans Jürgen Schlochauer *Rechtsfragen der Internationalen Organisation* (V. Klostermann, 1956), p. 216.
[14] Scelle Précis de droit des gens, pp. 247-249.
[15] Georges Scelle, The Second League Assembly, The Living Age, 24 December 1921, p. 759.
[16] Scelle Précis de droit des gens, p. vi.
[17] Georges Scelle, The Second League Assembly, The Living Age, 24 December 1921, p. 760
[18] Antonio Cassese, 'Remarks on Scelle's Theory of 'Role Splitting' (dédoublement fonctionnel) in International Law', *European Journal of International Law*, 1: ½ (1990), p. 211

recommended that the world community should work towards the establishment of progressive universal federalism.[19] While acknowledging the difficulty of achieving perpetual peace, Scelle was optimistic about the possibility of universal federalism, underlining that the sovereign authority of states should be limited and international organisations should be formed.[20] In addition to international organisations, Scelle focused on the role democratic people can play in curbing states' sovereign authority and in the transformation of an international order towards a world community.[21]

Nicolas Politis (1872-1942)

Nicolas Politis, a Greek and naturalised French citizen, was a legal scholar, a politician, and a diplomat. He was a foreign minister of Greece during World War I and represented Greece in the League of Nations.[22] He belonged to a group of French internationalists who were interested in creating a science of international law as opposed to the exegetical school that promoted the literal interpretation of legal codes.[23] Politis saw arbitration in the legal domain, not in the domains of politics or diplomacy. While considering that the success of arbitration depends on the goodwill of disputed parties, he argued that the very operation of arbitration through legal mechanisms might promote confidence in governments and ensure guarantees to smaller states.[24]

By regarding the state not only as a solid entity, but as a pure abstraction, Politis described the international community that consists of the state as a greater abstraction and argued that international law should be rooted in the solidarity of human relations.[25] He underlined that states have an obligation to submit to international law and acknowledge their limitations on their independence and sovereignty.[26] His view on the international was based

[19] Georges Scelle 'Le droit constitutionnel international' in Christian Pfister and Joseph Duquesne (eds) *Mélanges R. Carré de Malberg* (Paris: Librairie du Recueil Sirey, 1933), p. 488.
[20] Couveinhes, 'Georges Scelle, les ambiguïtés d'une pensée prémonitoire', p. 406.
[21] Quoted in Cassese, 'Remarks on Scelle's Theory of 'Role Splitting' p. 216-7.
[22] Koskenniemi, *The Gentle Civilizer of Nations*, pp. 305-6.
[23] Marilena Papadaki, 'The 'Government Intellectuals': Nicolas Politis – An Intellectual Portrait', *The European Journal of International Law,* 23:1 (2012), p. p. 224.

[24] Papadaki, p. 225.
[25] Nicolas Politis, 'Le probleme des limitations de la souverainet´e et la th´eorie de l'abus des droits dans les rapports internationaux', RdC, 6 (1925-I), pp. 5-9.

[26] Papadaki, p. 225

on the concept of collective security.[27] He focused on the importance of individual liberty and social justice in the system of collective security that would prevent the possibility of warfare.[28]

The internationalism of Politis derived from his quest to transform the international system from the dominance of the principle of sovereignty and revive the principle of solidarity in the international arena, arguing that the principle of sovereignty paved the way for arbitrary and abusive state behaviours and prevented states' subjection to the law. On this basis, Politis recommended the removal of sovereignty from juridical language.[29]

Hersch Lauterpacht (1897-1960)

Another contribution to interwar liberal internationalism came from Hersch Lauterpacht, a Polish-British legal scholar. During the early years of his career, he participated in the 'Grotius Society', which was created in 1914 in response to World War I. Lauterpacht taught international law at the University of Cambridge and then became a judge at the International Court of Justice. Lauterpacht sought to revive the tradition of natural law, stressing the primacy of interpretation over substance.[30]

Lauterpacht's internationalism accorded a great emphasis on the individual. He regarded the individual as the ultimate unit of all law.[31] The importance he accords to the individual is also obvious in his description of the state as an entity that has 'no justification and no valid claim to obedience except as an instrument to secure the welfare of the individual human being'.[32] In line with his view that recognises the pivotal role of the individual in the international system, Lauterpacht went on to argue that international lawyers should play a greater role in world affairs.[33]

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[27] Papadaki, p. 228.
[28] Papadaki, p.226
[29] Politis, 'Le *problème* des *limitations* de la *souveraineté* etla *théorie* de *l'abus* des *droits* dans les *rapports internationaux*', pp. 19-20; Lorca, *Mestizo International Law*, p. 210.
[30] Jeffery R. Hersch Lauterpacht, the Realist Challenge and the 'Grotian Tradition' in 20th-Century International Relations. *European Journal of International Relations*. 2006;12(2), p.226-228.
[31] Hensch Lauterpacht, The Grotian Tradition in International Law' reprinted in Collected Papers of Hersch Lauterpacht 2:1(1975), p. 336
[32] Hensch Lauterpacht International Law and Human Rights (Praeger: London, 1950), p. 80.
[33] Martti Koskenniemi 'The Function of Law in the International Community: 75 Years After', *British Yearbook of International Law*, 79:1 (2008), p. 366.

Lauterpacht argued that collective security was achievable with the effective implementation of international law, and attributed the failures to solve international crises during the interwar years to the relegation of international law to a secondary plane. He went on to argue that international law could resolve all international disputes.[34]

Lauterpacht's liberal internationalism was inspired by humanism, cosmopolitan individualism and, specifically, Kant's political philosophy.[35] His argument that stresses the universality of international law is built upon the concept of universal human rationality, saw law and morality closely interlinked, evaluated the aggressive form of nationalism as the driver of World War I and considered the interwar period as 'a period of retrogression' from cosmopolitan and liberal principles. As such, he argued for the development of cosmopolitan law, the consolidation of the liberal state, and the functional orientation of international law towards world peace and the protection of human rights. [36]

Lauterpacht evaluated international law from a progressive point of view and envisioned that the principle of state sovereignty would eventually fade away and the international community would evolve into a system that hinges on the rule of law.[37] Lauterpacht's expressed his belief in progressive international relations by stating that: "faith in the ultimate assertion of reason in the relations of man [from which] conceptions like the League of Nations and collective security must be regarded as manifestations of a permanent and ever recurring purpose, and their eclipse must be regarded as temporary and transient".[38]

Walther Schücking (1875-1935)

Walther Schücking, a German scholar of international law, was associated with the tradition of German idealism. He was influenced by Kantian idealism and Neo-Kantian philosophers during his era (such as Paul Natorp and Hermann Cohen).[39] Schücking supported a strong

[34] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933), p.446.
[35] Martti Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law', *European Journal of International Law*, 8:2 (1997), p. 218.
[36] Kita, *Sir Hersch Lauterpacht as a prototype of post-war modern international legal thought*, p. 68.
[37] Pattrick Capps, Lauterpacht's Method, *The British Yearbook of International Law*, 82: 1, (2012), p. 219.
[38]Lauterpacht, 'Neutrality and Collective Security', p. 154.
[39] Frank Bodendiek, 'Walther Schücking and the Idea of 'International Organization', *The European Journal of International Law,* 22: 3 (2011), p.742.

interaction between science and politics by underlining that scientists should study current political issues and lay out specific solutions to political problems by drawing on scientific methods. He also held that scientists are morally obliged to adopt a progressive view on political issues. [40]

Schücking associated international law with pacifism and recommended taming war by 'turning it into an instrument of law'.[41] He acknowledged international arbitration and adjudication as important dimensions of pacifism.[42] Nevertheless, he underscored that even if these instruments were used, the maintenance of peace would still be difficult.[43] According to Schücking, the establishment of an international organisation would be the recipe for peace, and he adopted an evolutionary perspective to international organisations by arguing that they were dynamic entities that would evolve over time.[44]

Schücking argued that economic interdependence, through the linkage of states' economic interests, provided permissive conditions for strengthening international solidarity. He also touched upon an increase in cultural links between nations due to the development of modern communication technology by giving examples from international clubs and associations. Schücking's optimism led him to evaluate the plan for the third Hague Peace Conference (that was cancelled due to the outbreak of World War I) as evidence of an emerging world confederation. Furthermore, he predicted the transformation of the current international legal norms into the norms of the future world confederation.[45]

Schücking laid a specific outline for international peace by arguing that it could be achieved through a "republican organisation of the world". According to him, this type of change in the international arena necessitated the abolishment of hegemonic relations among states. Within this new system, states would continue their existence, but enjoy equal relations supported by an increasing number of legal norms and eschew conflicts by balancing their interests peacefully. Under this systemic and normative change, war would no longer be an instrument of dispute resolution. He further underlined that, under this new system, states

[40] Ibid.
[41] Mónica García-Salmones, 'Walther Schücking and the Pacifist Traditions of International Law', *The European Journal of International Law*, 22:3 (2011), p.764.
[42] Christian J. Tams, 'Re-Introducing Walter Schücking', *The European Journal of International Law,* 22:3 (2011), p. 737
[43] García-Salmones, 'Walther Schücking', p.771
[44] García-Salmones, 'Walther Schücking', p.771
[45] Ibid., pp.745-6.

would establish an international organisation that ensures respect towards international law and works towards the maintenance of international peace.[46]

Hans Wehberg (1885-1962)

Hans Wehberg, a German scholar of international law, associated international law with pacifism. In his speech at the Hague Academy of International Law in 1928, he noted that "[w]ar is dishonored. Upon the complaint of mankind, civilization has brought suit against the conquerors and the generals. A new era has begun".[47] A year later, he wrote that "if war is to be proscribed…then war ought to be renounced forever, without asking whether it be for means of national or international policy".[48]

Wehberg focused on the need for a comprehensive transformation of international law and the abolishment of the right of sovereign states to self-defence for the maintenance of international peace. He criticised the Covenant of the League of Nations, the Geneva Protocol, the Locarno Treaties, and the Kellogg-Briand Pact for their support of the norm of self-defence. By taking this position, Wehberg opposed a strand in international legal thought that ranged from Thomas Aquinas to Hugo Grotius. [49]

Wehberg justified his criticism of states' right to self-defends by arguing that only individuals, not states are entitled to self-defense.[50] He went on to say that "If a murderer kills me, then a reparation of this crime is no longer possible. A state, however, cannot simply be annihilated but rather only occupied".[51] He underlined that considering the advance in military technology, military self-defense would have catastrophic consequences for the local population. Accordingly, he noted that states should instead rely on the instrument of law in the case of an attack. Wehberg strengthened his pacifist argument by taking into consideration the possibility that states might justify their hostile acts under the cloak of self-defense. He

[46] García-Salmones, 'Walther Schücking', p.766; Bodendiek, 'Walther Schücking', p.745.
[47] Hans Wehberg, *The Outlawry of War* (Washington: The Carnegie Endowment for International Peace, 1931), p.122.
[48] Hans Wehberg, 'Der Verteidigungs- und Exekutionskrieg als Sicherung eines angegriffenen Staates', *Die Friedens-Warte*, 29: 2 (1929), pp. 33–38.
[49] Joshua Smeltzer, 'Hans Wehberg and the jus belli ac pacis in interwar international law', *Global Intellectual History* (2018), pp. 1-3. DOI: 10.1080/23801883.2018.1500867
[50] Ibid., p.7.
[51] Wehberg, 'Der Verteidigungs- und Exekutionskrieg als Sicherung eines angegriffenen Staates', p.36.

contended that the outlawing of war would be possible if international law was revolutionised through the elimination of states' right to self-defence. [52]

Wehberg proposed that the Council of the United Nations be empowered to be the 'highest court over war and peace' in an effort to outlaw self-defence wars. With effective measures from the Council to protect the interests of threatened states, states would no longer feel obliged to resort to self-defence acts. He evaluated Article 11 of the Covenant of the League of Nations that treats war as a 'matter of concern to the whole League' as a legal justification for the Council's power on war issues. He criticized the Council of the League of Nations for focusing mostly on conflict prevention in consideration of the difficulty of restoring peace once conflicts emerge.[53]

On this basis, Wehberg proposed that the Council of the League of Nations should also be able to give binding orders to states also in times of war. More specifically, it should have the right to issue a ceasefire and demand the withdrawal of states from the territory of other states. On the other hand, taking into consideration that the U.S. would be less likely to support these proposals as a nonmember of the League, he later proposed the establishment of an international court that is entitled to solve the problems related to peace and war.[54]

Discussion and Conclusion

As the discipline of international law developed in the 19th and 20th centuries, two lines of thought that had different visions of internationalism became crystallised: conservative internationalists and liberal internationalists (progressives). The first called for increased cooperation among states albeit with skepticism towards binding arbitration and permanent international organizations. The latter embraced principles such as humanitarianism, and self-determination, universal participation, and supported stressed the importance of arbitration and permanent international organisations for dispute resolution and war prevention. The progressive line of thought supported international efforts that would impose constraints on states to prevent aggression and that would create conditions in favour of

[52] Smeltzer, 'Hans Wehberg', pp.7-8.
[53] Ibid. p. 8.
[54] Ibid., p. 14.

greater economic opportunity and poverty reduction, which are assumed to be the underlying conditions of war. They argued in favour of the establishment of a council of nations and international courts that would authorize sanctions and even the use of force as means to prevent wars.[55]

International law evolved with the development of laws regarding codes of conduct that relate to how wars are fought, as well as the restrictions of aggression. With respect to the first, rules that concern the protection of prisoners of war and noncombatant civilians were shaped during and after the US Civil War and the Crimean War in the 19th century. In 1864, the Geneva Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field was adopted. In the years to come, many more agreements were adopted in defence of the rights of noncombatants, prisoners, wounded soldiers, etc. Furthermore, from the 19th century onwards, international law societies were formed, international agreements (on commerce, communications, the rights of foreign residents) were made, and seeds of international arbitration were sown.[56]

In the early the 20th century, the international system witnessed fundamental changes with the participation of semi-peripheral states (such as Brazil, China, Japan, and Iran) to international conferences, the collapse of empires, the revision or abrogation of unequal treaties between European and non-European polities.[57] Concomitant with these developments, the mainstream legal through built around the principle of absolute sovereignty and legal positivism started to be challenged.[58]

Interwar international lawyers critiqued the fundamental elements of classical international law. More specifically, they critiqued the absolute understanding of sovereignty and legal positivism. They focused on the transformative potential of international law by providing order on the international level, and the legal scholars examined in this study were optimistic about the prevention of conflicts and wars. They contributed to the liberal internationalist school with their vision based on the idea of progress, the importance of the individual, and the links between law and morality. In line with liberal internationalists from other disciplines, they recommended the transformation of the international system to serve

[55] David Cortright, *Peace: A History of Modern Movements and Ideas*. Cambridge: Cambridge University Press, 2008, pp. 45-8.
[56] Cortright, pp. 45-8; Lorca, *Mestizo International Law,* p.78.
[57] *Mestizo International Law,*p.144.
[58] *Mestizo International Law,*p.143.

general human welfare. Notwithstanding their differences regarding their vision of the international system and their practical policy solutions, they attributed important roles to international law and international organisations for the maintenance of peace.

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