RAOUL WALLENBERG INSTITUTE
OF HUMAN RIGHTS AND HUMANITARIAN LAW

Student Yearbook of International Human Rights Law Volume 1

2025/2026

Selected works from the Lund University / RWI LLM in international human rights law programme
IHRL I & IHRLII courses

Editor: Dr Matthew Scott

Published September 2026

ISBN: 978-91-90084-21-2

The views and opinions expressed in this research are those of the authors and do not necessarily reflect the views of RWI

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Editor’s note

Welcome to the inaugural edition of the Yearbook of International Human Rights Law! This initiative is inspired by more than a decade of engagement with students on the LLM in international human rights law, which is a joint initiative of the Faculty of Law at Lund University, and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. Teaching on this programme, I have consistently been struck by the originality and depth of academic engagement that students demonstrate in their written work. Acknowledging the wealth of academic and often practical experience that students bring to the programme and concerned that at least some of the contributions should reach audiences beyond the classroom, the idea of a Yearbook to celebrate some of the most distinctive texts written on the core human rights law courses in the programme began to take root.

The articles in this volume represent some of the most compelling submissions made by students in partial fulfilment of the course requirements. Topics covered in this volume reflect dominant contemporary human rights challenges: Armed conflict, environmental degradation, violence against women, persons of diverse sexual orientations and gender identities, Indigenous Peoples, migrants, and racialised people, amongst others. Issues and the people who are affected by and shape those issues intersect and overlap, as reflected in the articles.

A dominant theme across the programme is that, in addition to the formal structures that make up the international system for the protection of human rights, human rights law is a language that shapes how human experience is represented and governed. This language is neither neutral nor static. It is a product of contextual histories that can be seen differently depending on how one approaches it. Consequently, critical human rights scholarship reflected in this volume explores assumptions underpinning legal doctrine, finding exclusions and limitations alongside potentially transformational concepts like equality and non-discrimination.

Equally important, the international system for the protection of human rights is itself not monolithic. It manifests differently in different times and places. Treaties and judicial decisions may represent quintessential components of this system, but everyday practices of local authorities, or dynamics within the global economy, also have human rights dimensions that, whether latent or overt, can shape how people experience the world around them. International human rights law is, on this reading, not limited to UN mechanisms and international courts, but can also guide child-centric justice, disaster preparedness and response, and media representation of Palestinians.

In the nearly 80 years since the Universal Declaration of Human Rights affirmed the ‘inherent dignity and of the equal and inalienable rights of all members of the human family', the realisation of this ambition can seem so distant that many doubt whether human rights is fit for purpose, notwithstanding the proliferation of issues capable of being understood from a human rights perspective. The articles in this volume tell a different story. Notwithstanding challenges with enforcement of international human rights law and the persistence of outrageous violence against humans and the more than human world, this language of human rights provides a framework for describing what the right to life with dignity entails, and for working, both fast and slow, towards the amelioration of conditions that deprive people of their rights. That notions of rights are contested, that the normative weight of human rights has been leveraged in service of Empire, and that a vision of *human* rights that fails to account for the more than human world does not diminish the contribution of this project, provided one does not expect monolithic progress towards a pre-defined end that somehow magically captures the shared aspirations of all people everywhere. Human rights law works with complex, contentious and constantly evolving local and global realities. The articles in this volume provide a glimpse into some of the ways we try to engage.

To find out more about the LLM in international human rights law, visit:

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Matthew Scott
Associate Professor
Raoul Wallenberg Institute / Lund University

A spiral in the time of turbulence: Human rights law and the large-scale upheaval of the reformation era (Muhammad Reza Magistra)

Abstract

Following the fall of Soeharto, Indonesia faced profound political instability. Yet amid this turbulence, the state rapidly incorporated international human rights principles into domestic law. This article argues that this reform was not merely altruistic but a survival strategy mirroring the "Spiral Model" developed by Risse, Ropp, and Sikkink. The discussion proceeds in two sections. First, it examines the pre-Reformation era, acknowledging that even during widespread violations, the state made "tactical concessions" that laid the groundwork for reform. Second, it reconfigures the spiral model to analyse the Reformation era, tracing how the state successfully codified future-looking civil liberties while simultaneously stalling on retrospective justice. This analysis offers a specific Global South perspective on the development of human rights law during periods of large-scale upheaval.

Introduction

The resignation of President Soeharto in May 1998 plunged Indonesia into a period of profound uncertainty, characterised by what this article terms a ‘time of turbulence’. The sudden collapse of the 32-year New Order regime (Orde Baru) left a power vacuum that was rapidly filled by economic volatility, mass civil unrest, and a fragile political elite scrambling for legitimacy.[1] As Aspinall observes, this transition was not a clean rupture from the past but rather a chaotic negotiation between the rising demands of a reformist student movement and the entrenched interests of political and military oligarchs.[2] In this volatile environment, the Indonesian state executed a surprising and rapid pivot towards the language and architecture of universal human rights. Between 1998 and 2002, a government that had defined itself for decades by its staunch rejection of ‘Western’ liberal norms in favour of ‘Asian Values’ ratified major international treaties, established a comprehensive constitutional bill of rights, and created dedicated judicial mechanisms for human rights accountability.[3]

This rapid legislative overhaul presents a compelling puzzle for legal and political scholars: was this ‘rights revolution’ a genuine moral awakening on the part of the

[1] Harold Crouch, Political Reform in Indonesia (Cambridge University Press 2010).
[2] Edward Aspinall, Opposing Suharto: Compromise, Resistance, and Regime Change in Indonesia (Stanford University Press 2005).
[3] Todung Mulya Lubis, In Search of Human Rights: Legal-Political Dilemmas of Indonesia’s New Order, 1966-1990 (Gramedia Pustaka Utama 1993).

Indonesian state, or was it, as Hadiz and Robison suggest, a calculated survival strategy by predatory elites seeking to preserve their ascendancy within a new democratic framework?[4] To address this question, this article adopts a socio-legal research methodology. Unlike a purely normative approach that focuses solely on the textual interpretation of statutes, a socio-legal framework examines legal phenomena as products of their broader political and historical contexts.[5] This approach is essential for the Reformation era, as the rapid ratification of human rights instruments cannot be understood in isolation from the domestic power struggles and international economic pressures that precipitated them.

The primary analytical tool utilised is the 'Spiral Model' of human rights socialisation developed by Risse, Ropp, and Sikkink.6 This model provides a qualitative heuristic to evaluate the gap between Indonesia's formal legal commitments and its material compliance. It posits that authoritarian states are often 'entrapped' in a process beginning with 'repression' and 'denial', moving to 'tactical concessions', where regimes make superficial gestures to appease international critics, and eventually leading to 'prescriptive status', where norms are codified into domestic law.7 The model assumes a teleological progression wherein institutionalised norms inevitably pressure the state toward 'rule-consistent behaviour'.8 By mapping the transition from the establishment of Komnas HAM in 1993 to the operation of the Ad Hoc Human Rights Courts in 2004, this research tests the theoretical stages of the model against the empirical reality of Indonesia's legal reform.

However, applying this model to Indonesia's Reformation era reveals a complex divergence from the theory's linear path. This article argues that the Indonesian experience represents a 'split spiral'. On one hand, the state successfully accelerated into 'prescriptive status' regarding *future-looking* civil liberties, such as freedom of expression and protection from torture, driven by the need to signal democratic modernity to international donors like the IMF.[9] On the other hand, as Cammack argues, the spiral effectively stalled when confronting *retrospective* justice.[10] The development of the right to remedy for past atrocities collided with a 'turbulence' of domestic political resistance, in which old elites successfully weaponised legal principles such as non-retroactivity.[11]

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[4] Vedi R Hadiz and Richard Robison, Reorganising Power in Indonesia: The Politics of Oligarchy in an Age of Markets (Routledge 2004).
[5] Reza Banakar and Max Travers, Theory and Method in Socio-Legal Research (Hart Publishing 2005).
[6] Thomas Risse, Stephen Ropp and Kathryn Sikkink, 'The Power of Human Rights: International Norms and Domestic Change'.
[7] ibid.
[8] Thomas Risse, Stephen Ropp and Kathryn Sikkink, 'The Persistent Power of Human Rights: From Commitment to Compliance'.
[9] Philip Eldridge, 'Human Rights in Post-Suharto Indonesia' (2002) 9 Brown Journal of World Affairs 127.
[10] Mark Cammack, 'The Indonesian Human Rights Court' (2001) 2 New York City Law Review 403.
[11] Simon Butt, 'The Constitutional Court and Democracy in Indonesia' (2003) 39 Journal of Asian and African Studies 51.

The discussion proceeds in two sections. Section One examines the roots of the spiral during the late New Order, analysing the establishment of the National Commission on Human Rights (Komnas HAM) in 1993. As Jetschke observes, this was a classic 'tactical concession' intended to deflect international criticism, which inadvertently empowered domestic dissent.[12] Section Two reconfigures the spiral model in light of the Reformation era's legal reforms. It contrasts the successful codification of civil rights in the 1999 Human Rights Law against the systemic failure of the *Ad Hoc* Human Rights Courts, which Linton characterises as mechanisms of impunity rather than justice.[13] Ultimately, this article suggests that in times of political turbulence, legal reform can serve as both a bridge to a democratic future and a firewall against a criminal past.

The Roots of the Spiral (Pre-1998)

To fully comprehend the turbulence of the Reformation era, one must first analyse the rigid structure it sought to dismantle. The development of human rights law in Indonesia did not occur in a vacuum in 1998; it emerged from a complex dialectic between state repression and international pressure during the New Order. Applying the Spiral Model, this period corresponds to the transition from the phase of 'denial' to the phase of 'tactical concessions'.[14] This section argues that while the Soeharto regime successfully maintained an ideological firewall against human rights norms for decades, the establishment of the National Commission on Human Rights (Komnas HAM) in 1993 marked a critical pivot point, a tactical manoeuvre intended to preserve the regime that ultimately sowed the seeds of its legal unravelling.[15]

The Phase of Denial: *Pembangunan* over Rights

For the majority of the New Order's rule (1966–1993), the Indonesian state firmly occupied the 'denial' phase of the Spiral Model. In this stage, authoritarian regimes typically refuse to accept the validity of international human rights norms, dismissing them as foreign interference in domestic jurisdiction.[15] The Soeharto regime constructed a sophisticated legal and political ideology to support this denial, centred on the concept of *Pembangunan* (Development) and the 'Integralistic State' (*Negara*

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[12] Anja Jetschke, 'Linking the Unlinkable? International Norms and Nationalism in Indonesia and the Philippines' (1999) 43 International Studies Quarterly 363.
[13] Suzannah Linton, 'Accounting for Atrocities in Indonesia' (2006) 10 Singapore Year Book of International Law 199.
[14] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds), The Power of Human Rights: International Norms and Domestic Change (Cambridge University Press 1999).
[15] ibid.

Integralistik).[16] Derived from the theories of Supomo, one of the drafters of the 1945 Constitution, the Integralistic State posited that the nation was an organic unity in which the interests of the individual were inseparable from the interests of the state. Consequently, the very concept of individual rights vis-à-vis the state was deemed conceptually impossible and socially destructive.[17]

This ideological rejection was bolstered by the 'Asian Values' argument, a discourse prominent in the 1980s and 1990s which argued that universal human rights were a Western construct incompatible with Indonesia's cultural emphasis on harmony, hierarchy, and communal obligation.[18] The judiciary, stripped of its independence by the 1970 Law on Judicial Power, became an instrument of executive power, enforcing subversion laws to silence dissent rather than protecting civil liberties.[19] Thus, domestic human rights advocates faced a closed political opportunity structure; they had no legal recourse within the country and were frequently branded as enemies of the state for appealing to international standards.

The Tactical Concession: The 1993 Turn

The shift from denial to 'tactical concession' was not driven by a domestic legal awakening, but by the shifting geopolitical tectonics of the early 1990s. The end of the Cold War diminished Indonesia's strategic value to the West as an anti-communist bulwark, leaving its human rights record exposed to unprecedented scrutiny.[20] The catalyst for this shift was the 1991 Santa Cruz massacre in East Timor, where Indonesian troops opened fire on pro-independence demonstrators, an event captured on film and broadcast globally. The subsequent international outcry threatened the flow of development aid from the Consultative Group on Indonesia (CGI), the donor consortium upon which the New Order's economic legitimacy depended.[21]

In response to this 'boomerang pattern' of pressure, where domestic grievances are amplified by transnational networks back onto the state, Soeharto issued Presidential Decree No. 50 of 1993 to establish Komnas HAM.[22] Risse and Sikkink describe such moves as 'tactical concessions': cosmetic institutional changes designed to alleviate international pressure without surrendering real coercive power.[23] The regime's intent was transparent: Komnas HAM was designed to be a "toothless tiger," a state-

[16] David Bourchier, Illiberal Democracy in Indonesia: The Ideology of the Family State (Routledge 2014).
[17] Lubis (n 3).
[18] Michael RJ Vatikiotis, Indonesian Politics under Suharto: The Rise and Fall of the New Order (Routledge 1998).
[19] Sebastiaan Pompe, The Indonesian Supreme Court: A Study of Institutional Collapse (Cornell Southeast Asia Program 2005).
[20] Ann Marie Murphy, 'Indonesia and the World' in Donald K Emmerson (ed), Indonesia Beyond Suharto: Polity, Economy, Society, Transition (ME Sharpe 1999).
[21] Jetschke (n 12).
[22] Presidential Decree No. 50 of 1993 concerning the National Commission on Human Rights 1993.
[23] Risse and Sikkink (n 14).

sanctioned body that would deflect criticism at the United Nations Commission on Human Rights while remaining subservient to the executive.

Institutional Entrapment

However, the Spiral Model predicts that tactical concessions often produce unintended consequences, trapping the regime in a rhetoric it cannot control.[24] This phenomenon of "institutional entrapment" occurred rapidly with Komnas HAM. Despite its members being appointed by the President, the Commission began to exercise a surprising degree of independence. Two key events illustrate this spiral. First, in the aftermath of the brutal murder of labour activist Marsinah in 1993, Komnas HAM conducted an independent investigation that directly contradicted the military's narrative, implicitly accusing state security forces of involvement.[25] Second, following the July 27, 1996, raid on the Indonesian Democratic Party (PDI) headquarters, the Commission issued a bold report holding the government and military accountable for the violence.[26]

These actions were significant not because they led to immediate prosecutions, impunity remained the norm, but because they shattered the state's monopoly on truth.[27] By utilising a state-created institution to validate victims' claims, Komnas HAM legitimised human rights discourse within the domestic legal sphere. It moved the country from a phase in which rights were dismissed as "foreign lies" to one in which they were a valid, albeit contested, standard of state behaviour. Thus, even before the chaos of 1998, the New Order had inadvertently laid the institutional groundwork for the human rights reforms that would follow.

Reconfiguring the Spiral in the Reformation Era

The collapse of the New Order in May 1998 unleashed the "turbulence" described in this article's title, a chaotic convergence of economic collapse, student protests, and elite fragmentation. In this volatile environment, the gradual socialisation predicted by the Spiral Model was replaced by an explosive acceleration.[28] The post-Soeharto state did not slowly climb the ladder from tactical concessions to prescriptive status; it vaulted into it. However, this acceleration was not uniform. This section argues that the spiral splits into two divergent paths: a successful trajectory for future-oriented civil liberties and a stalled trajectory for *retrospective* justice.

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[24] ibid.
[25] Human Rights Watch, 'The Limits of Openness: Human Rights in Indonesia and East Timor' (Human Rights Watch 1994) <https://www.hrw.org/reports/1994/indonesia/>.
[26] Aspinall (n 2).
[27] Mary E McCoy, 'Domesticating International Norms: A Comparison of the National Human Rights Commissions in Indonesia and Malaysia' (2012) 6 Asian Journal of Comparative Law 343.
[28] Edward Aspinall, 'The Struggle for Political Reform' in Donald K Emmerson (ed), Indonesia Beyond Suharto: Polity, Economy, Society, Transition (ME Sharpe 1999).

The Acceleration: Achieving ‘Prescriptive Status’ for Civil Liberties

The first trajectory, the successful codification of civil and political rights, was driven by the legitimacy crisis facing President B.J. Habibie. As Soeharto’s hand-picked successor, Habibie led a transitional government with little domestic support and a desperate need for international financial assistance to combat the Asian Financial Crisis.[29] Consequently, human rights reform became the primary currency for purchasing both domestic tolerance and international liquidity.

Habibie’s administration (1998–1999) engaged in what Risse and Sikkink term ‘prescriptive status’: the formal ratification of international norms into domestic law.[30] Within a span of eighteen months, the government ratified the Convention Against Torture (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and later, the International Covenant on Civil and Political Rights (ICCPR). The crown jewel of this legislative sprint was the enactment of Law No. 39 of 1999 on Human Rights. Often referred to as Indonesia’s "Magna Carta," this statute incorporated almost all the provisions of the Universal Declaration of Human Rights (UDHR) into national law.[31] Crucially, it dismantled the New Order’s subversion laws, explicitly guaranteeing the right to freedom of expression and assembly.[32]

Scholars like Eldridge argue that these reforms were motivated less by a normative shift in the military-bureaucratic elite than by the conditionalities attached to the IMF bailout packages.[33] The state needed to signal to the international community that Indonesia was now a modern democracy safe for foreign investment. This momentum was further cemented by the Second Amendment (2000) to the 1945 Constitution, which introduced Chapter XA (Articles 28A–28J).[34] By elevating rights such as the freedom from torture (Article 28G) and freedom of expression (Article 28E) to the supreme law of the land, the Reformation leaders effectively locked the state into the ‘prescriptive status’ phase regarding future conduct.[35]

The Stalled Spiral: The Failure of ‘Rule-Consistent Behaviour’ regarding the Past

While the Reformation era succeeded in liberalising the future, it failed to adjudicate the past. The Spiral Model assumes that once a state reaches ‘prescriptive status’, the momentum of transnational advocacy networks will inevitably push the state toward

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[29] Dewi Fortuna Anwar, ‘The Habibie Presidency’ in Geoff Forrester (ed), Post-Soeharto Indonesia: Renewal or Chaos? (ISEAS 1999).
[30] Risse, Ropp and Sikkink (n 6).
[31] Law Number 39 of 1999 concerning Human Rights 1999.
[32] Petra Stockmann, The New Indonesian Constitutional Court: A Study into Its Beginnings and First Years of Work (Seip 2007).
[33] Eldridge (n 9).
[34] The 1945 Constitution of the Republic of Indonesia 1945.
[35] Simon Butt and Tim Lindsey, Indonesian Law (Oxford University Press 2018).

'rule-consistent behaviour' (compliance).[36] However, in the realm of retrospective justice, specifically the right to remedy for victims of state-sponsored violence, the Indonesian spiral stalled. This subsection argues that the "turbulence" of the transition allowed old elites to erect two formidable barriers against accountability.

The first barrier was the constitutional prohibition on retroactivity. Paradoxically, the same amendment that introduced human rights protections also introduced a mechanism to defeat them. Article 28I(1) of the 1945 Constitution lists the "right not to be prosecuted under a law with retrospective effect" as a non-derogable right.[37] As Butt notes, this provision was championed by military factions in the MPR specifically to immunise themselves from prosecution for crimes committed during the New Order, such as the 1965 anti-communist purge or the military operations in Aceh and Papua.[38] The devastating effect of this provision became clear in the Bali Bombing Case (2004). The Constitutional Court ruled that the anti-terrorism law could not be applied retroactively to the bombers, citing Article 28I(1).[39] Although the Court later carved out exceptions for gross violations of human rights, the initial absolutist interpretation created a "culture of impunity," signalling that the new human rights regime was designed to protect the perpetrators of the past from the victims of the past.[40]

The second barrier was institutional: the politicised mechanism of the *Ad Hoc* Human Rights Courts. Facing intense international pressure after the devastation of East Timor in 1999, the government enacted Law No. 26 of 2000, establishing both permanent and *Ad Hoc* Human Rights Courts.[41] However, Cammack argues that the law contained a fatal "political filter." Unlike permanent courts, *Ad Hoc* courts (for crimes committed before 2000) could only be established upon the recommendation of the House of Representatives (DPR) and the issuance of a Presidential Decree.[42] This effectively placed the judiciary under the thumb of the legislature. Since the post-1999 DPR was still populated by influential figures from the old regime, there was no political will to prosecute.

The failure of the spiral is most evident in the operation of these courts. The East Timor *Ad Hoc* Human Rights Court (2002–2003) serves as the primary case study. Of the 18 defendants indicted for crimes against humanity, 12 were acquitted at first instance, and all remaining convictions, including that of Governor Abilio Soares, were eventually overturned on appeal.[43] Linton characterises these proceedings as "show trials" intended to deflect the UN Security Council from establishing an international

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[36] Risse and Sikkink (n 14).
[37] The 1945 Constitution of the Republic of Indonesia.
[38] Butt (n 11).
[39] Shalom Horowitz, 'Constitutional Courts and Consolidated Power: The Indonesian Constitutional Court' (2006) 6 Journal of East Asian Studies 253.
[40] ibid.
[41] Law Number 26 of 2000 concerning Human Rights Courts 2000 26.
[42] Cammack (n 10).
[43] David Cohen, Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor (East-West Center 2006).

tribunal.[44] The prosecutors, often career officials from the Attorney General's Office, presented weak indictments that failed to establish the "command responsibility" of high-ranking generals. Instead, they framed the violence as spontaneous clashes between rival East Timorese factions, ignoring the systematic role of the Indonesian military (TNI).

Reconfiguring the Model: The Limits of the 'Boomerang Pattern'

The divergence between the successful future-looking spiral and the stalled retrospective spiral necessitates a reconfiguration of Risse, Ropp, and Sikkink's original theory. The classic Spiral Model relies heavily on the "boomerang pattern", the idea that domestic NGOs can bypass their blocked state to seek international allies who then pressure the state from above.[45] The assumption is that international pressure is a consistent force that authoritarian states eventually succumb to.

However, the Indonesian experience demonstrates that this pressure can be deflected by a "nationalist firewall." As Jetschke argues, the Indonesian military and political elite successfully decoupled human rights from international legitimacy when it came to past crimes.[46] They reframed the demand for international tribunals not as a matter of justice, but as an infringement on Indonesian sovereignty. By characterising the *Ad Hoc* trials as a necessary defence against "foreign interference," the elite rallied domestic nationalist sentiment, effectively blunting the power of transnational advocacy networks.[47] Thus, the spiral in the Reformation era did not stall simply because of a lack of capacity; it stalled because the "tactical concessions" (the courts) were successfully repurposed to insulate the regime from the very norms they were supposed to enforce.

Conclusion

The Reformation era demonstrates that human rights socialisation in the Global South is rarely linear. This article has argued that post-Soeharto Indonesia produced a "split spiral," with a sharp divergence between protecting future liberties and adjudicating past atrocities. While the "tactical concessions" of the late New Order, such as Komnas HAM, inadvertently entrapped the state in human rights discourse, the transition itself was turbulent. Driven by the need for international legitimacy, the new government successfully accelerated into "prescriptive status" by locking civil liberties into the 1945 Constitution, effectively ending the era of "Asian Values" denialism.

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[44] Suzannah Linton, 'Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor' (2004) 17 Leiden Journal of International Law 303.
[45] Margaret E Keck and Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (Cornell University Press 1998).
[46] Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press 2011).
[47] ibid.

However, this forward momentum collided with a domestic firewall regarding retrospective justice. The rights that failed to advance, specifically the right to remedy, were blocked by the weaponisation of non-retroactivity and the politicisation of the *Ad Hoc* Human Rights Courts. Ultimately, the Indonesian experience reconfigures the Spiral Model: in times of upheaval, a state can simultaneously build a liberal democracy for the future while maintaining an impunity regime for the past, leaving the spiral of justice permanently suspended.

Human rights beyond the courtroom: The Barnahus model and the operationalisation of child-centred justice (Natascha Beck Hansen)

Abstract

This essay examines the Barnahus model as a significant expression of child-centred justice that seeks to operationalise international human rights beyond the traditional courtroom setting. While the model originated in Iceland, it was inspired by the Children's Advocacy Centres (CACs) in the United States and has since influenced multidisciplinary child advocacy responses across Europe. Using CACs in the US, Barnahus in Iceland, and European implementations as comparative case studies, the essay explores how integrated, trauma- informed services affect child victims' access to justice, procedural rights and well-being. The analysis evaluates the model through the lens of the UN Convention on the Rights of the Child, the Council of Europe's Lanzarote Convention, and relevant soft-law standards on child-friendly justice. Evaluations and research, including evidence of reduced re-traumatisation and improved forensic interviewing, are used to assess the model's practical impact. The essay argues that the Barnahus approach demonstrates the capacity of human rights to drive institutional innovation and improve child protection responses, while also identifying limitations relating to resourcing and uneven implementation.

Introduction

Children who experience violence or sexual abuse often encounter justice systems that are fragmented, intimidating and poorly adapted to their needs. Traditional criminal procedures tend to prioritise evidentiary efficiency over children's well-being, resulting in repeated interviews, delays, and secondary victimisation.[1] International human rights law has increasingly challenged this, insisting that children's rights must be realised not only in outcomes, but throughout legal processes themselves.[2]

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[1] Theodore P. Cross *et al.* 'Child forensic interviewing in children's advocacy centers: Empirical Data on a practice model' (2007) Child Abuse & Neglect, 31(10), p. 1032; Theodore P. Cross *et al.* 'Evaluating children's advocacy centers' response to child sexual abuse' (2008) Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice. OJJDP Juvenile Justice Bulletin No. NCJ 218530, p. 1; Lisa M Jones *et al.* 'Do Children's Advocacy Centers Improve Families' Experiences of Child Sexual Abuse Investigations?' (2007) Child Abuse & Neglect, 31(10), p. 1070.

[2] See e.g. UN Committee on the Rights of the Child, 'General Comment No. 12 on The right of the child to be heard' (2009) UN Doc CRC/C/GC/12; UN Committee on the Rights of the Child, 'General Comment No. 13 on The right of the child to freedom from all forms of violence' (2011) UN Doc CRC/C/GC/13; UN Committee on the Rights of the Child, 'General Comment No. 5 on General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)' (2003) UN Doc CRC/C/GC/5.

Against this background, the Barnahus ("Children's House") model has emerged as a practical response to demands for child-centred justice. Rather than requiring children to move between police stations, hospitals, courts, and social services, Barnahus brings all key agencies together in a single, child-friendly setting.[3] The model represents an attempt to translate international child rights standards into practice.

Despite its influence across Europe, Barnahus has rarely been analysed explicitly as a human rights mechanism. Yet it offers one of the clearest examples of institutional design aimed at realising States' obligations under the UN Convention on the Rights of the Child (UNCRC), the European Convention on Human Rights (ECHR), and the Lanzarote Convention. Its focus on protection, participation, dignity, and access to recovery directly reflects these normative frameworks.

This essay argues that Barnahus illustrates how human rights norms can drive structural innovation beyond the courtroom. Using comparative examples from the United States, Iceland and Europe, the analysis examines whether and how Barnahus enhances children's access to justice, procedural safeguards and recovery. The model is assessed through the lens of the UNCRC, the Lanzarote Convention, and other relevant instruments on child-friendly justice. At the same time, the essay recognises that Barnahus is not a uniform or flawless solution, and that its effectiveness depends on legal frameworks, resources and inter-agency cooperation.

What is Barnahus?

Barnahus is a multidisciplinary, interagency model designed to respond to cases of violence and sexual abuse against children in a coordinated and child-sensitive way. Its defining feature is that all key services are provided under one roof, reducing the need for children to navigate multiple institutions such as police stations, hospitals and courts.[4] The physical environment is deliberately designed to be non-threatening and age-appropriate, reflecting an understanding of children's vulnerability within formal justice settings.[5]

While implementation may vary across jurisdictions, most Barnahus typically provide four core services designed to respond to the needs of the child.[6] Together, these services ensure that protection, investigation, health, and well-being are addressed in a coordinated and child-centred manner.

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[3] Susanna Johansson & Kari Stefansen, 'Policy-making for the diffusion of social innovations: the case of the Barnahus model in the Nordic region and the broader European context' (2019) Innovation: The European Journal of Social Science Research, 33(1), p. 5.
[4] Daja Wenke, 'Enabling Child-Sensitive Justice: The Success Story of the Barnahus Model and Its Expansion in Europe' (2017) Promise Project Series, Council of the Baltic Sea States, p. 2.
[5] Susanna Johansson & Kari Stefansen (n 3) p. 6.
[6] 'About Barnahus – Barnahus Network' <https://barnahus.eu/barnahus/about-barnahus/> accessed 22 December 2025.

First, child protection services are responsible for carrying out child protection and risk assessments when concerns arise about a child's safety, ensuring that the child's needs remain central and are appropriately met at every stage.[7]

Second, Barnahus supports the investigative process in ways that seek to prevent secondary victimisation. Child-friendly forensic interviews are conducted by specially trained professionals in a safe and supportive environment.[8] These interviews are observed remotely by police, prosecutors, and defence representatives to ensure that due process and evidentiary standards are upheld without subjecting the child to direct adversarial confrontation.[9] Interviews are often video-recorded and may be used as evidence in criminal proceedings, thereby reducing or eliminating the need for the child to testify in court.[10]

Third, when necessary, a sensitive and child-friendly medical assessment is carried out by specialised staff. These examinations serve both investigative purposes and ensure the child's physical health, and are conducted only when required with the child's well-being as the primary consideration.[11]

Finally, Barnahus offers mental health services, including an initial psychological assessment and appropriate follow-up support. Specialised professionals provide crisis intervention and short- and long-term therapeutic services to address the impact of trauma on the child, and where appropriate, on non-offending family members and caregivers.[12] Importantly, these services are available regardless of whether criminal proceedings are initiated, ensuring that the child's health and recovery remain a priority in all cases.[13]

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7 'About Barnahus – Barnahus Network' <https://barnahus.eu/barnahus/about-barnahus/> accessed 22 December 2025.

8 Ibid.

9 Susanna Greijer & Daja Wenke, 'Barnahus: A European Journey Mapping Study on Multidisciplinary and Interagency Child-Friendly Justice Models Responding to Violence against Children in Council of Europe Member States' (Council of Europe 2023) p. 78.

10 Susanna Johansson *et al.* 'Implementing the Nordic Barnahus Model: Characteristics and Local Adaptions' in Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 12; 'About Barnahus – Barnahus Network' <https://barnahus.eu/barnahus/about-barnahus/> accessed 22 December 2025.

11 'About Barnahus – Barnahus Network' <https://barnahus.eu/barnahus/about-barnahus/> accessed 22 December 2025.

12 Hrefna Friðriksdóttir & Anni G. Haugen, 'Child Friendly Justice: International Obligations and the Challenges of Interagency Collaboration' in Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 201.

13 Susanna Greijer & Daja Wenke (n 9) p. 75.

International Legal Framework on Child-Friendly Justice

At the global level, the UNCRC constitutes the central legal framework. Several provisions are directly relevant to child victims and witnesses of violence. Article 3 requires that the best interests of the child be a primary consideration in all actions concerning children, including criminal investigations and proceedings. Article 12 establishes the child's right to be heard, while Articles 19 and 34 oblige states to protect children from all forms of violence and sexual abuse. Importantly, Article 39 requires states to promote the recovery and reintegration of child victims, making it clear that criminal investigations into child abuse must minimise further harm, and support the healing and well-being of children.

The UN Committee on the Rights of the Child has further clarified these obligations through its General Comments. General Comment No. 12[14] stresses that children's participation must be meaningful and adapted to their age and situation, while General Comment No. 13[15] emphasises the need to avoid re-traumatisation in responses to violence. General Comment No. 5[16] underscores the need for institutional reform to make rights effective, paving the way for models like Barnahus as structural mechanisms to translate treaty obligations into practice. Together, these interpretations signal that traditional procedures may fall short of UNCRC standards and that states must actively modify their systems to ensure child-sensitive processes.

At the regional level, the Council of Europe has played a particularly influential role in shaping expectations around child-friendly justice. The Lanzarote Convention[17] requires states to ensure that investigations and proceedings involving child victims of sexual abuse are conducted in a manner that limits harm to the child. Articles 30–36 oblige States to establish procedures that avoid repeated interviews, protect children during judicial processes, and ensure that evidence is collected in a manner respectful of children's dignity and developmental needs.

Further guidance is provided by the Council of Europe Guidelines on Child-Friendly Justice, which call for multidisciplinary and interagency approaches, child-friendly environments, and procedural adaptations to avoid re-traumatisation.[18] They stress that children's rights must be respected at all stages of the process, from first contact with authorities to follow-up support.

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[14] UN Committee on the Rights of the Child, 'General Comment No. 12 on The right of the child to be heard' (2009) UN Doc CRC/C/GC/12.
[15] UN Committee on the Rights of the Child, 'General Comment No. 13 on The right of the child to freedom from all forms of violence' (2011) UN Doc CRC/C/GC/13.
[16] UN Committee on the Rights of the Child, 'General Comment No. 5 on General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)' (2003) UN Doc CRC/GC/2003/5.
[17] Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, Council of Europe Treaty Series (CETS) No. 201.
[18] Council of Ministers, 'Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice' (2010).

The European Court of Human Rights (ECtHR) has held that States have positive obligations under Articles 3 and 8 of the ECHR to protect children from abuse and to conduct effective investigations.[19] In *S.N. v. Sweden*[20], the Court recognised that using video-recorded forensic interviews instead of requiring a child to testify multiple times did not violate defence rights and could be essential to safeguarding vulnerable victims. In *Y v. Slovenia*[21], the Court emphasised States' obligations to prevent secondary victimisation during judicial proceedings.

Taken together, these international instruments establish clear state obligations to prevent secondary victimisation, enable children's meaningful participation, ensure effective investigation and prosecution, and provide recovery-oriented support.

Country Case Study

Children's Advocacy Centres in the United States

Children's Advocacy Centres (CACs) in the United States are widely recognised as the institutional precursors to the Barnahus model. Like Barnahus, they were designed to address systemic deficiencies in the investigation and response to child sexual abuse. The first CAC was established in Huntsville, Alabama in the mid-1980s by prosecutor Bud Cramer, in response to concerns that child victims of sexual abuse were being subjected to repeated interviews by different agencies in fragmented and intimidating settings.[22] Children were often required to recount traumatic experiences multiple times to police officers, social workers, doctors and prosecutors, frequently in environments ill-suited to their age and vulnerability.[23]

The core idea was simple but transformative: instead of requiring the child to navigate the justice system, the system is brought to the child. CACs are designed as child-friendly, non-clinical spaces where a multidisciplinary team of key professionals – typically law enforcement, child protection services, prosecutors, medical practitioners, mental health professionals and victim advocates – coordinates its response.[24] A key feature is the use of a single, recorded forensic interview conducted

[19] M.C. v Bulgaria, no. 39272/98, ECHR 2003-XII, para. 150-153.
[20] S.N. v Sweden, no. 34209/96, ECHR 2002-V, 145.
[21] Y v Slovenia, no. 41107/10, ECHR 2015-II, 185.
[22] Office of Justice Programs, 'Children's Advocacy Centers: At the Forefront of the Fight Against Child Abuse' (2020) U.S. Department of Justice <https://www.ojp.gov/files/archives/blogs/2020/childrens-advocacy-centers> accessed 5 January 2026.
[23] Ibid; Nancy Chandler, 'Children's Advocacy Centers: Making a Difference One Child at a Time' (2006) Hamline Journal of Public Law & Policy, 28(1), p. 319-321.
[24] Monique Simone *et al.* 'Children's Advocacy Centers — Understanding the Impact of a Phenomenon' in Kathleen A Kendall-Tackett & Sarah M Giacomoni (eds), *Child Victimization: Maltreatment; Bullying and Dating Violence; Prevention and Intervention* (Civic Research Institute, Inc 2005) p. 22-3 & 22-4.

by a trained interviewer and observed by relevant professionals behind a one-way mirror, aiming to minimise re-traumatisation and improve evidentiary quality.[25]

The CAC model is structurally similar to Barnahus in its emphasis on coordination and child-sensitive practice, but differs in its institutional arrangements. CACs are not embedded within judicial systems in the same manner as most Barnahus facilities, but operate as community-based organisations accredited by the National Children's Alliance (NCA), the national membership and standard-setting body.[26]

Since the 1990s, CACs have expanded rapidly across the United States, supported by federal funding and coordinated nationally by the National Children's Alliance (NCA).[27] Today, over 900 CACs operate across all states, although their structure, resources and services vary significantly between jurisdictions.[28]

From an international human rights perspective, CACs reflect principles later articulated in child-friendly justice standards, including respect for dignity, protection from harm and sensitivity to children's developmental needs.

Barnahus in Iceland

Inspired by the CACs in the US, the Barnahus model was established in Iceland in 1998 as a pilot project initiated by Bragi Guðbrandsson, then director of the Government Child Protection Agency.[29] The initiative was motivated by growing awareness of child sexual abuse and dissatisfaction with fragmented responses that placed heavy burdens on children.

In Iceland, Barnahus operates as a single institution combining investigative, protective, medical and therapeutic functions under one roof.[30] Its structure reflects a core premise of the model: a child should only have to tell their story once, in a safe, non-intimidating environment, with the investigative process adapting to the child.

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[25] Monique Simone *et al.* (n 24) p. 22-3 & 22-4.
[26] JoAnna Elmquist *et al.* 'A Review of Children's Advocacy Centers' (CACs) Response to Cases of Child Maltreatment in the United States' (2015) Aggression and Violent Behavior, 25, p. 29; 'How the CAC Model Works' (National Children's Alliance, 30 May 2014) <https://www.nationalchildrensalliance.org/cac-model/> accessed 6 January 2026; Amber E Krushas *et al.* 'Identifying Successes and Barriers in a Child Advocacy Center: An Examination of Five Service Areas' (2022) Child & Youth Services, 44(3), p. 276-277.
[27] James Leslie Herbert & Leah Bromfield, 'Evidence for the Efficacy of the Child Advocacy Center Model: A Systematic Review' (2016) Trauma, Violence & Abuse, 17(3), p. 342.
[28] National Children's Alliance, Annual Report 2024, p. 2 <https://www.nationalchildrensalliance.org/wp-content/uploads/2025/03/2024-NCA-Annual-Report.pdf> accessed 5 January 2026.
[29] Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 353; Daja Wenke (n 4) p. 5 & 8.
[30] Susanna Johansson et al. (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 353.

Unlike the CACs in the United States, Barnahus services in Iceland are formally integrated into the national welfare and judicial system, with judges and prosecutors strongly involved and Barnahus services recognised as official procedures.[31] The investigative interview, conducted by a trained professional in a child-friendly setting and video-recorded, is given evidentiary value and can be admitted as evidence in court proceedings thereby eliminating the need for the child to appear in court or be cross-examined.[32]

In addition to forensic interviewing, Barnahus in Iceland provides on-site therapeutic and medical services, allowing immediate transition from disclosure to support and ensuring continuity of care beyond the investigation phase. Children and non-offending caregivers receive trauma-informed therapy, and medical examinations are carried out in child-friendly facilities by specially trained paediatricians.[33] Importantly, therapeutic interventions are not contingent on the outcome of criminal proceedings, allowing Barnahus to function as both a protective and restorative mechanism.[34]

The Icelandic Barnahus has become a central reference point and is widely recognised as the origin of the child-centred, multidisciplinary model now spreading across Europe. Its development marked a shift in how States could structure child-protection and criminal-justice processes around children's rights. The UN Committee on the Rights of the Child and the Lanzarote Committee have highlighted the Icelandic Barnahus as a good practice and an effective means of implementing child-friendly justice obligations.[35]

Expansion across the Nordics and Europe

Following its establishment in Iceland, the Barnahus model expanded first across the Nordic region and later into wider Europe. Within the Nordic countries, Barnahus was introduced sequentially, beginning with Sweden in 2005 and followed by Norway in 2007, Denmark in 2013 and Finland in 2019, each adapting the model to its national legal framework, professional cultures and administrative structures.[36] While these systems share a strong welfare orientation, institutional arrangements differ.

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[31] Trond Myklebust, 'The Nordic Model of Handling Children's Testimonies' in Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 101; Susanna Greijer & Daja Wenke (n 9) p. 15.
[32] Susanna Greijer & Daja Wenke (n 9) p. 15.
[33] Susanna Johansson et al. (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 353-354.
[34] Susanna Greijer & Daja Wenke (n 9) p. 75.
[35] Lanzarote Committee, 1st implementation report, 'Protection of children against sexual abuse in the circle of trust: The framework', adopted by the Lanzarote Committee on 4 December 2015, p. 27 <https://rm.coe.int/1st-implementation-report-protection-of-children-against-sexual-abuse-/16808ae53f> accessed 6 January 2026; Susanna Greijer & Daja Wenke (n 9) p. 30-31.
[36] Susanna Greijer & Daja Wenke (n 9) p. 15.

In Sweden, Barnahus developed as a locally driven initiative, often coordinated by social services and operating through voluntary interagency cooperation, with an emphasis on psychosocial support and child welfare perspectives.[37] Norway, by contrast, placed Barnahus more firmly within the criminal justice system, with stronger involvement of police and prosecutors and clearer procedural mandates.[38] Denmark initially approached Barnahus with caution, but later implemented a nationwide system with strong state coordination and consistent funding.[39] These variations demonstrate that Barnahus is not a fixed institutional model, but a flexible framework shaped by national legal and welfare contexts.

Beyond the Nordic region, the Barnahus model has gained significant traction across Europe, driven largely by the Council of Europe, the Lanzarote Committee and EU-funded initiatives such as the PROMISE project.[40] As a result, Barnahus or Barnahus-inspired centres now exist or are under development in a growing number of countries, including Croatia, Estonia, Lithuania, Cyprus, Germany, Spain and the United Kingdom.[41]

Governance structures for Barnahus vary considerably across Europe, reflecting differences in legal and welfare systems, and levels of state engagement. In the Nordic countries, Barnahus is typically government-led and embedded within public child protection and justice systems.[42] In contrast, at the European level, state involvement is often less clearly defined, and NGOs play a more prominent role in initiating, financing and operating Barnahus.[43] There is currently no unified European legal framework explicitly dedicated to Barnahus and most states rely on fragmented legislative provisions across child welfare, criminal procedure or victim protection laws,

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[37] Susanna Johansson *et al.* "Implementing the Nordic Barnahus Model: Characteristics and Local Adaptions" in Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 20; Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 355.
[38] Susanna Johansson *et al.* "Implementing the Nordic Barnahus Model: Characteristics and Local Adaptions" in Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 20-21; Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 359-360.
[39] Susanna Johansson et al. (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 361.
[40] Susanna Greijer & Daja Wenke (n 9) p. 5 & 17; Susanna Johansson *et al.* "Diffusion and Translation of the Barnahus Model Through the Lens of Institutional Tensions" in Susanna Johansson *et al.* (eds), *Justice and Recovery for Victimised Children: Institutional Tensions in Nordic and European Barnahus Model* (Springer Nature 2024) p. 21-22.
[41] Susanna Greijer & Daja Wenke (n 9) p. 42.
[42] Daja Wenke (n 4) p. 6.
[43] Susanna Johansson *et al.* "Diffusion and Translation of the Barnahus Model Through the Lens of Institutional Tensions" in Susanna Johansson *et al.* (eds*), Justice and Recovery for Victimised Children: Institutional Tensions in Nordic and European Barnahus Model* (Springer Nature 2024) p. 24-25; Susanna Greijer & Daja Wenke (n 9) p. 52.

or on policy instruments.[44] Despite this fragmentation, a growing number of states have begun to anchor Barnahus within their domestic legal or policy frameworks.[45]

From a human rights perspective, the expansion of Barnahus across Europe reflects an increasing willingness by states to rethink how justice is delivered to child victims. Rather than treating children as passive sources of evidence, Barnahus reframes them as rights-holders entitled to protection, participation and recovery. Overall, the European expansion of Barnahus illustrates the model's transformative potential as a practical mechanism for implementing international human rights obligations across diverse legal systems.

Evidence of Impact: How Barnahus Operationalises Human Rights

From a human rights perspective, the impact of the Barnahus model must be assessed not merely by procedural efficiency or criminal justice outcomes, but by its contribution to the effective realisation of children's rights under international and regional human rights law. While the evidence base varies across jurisdictions, research and evaluations indicate that Barnahus has had a measurable impact on states' ability to comply with these obligations.

One of the most consistently documented areas of impact concerns the prevention of secondary victimisation and re-traumatisation. Article 19 UNCRC obliges states to protect children from all forms of violence, and General Comment No. 13 makes clear that investigations must be conducted in ways that actively prevent further harm.[46] Evaluations of Nordic Barnahus models and US CACs demonstrate that co-location and coordinated case handling significantly reduce the number of interviews and institutional encounters children are subjected to, compared to traditional fragmented systems.[47] Forensic interviews are typically conducted once by specially trained professionals in a child-friendly setting and observed remotely by police, prosecutors and defence counsel – thereby limiting re-traumatisation and procedural harm while safeguarding due process.

Barnahus' impact can also be assessed through the lens of the best interests of the child. Article 3(1) UNCRC requires that the child's best interests be a primary consideration in all actions concerning children, further elaborated in General Comment No. 14[48]. General Comment No. 14 emphasises that best interests

[44] Susanna Greijer & Daja Wenke (n 9) p. 35.
[45] Ibid. E.g. In 2021, Slovenia became the first country to adopt a dedicated 'Barnahus law'.
[46] UN Committee on the Rights of the Child, 'General comment No. 13 on the right of the child to freedom from all forms of violence' (2011) UN Doc CRC/C/GC/13, para. 51.
[47] Susanna Greijer & Daja Wenke (n 9) p. 74 & 97.
[48] UN Committee on the Rights of the Child, 'General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*' (2013) UN Doc CRC/C/GC/14.

assessments must be embedded within institutional decision-making structures and not left to discretionary or ad hoc judgments.[49] By institutionalising coordinated, child-sensitive procedures across agencies and prioritising the reduction of harm, timely access to support and child-friendly processes, the Barnahus model can be understood as giving procedural effect to Article 3 UNCRC and operationalising the systematic consideration of children's best interests in justice responses.

A further area of impact relates to children's participatory rights. Article 12 UNCRC, further elaborated in General Comment No. 12, guarantees the right of the child to be heard in all matters affecting them and that their views be given due weight. Barnahus strengthens the conditions under which children are heard by ensuring that interviews follow evidence-based, child-sensitive protocols – improving both the quality of children's testimony and their experience of participation.[50] In this way, Barnahus operationalises the procedural guarantees envisaged in General Comment No. 12. This aligns with Article 35 of the Lanzarote Convention, which requires that child victims be heard without unjustified delay and in a manner adapted to their age and maturity. From a rights-based perspective, Barnahus thus reconciles children's participatory rights with due process requirements, without subordinating either.

There is also evidence that Barnahus contributes to more effective investigations and prosecutions, relevant to states' procedural obligations under human rights law. General Comment No. 13 emphasises that failure to investigate violence against children effectively constitutes a breach of Article 19 UNCRC. This interpretation aligns with ECtHR case law which underscores that states must conduct effective investigations into serious violence, including sexual violence against children, as part of their positive obligations under Articles 3 and 8 ECHR.[51] Nordic studies suggest that early prosecutorial involvement, improved interagency coordination and higher-quality forensic interviews enhance states' capacity to meet investigative obligations without placing disproportionate burdens on the child.[52] The ability to reconcile child-sensitive procedures with fair trial guarantees reflects a more balanced approach to the rights of child victims and defendants alike.

From the perspective of recovery and rehabilitation, Barnahus demonstrates added value in implementing Article 39 UNCRC and Article 14 of the Lanzarote Convention, which require states to ensure access to assistance, treatment and long-term support for child victims. Unlike traditional justice responses that focus narrowly on criminal proceedings, Barnahus integrates medical examinations, psychological assessments

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[49] UN Committee on the Rights of the Child, 'General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*' (2013) UN Doc CRC/C/GC/14, para. 36.

[50] Susanna Greijer & Daja Wenke (n 9) p. 61 & 69; Gunn Astrid Baugerud & Miriam Sinkerud Johnson, "The NICHD Protocol: Guide to Follow Recommended Investigative Interview Practices at the Barnahus?" in Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 123.

[51] M.C. v Bulgaria, no. 39272/98, ECHR 2003-XII, para. 150-153.

[52] Susanna Greijer & Daja Wenke (n 9) p. 97.

and therapeutic support alongside investigative functions. Evaluations show that children referred to Barnahus are more likely to receive timely support, often regardless of whether criminal proceedings lead to prosecution.[53] This is particularly significant from a human rights perspective, as children's entitlement to recovery is not contingent on criminal outcomes but arises from the harm suffered.

At a systemic level, the diffusion of the Barnahus model can itself be understood as evidence of impact in human rights terms. The model has influenced legislative reform, policy development and standard-setting at both national and European levels. The Council of Europe mapping study indicates that states with Barnahus services are better positioned to implement child-friendly justice standards consistently, particularly with regard to investigative duties and safeguards during interviews.[54] Barnahus principles are increasingly reflected in the interpretation of international standards and the practice of monitoring bodies, suggesting that the model has contributed to the operationalisation of children's rights beyond individual cases.

Overall, the available evidence supports the conclusion that Barnahus represents a substantive advancement in the realisation of children's rights under international and European human rights law. Its impact lies less in isolated outcome measures than in its capacity to restructure institutional responses in line with core human rights principles: the best interests of the child (Article 3 UNCRC; GC No. 14), participation (Article 12 UNCRC; GC No. 12), protection from violence (Article 19 UNCRC; GC No. 13), recovery (Article 39 UNCRC), and effective investigation under the ECHR and the Lanzarote Convention.

Limitations, Challenges and Implementation Gaps

Despite its significant potential and normative alignment with child-friendly justice standards, the Barnahus model is subject to persistent challenges, limitations and implementation gaps that affect its capacity to operationalise child-centred justice in practice.

Target Audience

A central challenge concerns the definition of the target group. While the original Icelandic model focused on child victims of sexual abuse involved in criminal proceedings, European adaptations show considerable variation in age limits, types of violence covered, and whether children are included as victims, witnesses, or both.[55] As a result, access to Barnahus services may depend less on children's needs

[53] Daja Wenke (n 4) p. 19.
[54] Susanna Greijer & Daja Wenke (n 9) p. 99.
[55] Susanna Greijer & Daja Wenke (n 9) p. 54-56; Susanna Johansson *et al.* (eds), *Justice and Recovery for Victimised Children: Institutional Tensions in Nordic and European Barnahus Model* (Springer Nature 2024) pp. 26, 57, 188 & 265; Susanna Johansson *et al.* 'Implementing the Nordic

and more on procedural classifications or offence types. Children exposed to domestic violence, neglect or non-criminal forms of harm risk being excluded or referred elsewhere, undermining the principle of equal access to recovery-oriented services. Such exclusions risk reproducing fragmented service pathways that Barnahus was designed to overcome. While the PROMISE Barnahus Quality Standards[56] seek to harmonise practice across Europe, significant differences persist between countries.

Accessibility

Geographical and practical accessibility remains uneven. Barnahus services are often concentrated in urban centres, creating barriers for children in rural or remote areas.[57] Travel requirements, limited opening hours and reliance on referral by specific authorities can further restrict access. For example, Iceland has only one Barnahus, located in Reykjavik, requiring children from rural areas to travel long distances to receive support.[58] Travelling units or "mobile Barnahus" have been proposed as a means of reaching children in less central areas – such units have successfully been established in Denmark and Greenland.[59] Language barriers, disability, and insufficient cultural adaptation also present obstacles for migrant children and children with complex needs. These gaps raise concerns regarding non-discrimination and effective access to justice in practice.

Resources and Funding

Insufficient and unstable funding represents a structural vulnerability. Establishing and maintaining Barnahus requires long-term financial commitment, specialised training, and stable staffing. While Barnahus is frequently promoted as cost-effective, many services operate with limited staffing and heavy reliance on project-based or short-term funding.[60] This constrains the availability of therapeutic follow-up and undermines continuity of care, essentially weakening the logic at the core of the model.

Barnahus Model: Characteristics and Local Adaptions' in Susanna Johansson *et al.* (eds*),* *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 17.

[56] Olivia Lind Haldorsson, 'PROMISE Barnahus Quality Standards: Guidance for Multidisciplinary and Interagency Response to Child Victims and Witnesses of Violence' (2017) Promise Project Series, Council of the Baltic Sea States.

[57] Susanna Greijer & Daja Wenke (n 9) p. 46.

[58] Hrefna Friðriksdóttir & Anni G. Haugen, 'Child Friendly Justice: International Obligations and the Challenges of Interagency Collaboration' in Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 198.

[59] Kari Stefansen *et al.* 'Epilogue: The Barnahus Model: Potentials and Challenges in the Nordic Context and Beyond' in Susanna Johansson *et al.* (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Springer 2017) p. 346; Susanna Johansson *et al.* 'Diffusion and Translation of the Barnahus Model Through the Lens of Institutional Tensions' in Susanna Johansson *et al.* (eds), *Justice and Recovery for Victimised Children: Institutional Tensions in Nordic and European Barnahus Model* (Springer Nature 2024) p. 12.

[60] Susanna Greijer & Daja Wenke (n 9) p. 50-54; Susanna Johansson *et al.* 'Diffusion and Translation of the Barnahus Model Through the Lens of Institutional Tensions' in Susanna Johansson *et al.* (eds),

Legal and Procedural Barriers

Legal and procedural barriers also limit the effectiveness of Barnahus in some states. Criminal procedure rules concerning evidence, defence rights and professional mandates can restrict the use and admissibility of video-recorded interviews, potentially requiring children to repeat their testimony in court. Where this occurs, one of Barnahus' core protective functions – shielding children from adversarial proceedings – is weakened. These constraints reduce the model's capacity to prevent repeated questioning and reveal the difficulty of embedding child-friendly procedures within justice systems that remain largely adult-oriented, despite formal commitments to children's rights.

Partial Models: 'Basic CACs' and 'Barnahus-type Services'

Finally, the proliferation of partial or diluted models presents a significant implementation gap. Studies reveal a growing number of "Barnahus-type" structures or 'basic CACs' that offer forensic interviews but lack on-site medical, psychological or therapeutic services.[61] While these models may improve investigative practices, they fall short of the response envisaged by Barnahus standards. The application of the Barnahus label without guaranteeing substantive compliance risks creating a false sense of alignment with child-friendly justice obligations.

Taken together, these limitations underline that Barnahus is not a self-executing solution. Its effectiveness depends on sustained political commitment, adequate resourcing and careful legal adaptation. Without these conditions, implementation risks reinforcing existing inequalities rather than transforming children's access to justice and recovery. Barnahus cannot compensate for broader systemic weaknesses in child protection or justice systems where legal safeguards, professional training, or child participation frameworks are deficient.

Conclusion

This essay has examined the Barnahus model as a concrete expression of child-centred justice and a practical mechanism for operationalising international human rights obligations. The analysis has shown that the model advances core rights under the UNCRC, the Lanzarote Convention and the ECHR, particularly in relation to the prevention of secondary victimisation, children's meaningful participation, and access to recovery and rehabilitation. By embedding child-sensitive procedures within coordinated institutional structures, Barnahus demonstrates how human rights norms

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Justice and Recovery for Victimised Children: Institutional Tensions in Nordic and European Barnahus Model (Springer Nature 2024) p. 24-25.

[61] Susanna Greijer & Daja Wenke (n 9) p. 7; James Leslie Herbert *et al.* 'A National Survey of Characteristics of Child Advocacy Centers in the United States: Do the Flagship Models Match Those in Broader Practice?' (2018) Child Abuse & Neglect, 76, p. 592.

can shape the design and functioning of justice systems in ways that prioritise children’s dignity and well-being.

At the same time, the analysis has highlighted that Barnahus is not a uniform or self-executing solution. Its capacity to deliver on its human rights promise depends on sustained political commitment, adequate resourcing, legal embedding and consistent implementation. Variations in access, scope and quality across jurisdictions reveal persistent implementation gaps that risk undermining its child-centred potential. Nevertheless, Barnahus remains a powerful illustration of how international human rights standards can be operationalised and translated into concrete institutional arrangements that prioritise children's dignity and well-being.

Shelter from the storm: The right to life's implications on sexual and reproductive health in the wake of disaster (Carolina Claire Boehm)

Abstract

The right to life is the most fundamental of human rights. Increased severity and frequency of environmental and natural disasters pose new threats to the full enjoyment of the right to life. As environmental degradation continues, states must develop environmental humanitarian response plans that ensure all impacted individuals' needs are addressed. Given particular challenges stemming from sexual and reproductive health issues, states must ensure that these plans engage a sexual and reproductive health rights perspective. This article will explore the ways the right to life operates within the nexus of climate change, environmental degradation, and sexual and reproductive health rights. Additionally, this article will discuss how states may uphold their right to life obligations in face of risks related to menstrual, maternal, reproductive, and sexual health. I will conclude that states better uphold their right to life obligations by incorporating a sexual and reproductive health approach to disaster response and climate resilience planning.

Introduction

Hurricane Harvey brought chaos and devastation to the Gulf Coast. Thousands of people were displaced in overcrowded shelters across the state of Texas with limited access to health and safety resources. In the months that followed, emergency responders and community organizations worked tirelessly to provide essential care to the survivors. Among them, an abortion fund answered a call from a woman seeking assistance in traveling out-of-state. A man had raped her in a shelter. Now pregnant, she needed life-altering care, in form of an abortion.[1] Environmental and natural disasters compound threats to human health, livelihood, and life.

Industrialization and warfare have led to the rise of extreme weather, climate events, and environmental degradation. Environmental degradation encompasses pollution, slow onset events, and other phenomena beyond climate, implicating several human rights including the right to health, respect for private and family life, and the right to life.[2] Throughout humanitarian disasters, communities struggle to fulfil their most basic

[1] Leyser-Whalen O, Zareei Chaleshtori S and Monteblanco A, 'Another Disaster: Access to Abortion after Hurricane Harvey' (2020) 41 Health Care for Women International 1111.
[2] Rio Declaration on Environment and Development 1992 (UN Doc. A/ CONF.151/26 (Vol. 1)); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Universal Declaration of Human Rights (adopted 10

needs. For those with marginalized[3] identities, mounting risks pose lethal threats. It is imperative that states begin assessing humanitarian response in environmental contexts and incorporating a sexual and reproductive health rights (SRHR) lens to reduce risks to the most precious right to life. This article will first discuss the right to life and its relation to health, environment, and SRHR frameworks. It will then discuss the nexus of environmental based humanitarian crises and SRHR. This article will conclude by suggesting the specific ways states can uphold their right to life obligations in this nexus by developing emergency response plans with SRHR in mind.

Defining Right to Life

All international, regional, and domestic treaties and conventions recognize the right to life as the most fundamental right.[4] Without it, all other rights are unattainable. The Universal Declaration of Human Rights (UDHR), which is incorporated in many domestic constitutions and adopted by the UN Charter, asserts that 'everyone has the right to life, liberty and security of person.'[5] Variations on the right's expression in regional treaties still centre on the fundamental aspect that 'no one shall be arbitrarily deprived of his life.'[6] No derogation is permitted and it is recognized as both a rule of customary international law and as a *jus cogens* norm. Regardless of treaty ratification, all states are obligated to protect the right to life.[7]

Fulfilment of the right to life hinges largely on the right to health, articulated in the UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[8] Historic interpretations of the right to life focused more on states' obligations to not kill. However, developing jurisprudence in international and domestic forums expands states obligations under the right to life to address other forms of harm that are less overt than state-sanctioned killings.[9] The right to life offers protection

December 1948 UNGA Res 217 A(III) (UDHR); International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[3] Marginalized identities are social identities of individuals or groups who experience exclusion, disadvantage, discrimination, and systematic harm due to characteristics such as gender, race, sexuality, ability, religion, and socioeconomic status. As an additional note on language: sexual and reproductive health rights impact individuals who do not necessarily identify with a specific gender. Though gendered language may be used to acknowledge disproportionate impact on certain groups, please remember that transgender and gender non-conforming individuals are included.

[4] ICCPR art. 6(1) (n 2); American Convention on Human Rights (adopted 22 November, 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pacts of San José) art 4 (IACHR); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 Oct 1986) (1982) 21 ILM 58 art 4 (ACHPR).

[5] UDHR art 3 (n 2).

[6] ICCPR art 6 (n 2).

[7] Human Rights Committee, General Comment No. 36 (2018) on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights, CCPR/C/GC/36 (2018).

[8] UDHR art 25 (n 2), ICESCR art 12 (n 2).

[9] *Víctor Rosario Congo v. Ecuador,* (Judgment) Case 11.427, Inter-Am. C.H. R. Report No. 12/97, OEA/Ser.L/V/II.98, doc. 6 rev. (1997); United Nations Human Rights Committee, 'Communication No.

against unlawful deprivation of life as well as against life-threatening situations. International human rights law developed to acknowledge states' right to life obligations within the private sphere, including instances of domestic violence and environmental harm.[10] States have a duty to take preventative measures against intentional or otherwise foreseeable lethal risks.[11] For full realization of the right to life, states must address the rising threat of environmental degradation and its impact on sexual and reproductive health (SRH).

The right to life's evolution incorporating notions of liveability provides a more nuanced approach to protecting human life in the face of both environmental and reproductive harms. This evolution will help address the gaps left using rights traditionally used in these contexts, such as right to health and right to respect for private and family life. Notably, both rights are qualified rights, as states can interfere under specific conditions.[12] Additionally, right to health's clinical approach tends to ignore the socio-political contexts of reproductive and abortion healthcare. This tendency reflects general trends that gendered concerns may not always be taken seriously despite progress stemming from the international women's rights movement. Other marginalized groups' rights are also better served by the right to life as systemic racism, transphobia, and ableism compound lethal risk factors.

Right to Life in the Environmental Context

The application of right to life is becoming more adept at addressing the wide range of threats to human life, particularly in the environmental context. This development stems in part from growing concerns that the harms humanity has wrought onto the environment are approaching the state of no return. Environmental rights are being transposed into human rights frameworks to address the impact environmental degradation has on marginalized communities. Decades of advocacy led to the UN General Assembly's recognition of the right to a healthy environment.[13] The resolution is nonbinding but signifies the progress made at the intersection of environmental and human rights.

Two recent decisions by the Human Rights Committee explicitly recognized that a State can violate its Article 6 obligations by failing to take action against environmental harm.[14] In *Portillo Cáceres v Paraguay*, farming families brought legal action after

763/1997, *Lantsov v. Russian Federation*' (26 March 2002) UN Doc CCPR/C/74/D/763/1997; *Paschim Banga Khet Samity v. State of West Bengal*, 1996 AIR SCW 2964.

[10] *Talpis v. Italy*, App. No. 41237/14 (Judgment)(2017) ECHR 202.

[11] Human Rights Committee, *General Comment No. 36 (2018) on Article 6 (Right to Lif*e), UN Doc CCPR/C/GC/36 (30 October 2018) para 6.

[12] ICESCR, art 4 (n 2).

[13] UNGA Res 76/300 (28 July 2022).

[14] Human Rights Committee, 'Communication No. 2751/2016, *Portillo Cáceres and Others v. Paraguay* '(25 July 2019) UN Doc CCPR/C/126/D/2751/2016, para 2.3; Human Rights Committee, 'Communication No. 2728/2016, *Ioane Teitiota v. New Zealand* (24 October 2019) UN Doc CCPR/C/126/D/2751/2016.

being poisoned by agro-toxics that led to the death of Mr. Portillo Cáceres.[15] *Teitiota* involved questions of rising sea levels creating hostile environments warranting asylum for the complainant.[16] Though only *Portillo Cáceres* was found in favour of its complainants, both decisions made clear connections to the right to life and climate change. General Comment No. 36 elaborates on the ways environmental degradation, climate change, and unsustainable development pose severe threats to the right to life and imposes obligations on the States to take 'appropriate measures.'[17] *Teitiota* also recognized that slow-onset climate impacts threaten individuals' right to health and right to life.[18] The influential nature of recent HRC jurisprudence could allow for future litigation bridging the divide between environmental protection and human rights law.

This evolution continues at a regional basis as well, with the European Court of Human Rights (ECtHR) recent decision firmly linking states' obligations under the right to life to the environmental context. *Cannavacciuolo and Others v. Italy* held that Italy failed to protect its citizens' right to life by not conducting any risk assessment or management of the known polluting activities in the so-called Land of Fires.[19] This decision heralds a key shift in right to life rhetoric issued by the European Court of Human Rights. Historically, the Court only found European Convention on Human Rights Article 2 violations in instances of 'imminent danger' such as unchecked hazardous industrial activities.[20] Prior to *Cannavacciuolo*, the Court's approach to pollutant cases rested on Article 8, the right to respect one's private and family life. These cases viewed pollution as less critical and not life-threatening.[21] By ruling Italy's neglect violated Article 2, the Court paved the way for future pollution cases to point to right to life violations.

Domestic courts have also begun to link the right to life with environmental degradation. In *Pro Public v. Godavari Marble Indus. Pvt. Ltd.*, the Nepalese Supreme Court declared 'it shall be erroneous and incomplete to have a narrow thinking that the right to life is only a matter of sustaining life. Rather it should be understood that all rights necessary for living a dignified life as a human being are included in it.'[22] This decision indicates growing discourse of how life, dignity, and climate are interconnected. The right to a dignified life continues to grow and develop in environmental and rights-based litigation.[23]

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[15] Cáceres (n 14).
[16] Teitiota (n 14).
[17] General Comment No. 36 para 26, 62 (n 11).
[18] Teitiota, para 9.11 (n 14).
[19] *Cannavacciuolo and Others v. Italy* (2025) App. 51567/14, 39742/14, 74208/14, 21215/15 (ECHR 30 January 2025).
[20] Öneryıldız v Turkey, (2004) 41 EHRR 20.
[21] Brincat and others v Malta (2014) ECHR 240; Guerra v. Italy, (1998) ECHR 7.
[22] *Pro Public v. Godavari Marble Indus Pvt Ltd*, Case 068-WO-0082 (Sup. Ct. of Nepal 2015).
[23] Daly E and May JR, 'Exploring Environmental Justice Through the Lens of Human Dignity' (2019) 25 Widener Law Review 177, 190.

This jurisprudence establishes that states have right to life obligations relating to environmental degradation. As a result, several state obligations arise in anticipation of these environmental. Environmental degradation can also be more concretely linked to state-sanctioned violence, as both a cause and result. Further research should explore SRHR frameworks specifically in these international humanitarian law contexts. Destruction of land is a tactic of genocidal violence or war. The U.S. explicitly deployed of Agent Orange in Northern Vietnam to eliminate targeted communities' resources. [24] The Israeli genocide of the Palestinian people has included environmental destruction, as has Russia's war on Ukraine. [25] State-sanctioned violence can therefore entail environmental degradation, implicating the negative obligations of right to life.

Right to Life in the Reproductive and Sexual Health Context

Evoking the right to life in the reproductive context may give pause, given the conservative ideological tendencies to extend it before birth. However, as established by law and science, this right begins at birth and not conception.[26] The right to life and health includes access to reproductive healthcare.[27] Reproductive health is not merely absence of disease, but rather the state of complete physical, mental, and social well-being in all matters relating to the reproductive system. [28] By expanding on the definition of reproductive health by including political, spiritual, and economic well-being, the reproductive justice framework better articulates the needs and realities of individuals with marginalized identities. [29] Using the right to life within other intersections of the environmental and reproductive justice movements should be developed more thoroughly in future research.

Framing sexual and reproductive health rights within the right to life acknowledges that they are not solely subsets of the right to health, which is primarily framed in the context of economic, social, and cultural rights. The right to health aims for

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[24] Killean R and Dempster L, 'Mass Violence, Environmental Harm, and the Limits of Transitional Justice' (2022) 16 Genocide Studies and Prevention 11, 17.
[25] United Nations Environment Programme, 'Environmental damage in Gaza Strip harming human health, threatening long-term food and water security - new UNEP report' (Press Release, UNEP, 23 September 2025) <https://www.unep.org/news-and-stories/press-release/environmental-damage-gaza-strip-harming-human-health-threatening> accessed 11 January 2026; United Nations Development Programme, 'Environmental Damage Assessment – Ukraine' (Project Summary, UNDP, 2023) < https://www.undp.org/ukraine/projects/environmental-damage-assessment> accessed 11 January 2026.
[26] Center for Reproductive Rights, 'Whose Right to Life? Women's Rights and Prenatal Protections Under Human Rights and Comparative Law' (Report, CRR 2014) < https://reproductiverights.org/wp-content/uploads/2020/12/GLP_RTL_ENG_Updated_8-14_Web.pdf> accessed 27 December 2025.
[27] Gable L, 'Reproductive Health as a Human Right' [2011] Case Western Law Review, 958.
[28] Ibid, 977.
[29] Onwuachi-Saunders C, Dang QP and Murray J, 'Reproductive Rights, Reproductive Justice: Redefining Challenges to Create Optimal Health for All Women' (2019) 9 Journal of Healthcare, Science and the Humanities 19.

accessibility and foundational aspects of human rights by upholding underlying determinants of health. Reproductive rights, by contrast, were developed to ensure freedom of reproductive decision making. These rights are therefore more aligned with civil and political rights doctrines.[30] Though the right to health encompasses a wide range of socio-economic factors, analysing SRHR solely through right to health has neglected an explicit connection to deprivation of life within vulnerable identities. Expanding the right to life to include obligations relating to SRHR better reflects the deadly implications of restricting decisional autonomy relating to reproductive health. It also better reflects the dynamics of sexuality, gender, and power at play.

As with many gendered concerns, reproductive health is often overlooked. Until the 1990s, most discussions pertaining to reproductive health had more to do with population and family planning rather than human rights. The First World Conference on Women in 1995 marked the first significant inclusion of human rights rhetoric in the reproductive health realm, heralding the beginning of the reproductive rights framework.[31] This framework built on the International Conference on Population and Development, which addressed sexual and reproductive healthcare accessibility, autonomy in reproductive decision-making, and the right to conditions enabling safe pregnancy and childbirth.[32]

Many courts have interpreted the right to life to include general health rights.[33] An increasing number of decisions have found violations of the right to life by state inaction regarding sexual, reproductive, and maternal healthcare. One example in Pakistan, *Syed & Others v. Sindh*, found that by neglecting maternal health policies considering widespread occurrences of obstetric fistula, the health department violated the petitioner's right to life.[34] Growing jurisprudence has also connected SRHR to the freedom from cruel, inhuman and degrading treatment.[35] Other cases have linked state obligations under the right to life to abortion protections and measures to combat sexual violence.[36]

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[30] Gable, 969 (n 28).
[31] Onwuachi-Saunders (n 29).
[32] Gable, 989 (n 28)
[33] *Case of Cuscul Piraval et al v Guatemala*, Judgment of Inter-American Court of 23 August 2018 Series C No. 359, para 157 – 160; ; *Lantsov v. Russian Federation* (n 9); *State of Punjab v. Mohinder Singh Chawla* (1997) 2 SCC 83
[34] Center for Reproductive Rights, 'Ensuring Access to Obstetric Fistual Treatment in Sindh, Pakistan' (Case Report, CRR 2025) <https://reproductiverights.org/news/pakistan-obstetric-fistula-maternal-health-sayed-v-sindh/> accessed January 10, 2026.
[35] UN Committee on Ending Discrimination Against Women, 'Communication No. 22/ 2009, *L.C. v. Peru*,' (25 November 2011) UN Doc CEDAW/C/50/D/22/2009; UN Human Rights Committee 'Communication No. 1153/2003, *K.L. v. Peru*,' (22 November 2025) UN Doc CPR/C/85/D/1153/2003.
[36] *Federation of Women Lawyers & Others v. Attorney General,* Petition No. 266 of 2015 High Court of Kenya [2015]; *Guzmán Albarracín et al. v. Ecuador*, Judgment, Inter-American Court of Human Rights Petition Number P-1055-06 (24 June 2020).

Environmental Degradation and Sexual and Reproductive Health Rights

Environmental degradation has compounded preexisting issues pertaining to SRHR. The past two decades have seen the impacts such as inaccessibility to healthcare, increased conflict, food and water scarcity, displacement, and increased gender-based violence (GBV). Vulnerable groups are made even more so and find themselves with even fewer resources and political protections.[37]

Extreme weather events disrupt healthcare infrastructure. Though regions with more robust healthcare infrastructure are not impervious to the storms and droughts ravaging the globe, many regions that have seen increased extreme events have added vulnerability due to weaker systems. The Global North's economic activities have a disparate impact on the Global South's environmental stability.[38] All facets of life are affected, but the consequences on health manifest in countless ways such as severe flooding submerging a hospital in Uganda, extreme temperatures in Pakistan leading to overcrowding and diminishing health resources, and drought in South Africa derailing HIV progress.[39]

Slow-onset events have additional repercussions on SRH. When rising temperatures and flooding coalesce, there is an uptick in disease vectors such as mosquitos. A rise in mosquito borne illnesses such as Zika causes more congenital malformations, preterm births, miscarriages, and other adverse birth outcomes.[40] Food insecurity stemming from droughts may lead to malnutrition based reproductive harm such as irregular menstruation, infertility, and higher risks of miscarriage and maternal and neonatal mortality.[41] Women and girls are often served last and least, elevating their risk of malnutrition.[42]

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[37] Daly, 185 (n 23).

[38] UN Development Programme, 'Human Development Report 2011' (Report, UNDP, 2011) <https://hdr.undp.org/system/files/documents/human-development-report-2011-summary-english.human-development-report-2011-summary-english#:~:text=Sustainability%20and%20Equity%3A&text=The%202011%20Human%20Development%20Report,a%20better%20quality%20of%20life> accessed January 13, 2026.

[39] Al Jazeera, 'Rwanda: Dozens killed as heavy rains trigger floods, landslides' (Al Jazeera, 8 May 2020) <https://www.aljazeera.com/news/2020/5/8/rwanda-dozens-killed-as-heavy-rains-trigger-floods-landslides> accessed January 10, 2026; Hammad Sarfraz, 'The Scorching New Normal in Pakistan' (T Magazine, 25 May 2025) <https://tribune.com.pk/story/2547633/the-scorching-new-normal-in-pakistan> accessed January 10, 2026; Orievulu KS and Iwuji CC, 'Institutional Responses to Drought in a High HIV Prevalence Setting in Rural South Africa' (2021) 19 International Journal of Environmental Research and Public Health 434.

[40] World Health Organization, 'Zika virus' (Fact Sheet, WHO, 6 November 2025) <https://www.who.int/news-room/fact-sheets/detail/zika-virus> accessed January 10, 2026.

[41] Shukla S and Shrivastava D, 'Nutritional Deficiencies and Subfertility: A Comprehensive Review of Current Evidence' [2024] Cureus.

[42] CARE, 'Gender-Based Violence and Food Insecurity: What We Know and Why Gender Equality Is the Answer' (*CARE*, 2022) <http://www.jstor.org/stable/resrep54185> accessed 10 January 2026

Gender dynamics typically assign women and girls as primarily responsible for gathering food and water for their households. As they travel further distances, the likelihood at least part of the journey is in darkness increases their vulnerability. Isolated routes compound the risk of assault.[43] Food and water insecurity may also create conflict over limited resources, exacerbating violent behaviour in and outside the home. The already taboo process of washing during menstruation is further impeded, aggravating menstrual health. The risk for sexual coercion (e.g. transactional sex for food) also skyrockets.[44]

Displacement stemming from both slow-onset and sudden-onset events heightens risk of GBV and the neglect of sexual and reproductive healthcare. Inaccessibility of sexual and reproductive healthcare following displacement elevates risks of early and unwanted pregnancies, unsafe abortions, and sexually transmitted infections.[45] Regardless of region, marginalized communities face additional systemic barriers to basic sexual and reproductive healthcare that are compounded by displacement. In the United States, extreme weather and climate events have disparate effects on predominantly Black, Brown, and Indigenous communities due to systemic cycles of oppression and restricted resources. Louisiana, one of the poorest states in the U.S., is host to several deadly environmental crises, from hurricanes to petrochemical plant pollution.[46] Hurricanes Katrina, Maria, and Harvey further destroyed the already fragile reproductive and sexual healthcare infrastructure of Louisiana, Texas, and Puerto Rico. The timing of Harvey coincided with Texas' widespread abortion clinic shutdown, resulting in people having to stretch already thin resources from managing their displacement to travel farther distances to receive abortion care.[47]

Being pregnant creates a perfect storm of increased vulnerability. During pregnancy, the body is subjected to significant changes to its structure and systems. If pregnant, a person's vulnerability to both new and old health complications skyrocket. Exposure to hazardous substances may lead to maternal hypertension, congenital anomalies, preterm birth, and issues with neurological development.[48] In 1998, a government

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[43] Tallman PS and others, 'Water Insecurity and Gender-based Violence: A Global Review of the Evidence' (2022) 10 WIREs Water

[44] Cole S and others, 'Water Insecurity Is Associated with Gender-Based Violence: A Mixed-Methods Study in Indonesia' (2024) 344 Social Science & Medicine 116507; Salim D and Salim K, ' Chapter 9 - Ensuring Right to Menstrual Hygiene and Health in India: A Microcosm of Right to Life', *EXPANDING HORIZONS OF ARTICLE 21 OF INDIAN CONSTITUTION: A CRITIQUE* (1st edn, The Delhi Law House 2921).

[45] UN Women and United Nations Environment Programme, 'Gender Climate and Security' (Report, UN Women, 11 June 2020) < https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Gender-climate-and-security-en.pdf> accessed 16 January 2026, 46.

[46] Colangelo S, 'Bridging Silos: Environmental and Reproductive Justice in the Climate Crisis' [2024] California Law Review 1255, 1257.

[47] Ibid, 1279.

[48] UN General Assembly, 'Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Marcos Orellana: Gender and hazardous substances' (16 July 2024) UN Doc A/79/163, para 97 – 106.

issued plane sprayed glyphosate over Colombian farmland, covering a pregnant twenty-eight-year-old Yaneth Valderrama. She was admitted to a nearby hospital with severe pain and difficulty breathing, where she suffered a miscarriage. She continued to deteriorate for months and was ultimately diagnosed with neurotoxicity. She died days later.[49]

Pollution and environmental disasters create further reproductive health complications. Industrial disasters have been linked to devastating reproductive health developments. Following the 1984 gas leak at a pesticide plant in Bhopal, India, infertility and pregnancy complications rapidly increased. Chemical interference severely impacts reproductive systems. Exposure to certain chemicals contributes to risk for sex-specific cancers. Certain regions in Ecuador have more than double the national average rates of breast and cervical cancer, which is largely attributed to regional gas flaring and recurring oil spills.[50] Proximity to an oil spill has severe consequences on neonatal mortality rate. One study in Nigeria found that the rate more than doubled based on pre-conception proximity to an oil spill.[51] Toxic air pollution from industrial plants also contribute to adverse birth outcomes and cancer rates. Louisiana's "Cancer Alley," which is predominantly made up of Black low-income communities, has a premature birth rate average between two to three times that of the national average.[52] Pesticide exposure can cause a myriad of reproductive health concerns including endocrine disruption, cancer, reduction in sperm quality, premature births, and damage to foetal development.[53]

Obligations of States Under Right to Life in the Wake of Disaster

There is a clear nexus between environment and SRHR. The right to life discourse continues to evolve to incorporate these threats. States will need to better understand how to respect, protect, and fulfil their obligations within these contexts. Currently, there is a large gap in research and guidance on how to lessen risks to life stemming from SRHR violations amidst environmental humanitarian disasters. Obligations imposed by different rights converge to demand states integrate SRHR into climate-responsive and proactive planning. CEDAW Art. 12 obliges parties to guarantee gender equality in healthcare, including SRH.[54] By implementing an SRHR framework into their approaches to environmental disasters, states can achieve progressive realization of additional implicated rights. Though the link to the right to life is more

[49]Center for Reproductive Rights, Reproductive health and glyphosate in the context of the armed conflict (CRR, Report, 2020).
[50] Special Rapporteur Report, para 99 (n 48).
[51] Ibid, para. 103.
[52] Ibid, para. 21.
[53] Ibid, para. 47.
[54] Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, UNTS vol 1249, 3 (entered into force 3 September 1981), art 12; UN Committee on the Elimination of Discrimination Against Women, 'General recommendation No. 24: Article 12 on the Convention (Women and Health)' (1999) UN Doc A/54/38/Rev.1, chap I, para 25.

readily applied in sudden-onset events, this obligation also applies in cases of slow-onset events such as rising sea levels, long-term toxic exposure, or droughts. CEDAW General Recommendation No. 37 provides suggestions on ways states can incorporate gender equality in their disaster risk reduction and climate change planning.

Addressing Gender-Based Violence

Given the prevalence of sexual and gender-based violence following environmental degradation and disasters, one proposal is to ensure confidential and effective reporting mechanisms are easily accessible and available. States should implement training on ways to identify, prevent, and address GBV for all emergency services workers and other groups providing support for disaster survivors.[55] Sexual assault and rape are severely underreported. Ensuring safe and accessible reporting mechanisms will not only support individual survivors but can contribute to future research on risk factors and how to develop better protections. Trans and gender diverse people are frequently targeted and face unique barriers in achieving SRHR. More investigation into how to best support people with diverse sexual orientations, gender identities, and sex characteristics during humanitarian crises is warranted.

When developing climate resilience plans states should implement suggestions from experts on how to better design shelters and evacuation routes to lessen the risk of GBV. Vanuatu, which is extremely susceptible to severe climate events, has adopted accessible checklists with GBV in mind. These checklists are accessible so that all emergency service providers, including nontraditional staff (i.e. community members volunteering), can easily follow without preexisting knowledge. These include scheduling resource distribution times during daylight, having gender balanced shelter staff, and allowing unaccompanied minors to register for assistance without having to attach themselves to an adult.[56] Addressing inadequate lighting and overcrowding within shelters also lessens risk of GBV.[57] By incorporating GBV perspectives into humanitarian preparedness, states will also alleviate risk of sexually transmitted infections, unwanted pregnancies, and unsafe abortions that result in loss of life.[58]

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[55] Committee on the Elimination of Discrimination Against Women, General Recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change (CEDAW/C/GC/37).
[56] Vanuatu National Disaster Management Office, 'Vatanau Gender & Protection Cluster Checklist – Shelter & Reconstruction' (NDMO 2018) https://ndmo.gov.vu/images/download/gender-protection-cluster-general-info/GeSI-Checklist-and-key-messages---Shelter-and-Reconstruction_English.pdf accessed 28 December 2025.
[57] Social Development Direct, 'Integrating GBV into Humanitarian Preparedness: Pacific Regional Brief' (Social Development Direct, October 2023) https://www.sddirect.org.uk/sites/default/files/2024-01/Integrating%20GBV%20into%20Humanitarian%20Preparedness%20-%20Pacific%20brief_%20FINAL.pdf accessed 28 December 2025.
[58] Colangelo, 1281 (n 44).

Sexual and Reproductive Health

Developing climate and disaster-resilient healthcare infrastructure with SRHR in mind should be a state priority. Climate resilient healthcare facilities can 'anticipate, respond to, cope with, recover from, and adapt to climate-related shocks and stress so as to bring ongoing and sustained healthcare to their target populations despite an unstable climate.'[59] WHO's guidance for climate resilient healthcare facilities provides several examples for how even under-resourced facilities can develop climate resiliency. Budgeting and legislating for healthcare facilities to follow WHO's guidance on climate resilient healthcare facilities is one way states should fulfil their obligations. For example, local governance can regulate how on-grid and off-grid sources of power are developed and maintained to withstand extreme weather events.[60]

Climate resilient healthcare infrastructure should prioritize health determinants by ensuring accessibility of clean water, sanitation facilities, and resources for menstrual hygiene management.[61] Climate variability aggravates water inaccessibility. The sense of scarcity may result in people resorting to contaminated water, compounding SRH concerns. Facilities need to collaborate needs-assessments to conserve or increase water use accordingly without harming another area's water access.[62]
States should also allocate resources for sexual and reproductive healthcare within the immediate response to an environmental disaster or climate event. Dispatching mobile medical care units is one way for states to address SRH needs following a disaster.[63] These units would include prevention and treatment of sexually transmitted infections, contraceptive care (both emergency and birth control), prenatal care, abortion care, and birth care. Emergency service providers should staff midwives and medical officials trained specifically in sexual and reproductive healthcare.[64]

Further Means of Preventing Deprivation of Life in the Environmental and Sexual and Reproductive Health Nexus.

Full participation of women, girls, and sexual and gender minorities in decision making will help fulfil a state's obligations under the right to life. The right to participation in political and public life is broad. Meaningful participation can take place through a broad range of institutions, administrative bodies, and many forms of civil society at local, regional, national, and international levels.[65] In the environmental and SRHR

[59] World Health Organization, 'Who Guidance for Climate-Resilient and Environmentally Sustainable Health Care Facilities' (Guidance Document, WHO 2020) 22.
[60] Ibid, 48.
[61] CEDAW General Recommendation No. 37, para 68 (b) (n 37).
[62] WHO Guidance, 40 (n 59).
[63] Colangelo, 1308 (n 44).
[64] CEDAW General Recommendation No. 37, para 57(e) (n 37)
[65] CEDAW Art. 7, International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, art 5; Convention on

context, community participation should be prioritized when developing emergency response plans and climate resilience models. Scientific information relating to how to maintain SRH and how environmental disasters and climate events may impact health practices should be made accessible and available.

Nepal's National Action Plan (NAP) serves as a strong example of prioritizing SRHR within its approach to climate resilience. Following the devastation of the 2015 earthquake. Survey results indicated that women were particularly impacted due to lack of oversight by local government regarding in shelter and sanitation needs. Surveyed women also highlighted the lack of safety mechanisms due to an uptick in violence and harassment that local governance failed to account for. [66] The Nepalese Constitution guarantees the right to safe motherhood and reproductive health rights, which is reflected in NAP, along with responses to the concerns articulated in the post-earthquake surveys. There is a large focus on capacity building, training, and participation of more vulnerable communities. Additionally, NAP provides a comprehensive set of action items in developing climate resiliency with those communities in mind. [67]

In addition to improving participation and access to information, states need to enshrine right to life protections within policy and legislative frameworks. Environmental and SRHR advocacy are inherently interdisciplinary, requiring collaboration and support between multiple groups including community members, service providers, and legal and administrative bodies. As right to life jurisprudence continues to evolve in these contexts, it will provide more forms of redress for violations. Multiple forms of human rights mechanisms and legal systems create a redundant infrastructure better serving individuals seeking recourse by providing diverse options to do so. Additional resources should be directed to address ways racial and disability justice intersect with SRHR in this context, as well as how nontraditional accountability mechanisms can better serve those whose sexual and reproductive rights have been violated.

Conclusion

Environmental and natural disasters catalyse sexual and reproductive health risks. These risks converge with humanitarian crises stemming from violence and

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the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 29.

[66] Mawby B and Applebaum A, 'Rebuilding Nepal: Women's Roles in Political Transition and Disaster Recovery' (Report, Georgetown Institute for Women, Peace and Security, 2018) https://giwps.georgetown.edu/wp-content/uploads/2018/04/Rebuilding-Nepal-Womens-Roles-in-Political-Transition-and-Disaster-Recovery.pdf accessed 28 November 2025.

[67] Ibid; Government of Nepal, 'National Adaptation Plan: 2021 – 2050' (UNFCCC, 2021); NAP Global Network, 'Gender-Responsive National Adaptation Plan (NAP) Processes: Progress and promising examples' (Report, NAP Global Network, 2022) https://napglobalnetwork.org/wp-content/uploads/2022/08/napgn-en-2022-gender-nap-synthesis-report.pdf accessed 14 January 2026.

environmental degradation grow more rampant, threatening individuals' right to life. Failure to address this intersection will result in not only fatal consequences, but avoidable ones. Social, cultural, and political barriers complicate marginalized communities' relationship with healthcare systems and the administrative bodies geared toward developing climate resiliency. The Global North's consistent shirking of responsibilities in both environmental and human rights contexts contributes to growing nihilism in the international law space. Yet international law is evolving to reflect new perspectives better poised to address obstacles to the complete enjoyment of fundamental human rights. This article suggests that by incorporating a SRHR approach into environmental humanitarian relief, states can uphold their obligations under the right to life, creating a viable path forward for individuals in the wake of disaster.

Critiquing *Rumor v. Italy*: Feminist insights on gender-insensitive legal reasoning (Martina Supani)

Abstract

The paper examines the case *Rumor v. Italy* (European Court of Human Rights (ECtHR), 2014), wherein the applicant endured domestic violence against her and her children's physical integrity, with severe psychological consequences. Despite the applicant alleging violations of Articles 3 and 14, the ECtHR ruled that neither of the articles were breached. By applying feminist legal theory, the paper argues that the Court's decision fails to acknowledge structural discrimination, consequently entrenching gendered power imbalances. The analysis is grounded on two major concepts in feminist legal theory: firstly, the ECtHR disregarded the feminist slogan *the personal is political*, ultimately trivialising private-sphere violence. Secondly, the decision perpetuated the expression *the law is gendered* by relying on masculine legal standards that prioritise objectivity and reasonableness over the violations suffered by victims. Ultimately, this paper asserts that *Rumor* represents a missed opportunity to address systemic and structural patriarchal oppression. By contrasting this case with the Istanbul Convention and subsequent ECtHR jurisprudence, I conclude that integrating feminist legal perspectives is essential for ensuring not merely formal, but rather substantive equality. In this way, international human rights law would effectively remedy, instead of perpetuating, domestic violence and patriarchal oppression.

Introduction

Despite the recognition of domestic violence as a human rights violation[1], its threat remains pervasive to all women[2] and rooted in the gender divide. Indeed, to each gender are attached social and cultural roles and stereotypes connected to the social

[1] CEDAW, "General Recommendation No. 19: Violence against women" (1992) UN Doc A/47/38; CEDAW, "General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19" (2017) UN Doc CEDAW/C/GC/35; *Opuz v Turkey* App no 33401/02 (European Court of Human Rights, 9 June 2009); *Eremia v Moldova* App no 3564/11 (European Court of Human Rights, 28 May 2013); Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011

[2] MacKinnon CA, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 The University of Chicago Press Journals 635

category of men and women[3], producing[4] and determining the social roles and practices that will be associated with[5] a socially perceived *male* or *female* being[6]. In other words, "one is not born, but rather becomes a woman"[7]. The gender divide entails remarkable inequalities[8], with social structures further embedding a disproportionate treatment that is defined by male power[9] and systemically reproduces women's subordination, reinforcing a structure that prioritises men[10]. This system is defined as *patriarchy*, a structure that exploits the segregation and thingification women endure[11], culminating in violence against women (VAW) as a tool to assert men's power over women[12]. The case *Rumor v. Italy* embodies this phenomenon, with the State not protecting the victim adequately, and the European Court of Human Rights (ECtHR) failing to redress the human rights violation suffered. Thus, this paper first offers a summary of this case, highlighting how discrimination and inequality were disregarded by the ECtHR. Secondly, it provides an account of feminist legal theory: this theoretical perspective will be applied to analyse the case, examining how feminism could have informed the Court's reasoning, possibly altering the outcome. Finally, the paper reflects on the subsequent jurisprudence of the ECtHR, arguing that gender-sensitivity[13] could aid in providing effective remedies to the victims of VAW.

Rumor v. Italy: An Outline of the Facts

In the case *Rumor v. Italy* (hereinafter *Rumor*), the applicant, Ms Rumor, suffered violence at the hands of her former partner, Mr JCN, with whom she had two children. Five years after the start of their relationship, JCN battered the applicant, threatened her with weapons, locked her inside her house and seized the keys so that she could not escape. One of the children witnessed the aggression. Upon the intervention of the police, the applicant was taken to the hospital, where she was diagnosed with,

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[3] del Cuvillo AÁ, Macioce F and Strid S, "Feminist Political and Legal Theories" *Gender-Competent Legal Education* (Springer 2023). This is because society is understood as a system "based on the binary code of male and female [...] and consists of 'institutionalisation of normative expectations'" according to Rottleuthner, "The Limits of Law: the Myth of a Regulatory Crisis" (1989) 17 International Journal of Sociology of Law 273, 275

[4] Lacey N, "The Constitution of Identity: Gender, Feminist Legal Theory, and the Law and Society Movement," *The Blackwell Companion to Law and Society* (Blackwell Publishing Ltd 2004) https://doi.org/10.1002/9780470693650.ch25

[5] Fletcher R, "Feminist Legal Theory" *An Introduction to Law and Social Theory* (Hart 2002)

[6] del Cuvillo AÁ, Macioce F and Strid S, "Feminist Political and Legal Theories" *Gender-Competent Legal Education* (Springer 2023)

[7] de Beauvoir S, *Le Deuxième Sexe* (Éditions Gallimard 1949), 285

[8] MacKinnon CA, *Toward a Feminist Theory of the State* (Harvard University Press 1989)

[9] *Ibid*

[10] del Cuvillo AÁ, Macioce F and Strid S (n 6)

[11] Mackinnon CA, "Feminism, Marxism, Method, and the State: An Agenda for Theory" (1982) 7 The Chicago University Press Journals 515

[12] Bermúdez Figueroa E, Dabetić V, Pastor Yuste R and Saeidzadeh Z, "Gender and Structural Inequalities from a Socio-Legal Perspective" *Gender-Competent Legal Education* (Springer 2023)

[13] *Valiulienė v Lithuania* App no 33234/07 (European Court of Human Rights, 26 March 2013)

inter alia, extensive bruising, a concussion and psychological distress[14]. The former partner was arrested and sentenced to serve approximately five years of detention, later reduced and allowed to serve the rest of his sentence under house arrest, in a reception centre fifteen kilometres away from the applicant's residence.

When the case was brought before the ECtHR, the applicant submitted that the Italian authorities did not protect nor support her after the violence she endured, and highlighted their overall inaction. This inaction, paired with the inability of the domestic legal framework in preventing and punishing VAW, resulted in a factual discrimination against the applicant due to her gender. To substantiate her claim, the applicant emphasised that the authorities did not protect her in any way from the reoccurrence of another episode of violence. In fact, the applicant received intimidating letters from JCN while he was detained, and was threatened by employees at the reception centre. The applicant alleged a violation of Article 3, alone and in conjunction with Article 14 of the European Convention on Human Rights (ECHR). While the ECtHR recognised that the physical and psychological violence suffered were severe enough to qualify as a form of ill-treatment[15], the Court nonetheless held that the authorities "took all reasonable measures"[16] to ensure the applicant was protected from other assaults, concluding that there was no violation of Article 3 or 14.

However, in focusing on whether the domestic framework was "effective"[17], the Court failed to acknowledge the factual discrimination the applicant suffered: by lightly ruling that the framework was effective, the Court considered that it was up to the applicant to seek better support, shifting the burden on the victim and further entrenching discrimination. Moreover, Article 14 took up no space in the Court's reasoning, and the Court did not engage with non-discrimination obligations, reflecting an overly technical approach that understands equality as merely formal rather than substantive, with Article 14 and non-discrimination simply left aside. Therefore, by not addressing Article 14, the ECtHR failed to recognise VAW as intrinsically discriminatory. Consequently, the Court neglected two fundamental aspects: firstly, it failed to acknowledge that domestic violence is a phenomenon that predominantly affects women; secondly, it did not consider the role of socio-cultural factors on the reoccurrence of domestic violence[18].

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[14] *Rumor v Italy* App no 72964/10 (European Court of Human Rights, 27 May 2014), para 27
[15] *Ibid*, para 61
[16] *Ibid*, para 62
[17] *Ibid*, paras 65 and 76
[18] De Vido S, "States' Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention on Human Rights", 6:6 *ESIL Reflection* (2017)

Feminist Legal Theory as Theoretical Framework

For the purpose of this essay, *Rumor* will be analysed through feminist legal theory. This section does not wish to recount the history of feminism, but rather it briefly outlines the theoretical perspective chosen in order to contextualise the analysis of the case, in the following section. To this end, this section will focus on the relevance of gender roles in the patriarchal system, radical feminism, and its slogans *the personal is political*[19] and *the law is gendered*[20].

The distinction of genders is relevant not only for social and cultural aspects, but also for economic and political ones: it affects the distribution of society's resources, economic status, and life opportunities[21]. As this gender inequality is so structurally embedded in the structures of power[22], the system is described as *patriarchy*: "a hierarchical organisation of social institutions and social relationships that allows men to maintain positions of power, privilege, and leadership in society"[23], making "male dominance [...] the most pervasive and tenacious system of power in history"[24]. Women thus face not merely discrimination, but rather oppression, which negates the objectification they experience[25] and asserts VAW as a device to establish men's claim over women[26], so much so that "to be rapable [...] defines what a woman is"[27]. Moreover, VAW is not, and cannot, be understood as an exceptional occurrence, rather, it is "a systematically used tool of patriarchal control"[28]. In this context, VAW is central to feminist inquiry.

Feminist legal theory revolves around sexuality and male control, *i.e.* VAW[29]. Such behaviour is connected to coercion[30], and feminism, as an account "of power and its distribution: inequality"[31], postulates that the patriarchy both creates and perpetuates this unequal distribution of power and wealth[32]. In this context, radical feminism,

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[19] Hanisch C, "The Personal Is Political" (*University of Victoria*, February 1969) https://webhome.cs.uvic.ca/~mserra/AttachedFiles/PersonalPolitical.pdf
[20] Smart C, "The Woman of Legal Discourse" (1992) 1 Social & Legal Studies 29
[21] MacKinnon CA (n 8)
[22] del Cuvillo AÁ, Macioce F and Strid S (n 6)
[23] DeKeseredy WS, "Bringing Feminist Sociological Analyses of Patriarchy Back to the Forefront of the Study of Woman Abuse" (2020) 27 Violence Against Women 621
[24] MacKinnon CA (n 2) 638
[25] MacKinnon CA (n 11)
[26] Bermúdez Figueroa E, Dabetić V, Pastor Yuste R and Saeidzadeh Z (n 12)
[27] MacKinnon CA (n 2) 651
[28] Ertürk Y, "Violence against Women: From Victimization to Empowerment" Paper presented at the ESCAP forum 'Where's the Power in Women's Empowerment?' Bangkok, Thailand, 4 August 2008, cited in United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences (27 May 2009) UN Doc A/HRC/11/6/Add.5 https://docs.un.org/en/A/HRC/11/6/Add.5
[29] Bermúdez Figueroa E, Dabetić V, Pastor Yuste R and Saeidzadeh Z (n 12)
[30] MacKinnon CA (n 11)
[31] *Ibid*, 516
[32] Evola M, Jungfleisch J, and Marinković T, "Gender and Structural Inequalities from a Socio-Legal Perspective" *Gender-Competent Legal Education* (Springer 2023)

hereinafter feminism,[33] identifies the patriarchy as the main cause of women's exclusion[34], and insists on the stereotypes and institutions that restrict women's opportunities[35]. Moreover, feminism acknowledges that patriarchy is so intrinsically linked to society that it permeates both the public and private spheres. It recognises that much of women's oppression occurs in the personal aspects of life, which is often pervaded by unequal power relations and domination[36], therefore necessitating political attention. Consequently, feminist legal theory advocates for the expansion of the scope of the political sphere in order to comprise political issues that were considered women's personal issues, such as intimate partner violence (IPV)[37].

Through the expression *the personal is political*[38], feminism challenges the divide between the public and private spheres, which bars state intervention in the domestic realm[39], realising that non-intervention leads to women's discrimination and inequality[40]. *The personal is political* acknowledges "that women's distinctive experience as women occurs within that sphere that has been socially lived as the personal"[41], emphasising the sexual objectification women experience in the private realm[42]. This strict division is rooted in a conception of rights that is profoundly male, and privileges a male perception of society[43], securing women's subordination[44].

This gendered conception of rights reinforces discrimination and promotes male dominance[45], so much so that it has been asserted that *the law is gendered*[46]. Feminist legal theory thus recognises that the universal subject of rights is perceived as male[47], postulating that this universalism entrenches oppression, further perpetuating the entitlement men feel over women[48]. The patriarchal social system is consequently reflected in law, through standards and interpretations that legitimise male control[49] and reinforce existing inequalities and oppression[50]. Indeed, the law adjudicates "in a

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[33] Since "radical feminism is feminism", as per MacKinnon CA (n 2) 639
[34] del Cuvillo AÁ, Macioce F and Strid S (n 6)
[35] Fletcher R (n 5)
[36] Okin SM, *Women in Western Political Thought* (Princeton University Press 1979)
[37] Bermúdez Figueroa E, Dabetić V, Pastor Yuste R and Saeidzadeh Z (n 12)
[38] MacKinnon CA (n 11)
[39] Bermúdez Figueroa E, Dabetić V, Pastor Yuste R and Saeidzadeh Z (n 12)
[40] Fletcher R (n 5)
[41] MacKinnon CA (n 11) 535
[42] Mackinnon CA (n 11) *and* MacKinnon CA (n 2)
[43] Evola M, Jungfleisch J, and Marinković T (n 32)
[44] MacKinnon CA (n 2)
[45] *Ibid*
[46] Smart C (n 20)
[47] Otto D, "Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law," *International Law and its Others* (Cambridge University Press 2006) https://doi.org/10.1017/cbo9780511494284.012
[48] Lacey N (n 4) *and* CEDAW, "General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19" (2017) UN Doc CEDAW/C/GC/35
[49] MacKinnon CA (n 2)
[50] *Ibid*

male way"[51] that reproduces historical discrimination and favours men[52], consolidating the structure of oppression[53] by adopting male standards and masculine values[54], such as reasonableness, objectivity, neutrality and impartiality[55]. While male standards have historically granted law its legitimacy[56], they nonetheless serve male hegemony[57] by denying the gender divide that perpetuates "the dominant point of view"[58]. Thus, male supremacy and social hierarchies are legitimised through the concept of a "neutral universal subject of human rights law"[59], making it clear why "to be human, in substance, means to be a man"[60].

Rumor through the Prism of a Feminist Critique

In its judgement, the Court referred to a variety of sources, among which its jurisprudence and other documents. In this section, I will argue that a feminist perspective would have urged the Court to consider other sources to make the reasoning more convincing. By means of example, General Recommendation No. 19 of the Committee of the Convention on the Elimination of Discrimination Against Women (CEDAW), which defines VAW as "violence that is directed against a woman because she is a woman or that affects women disproportionately"[61]. Furthermore, I will advocate for a "gender-sensitive interpretation"[62]. In addition, the ECtHR could have considered the United Nations General Assembly (UNGA) Declaration on the Elimination of Violence against Women to align its reasoning with other international law principles[63]. Similarly, the ECtHR could have mentioned the Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter "Istanbul Convention"): whilst not entered into force at the time of the judgement, Italy nonetheless ratified it the year before. Therefore, according to Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties[64], the ECtHR could have taken into account provisions of the Istanbul Convention as "relevant rules of international law"[65].

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[51] *Ibid*, 645
[52] Fletcher R (n 5)
[53] del Cuvillo AÁ, Macioce F and Strid S (n 6)
[54] *Ibid*
[55] MacKinnon CA (n 2) *and* Fletcher R (n 5)
[56] Fletcher R (n 5)
[57] MacKinnon CA (n 11)
[58] MacKinnon CA (n 2) 636
[59] Otto D (n 47) 318
[60] MacKinnon CA (n 8) 229
[61] CEDAW, "General Recommendation No. 19: Violence against women" (1992) UN Doc A/47/38, Article 6
[62] *Valiulienė v Lithuania* (n 13) concurring opinion of Judge de Albuquerque
[63] United Nations General Assembly, "Declaration on the Elimination of Violence against Women" (1993) General Assembly Resolution 48/104, Article 4(c) https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women
[64] Vienna Convention on the Law of Treaties 1969
[65] De Vido S (n 18)

Consequently, in this section I will highlight two findings: due to its excessive focus on the effectiveness of the domestic legislative framework, the ECtHR firstly ignored the divide between the public and private spheres, consequently delegitimising the violence suffered by the applicant. Secondly, by endorsing male standards, the ECtHR failed to address the discrimination suffered.

Questioning the Effectiveness of the Legal Framework

In *Rumor*, the ECtHR held that the Italian legislation was "effective in punishing the perpetrator [...] and preventing the reoccurrence of violent attacks" against the "physical integrity"[66] of the applicant. Moreover, the Court was satisfied with the reception facility where JCN served the remainder of his sentence, deemed "carefully"[67] inspected by the Italian authorities. However, in adjudicating that the domestic framework was effective, the Court shifted the burden of proof, effectively placing the applicant on trial, instead of the Italian Government[68]. Feminist legal theory argues that placing the burden of proof on the claimant presupposes a social system that is non-discriminatory[69], against which applicants will need to substantiate the discrimination they suffered[70]. This approach is then assumed as the standard[71], despite entrenching oppression[72] and denying substantive equality. In *Rumor*, the applicant was thus expected to demonstrate the ineffectiveness of the framework and the inaction of the authorities: she was required to prove inequality, which is measured against the same domestic framework that, by defining society from "the dominant point of view"[73], failed to address discrimination in the first place. It was thus impossible for the applicant to prove discrimination when the standard it is compared to utterly fails to address it at the outset, since law presupposes a society that is "already fundamentally equal"[74].

Furthermore, while insisting on the effectiveness of the legislative framework, the ECtHR did not offer any reason for this finding, which is curious since numerous elements indicated that the framework was, in fact, condoning the perpetrator. Firstly, JCN was convicted to approximately five years of detention[75], which was a rather weak sentence for the charges he was facing[76]. Secondly, JCN was granted house arrest

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[66] *Rumor v Italy* (n 14), para 76
[67] *Ibid*, para 67
[68] Bermúdez Figueroa E, Dabetić V, Pastor Yuste R and Saeidzadeh Z (n 12)
[69] MacKinnon CA (n 2)
[70] MacKinnon CA (n 8)
[71] Fletcher R (n 5)
[72] MacKinnon CA (n 8)
[73] MacKinnon CA (n 2) 636
[74] MacKinnon CA (n 8) 234
[75] *Rumor v Italy* (n 14), para 13
[76] McQuigg RJA, "Domestic Violence as a Human Rights Issue: Rumor v. Italy" (2015) 26 European Journal of International Law 1009. According to the *Codice Penale*, the prison term should have ranged between 15 to 22 years, given the severity of the crime and the aggravating circumstance that one of the children witnessed the aggression.

and allowed to work outside the reception facility, casting doubts over the harshness of the penalty[77]. Moreover, the ECtHR did not question the suitability of the reception centre, yet multiple factors suggested that the facility was inappropriate to host JCN: the centre was close to the applicant's residence and employees of the centre and JCN contacted and threatened the applicant[78]. Nevertheless, the ECtHR disregarded these elements[79], excusing the Italian authorities when they failed to inform the applicant that JCN was serving his sentence in the reception facility[80]. A feminist reading would nonetheless argue that this reproduces a social system that privileges the oppressors, rather than the oppressed[81], and would advocate for a "gender-sensitive interpretation and application"[82] of ECHR obligations. If this were the case, Italy would have been required to inform the applicant of JCN's relocation to the reception centre and his permission to leave it[83]. Actually, feminist theory would maintain that a truly effective legal framework would have precluded the perpetrator from being located in a facility close to the victim's house, much less would allow any form of conditional release[84]. Thus, I demonstrated that feminist legal theory would have established the legislative framework as insufficient in "punishing the perpetrator"[85] and that the applicant had been discriminated against.

The Personal is Political and VAW

By exclusively examining the domestic framework, the ECtHR disregarded the actual violation suffered by the applicant, which seems somewhat paradoxical since the Court deemed the violence endured "sufficiently serious" to qualify as a breach to Article 3 ECHR[86]. Therefore, the undivided attention to public legislation overlooks the oppression women endure in their private life[87], perpetuating the "public–private distinction"[88]. As aforementioned, this divide bars the private sphere from state intervention, perpetuating women's discrimination and inequality[89]. Thus, a gender-competent perspective would have embraced the feminist slogan *the personal is political*, recognising that IPV requires state intervention[90]. Therefore, instead of concentrating on the effectiveness of the framework[91], feminist legal theory would have urged the ECtHR to focus on the violation suffered by the applicant. The Court

[77] *Ibid*
[78] *Rumor v Italy* (n 14), para 44
[79] *Ibid*, paras 67 and 74
[80] *Ibid*, para 72
[81] Smart C, Feminism and the Power of Law (Routledge 1989)
[82] *Valiulienė v Lithuania* (n 13) concurring opinion of Judge de Albuquerque
[83] McQuigg RJA (n 76)
[84] *Ibid*
[85] *Rumor v Italy* (n 14), para 76
[86] *Ibid*, para. 61
[87] Okin SM (n 36)
[88] Lacey N (n 4) 479
[89] Fletcher R (n 5)
[90] Bermúdez Figueroa E, Dabetić V, Pastor Yuste R and Saeidzadeh Z (n 12)
[91] *Rumor v Italy* (n 14), para 76

recognised that "the applicant was a "vulnerable individual"[92] having regards to the physical injuries [...] and her fear of further violence"[93]. However, it fell short in realising that those injuries were inflicted by an intimate partner, in the personal aspect of the applicant's life, and in the context of VAW. By decontextualising the violence she suffered, the ECtHR delegitimised the experience of the applicant, and treated it in patronising terms. Namely, "the pain [...] and thingification" of the applicant was "pacified into nonpersonhood"[94], by merely evaluating the effectiveness of the framework and neglecting her violation of human rights. Thus, the gender-blind approach adopted leaves male power uncontested, dismissing and delegitimising VAW. Indeed, *Rumor* fails in that it sees violence as an isolated episode, and it fails to contextualise it in the broader frame of IPV and VAW: it does not understand violence as an instrument for patriarchal control and oppression, consequently trivialising the victim's experience[95]. Contrastingly, had a gender-sensitive approach been endorsed, the ECtHR would have considered further sources of law insisting on the abolition of the divide between the public and private spheres. CEDAW Committee General Recommendation No. 19 could have been cited to hold that states are required to "take [...] effective measures to overcome all forms of gender-based violence, whether by public or private act" and "to provide effective protection of women against gender-based violence"[96]. In addition, a feminist perspective would hold that the state did not "exercise due diligence to prevent [...] acts of violence against women, whether those acts are perpetrated by the State or by private persons"[97], as mandated by the UNGA Declaration and reiterated by the Istanbul Convention[98]. Therefore, I argue that feminist legal theory could have led to a different outcome, plausibly concluding that Italy did not "adequately discharge"[99] its obligations and that its framework was not effective, thus finding a violation of Article 3 ECHR, in conjunction with Article 14.

The Law is Gendered and its Effects

Finally, feminist legal theory would insist that the unsatisfactory outcome of *Rumor* is a direct consequence of a legal interpretation that draws its legitimacy from standards that reward masculine traits and practices, such as aperspectivity, objectivity and neutrality[100]. Since these standards are attributes historically associated with the male

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92 More interestingly, it seems that the ECtHR does not understand the applicant as being "vulnerable" as an inherent condition, but rather because of the violence she endured. *See generally* Otto D (n 47)
93 *Rumor v Italy* (n 14), para 60
94 MacKinnon CA (n 11) 520
95 MacKinnon CA (n 8)
96 CEDAW General Recommendation No. 19 (n 61), Article 24(a) and (t)
97 United Nations General Assembly (n 63), Article 4(c)
98 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011, Article 5
99 *Rumor v Italy* (n 14), para 59
100 MacKinnon CA (n 2) *and* Fletcher R (n 5)

gender, prominent scholars have argued that *the law is gendered*[101], as it perpetuates discrimination and VAW. Indeed, when applying such standards equally to men and women, the latter will be judged according to a logic that prioritises masculinity. Therefore, it is precisely by using neutrality and objectivity that the law fails to be equal, as it applies those same standards that, by being inherently male, reproduce and perpetuate inequality[102]. *Rumor* is a clear example of this mechanism, exemplifying how male values consistently fail to protect women in vulnerable situations. Indeed, the Italian Government maintained that "all reasonable measures"[103] were put in place to condemn the perpetrator and protect the victim and that the sentence was "proportionate"[104] to the offence committed. *Rumor* thus shows how male standards, namely reasonableness and proportionality, can have a detrimental effect on the protection of women who endured domestic violence. As demonstrated in the previous paragraphs, the Italian authorities utterly failed to provide assistance to the applicant[105]. Still, by relying consistently on reasonableness[106], the ECtHR fell short in recognising the failure of the Italian framework, dismissing the human rights violation suffered by the applicant[107]. By applying feminist legal theory, I thus question this gendered legal interpretation, recognising in it "a strategy of male hegemony"[108] that reproduces male oppression and domination[109]. The reasonableness standard, which was applied by both the domestic and international Courts and strove to achieve neutrality, only perpetuated male standards[110]. The latter entrench a distribution of power that reinforces "state violence" and "norms that carry their own violence"[111]. Indeed, the application of gendered values negate "the existence [...] of sex inequality that tacitly"[112] reproduces a social system of submission and oppression[113]. Concretely, this ignores gender discrimination[114] and leaves the victim without an effective remedy, as observed in *Rumor*. In this context, a "gender-sensitive interpretation"[115] would have led to a "textured understanding of the workings of law"[116], recognising that the application of male standards depoliticises the aims of women's human rights law and denies its claim to discrimination and inequality[117].

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[101] Smart C (n 20)
[102] *Ibid*
[103] *Rumor v Italy* (n 14), para 49
[104] *Ibid*, para 50
[105] *Ibid*, para 42
[106] *Ibid*, paras 62 and 68
[107] *Ibid*, para 76
[108] MacKinnon CA (n 11) 537
[109] van Rijswijk H, *Law, Culture and the Figure of the Girl* (Routledge 2024) https://doi.org/10.4324/9780429263675
[110] MacKinnon CA (n 8)
[111] van Rijswijk H (n 109) 14
[112] MacKinnon CA (n 2) 636
[113] MacKinnon CA (n 8)
[114] *Ibid*
[115] *Valiulienė v Lithuania* (n 13) concurring opinion of Judge de Albuquerque
[116] Lacey N (n 4) 483
[117] Charlesworth H, "Feminist Futures in Human Rights," *Human Rights in Transition* (Oxford University PressOxford 2024) https://doi.org/10.1093/oso/9780198901921.003.0005

Final Reflection

As evidenced above, *Rumor* represents a twofold failure in the ECtHR jurisprudence: first, it failed to provide an effective remedy for the human rights violation suffered; second, the Court missed the chance to expand the scope of state obligations[118] to encompass due diligence[119] and effective preventative measures[120]. Still, *Rumor* can be regarded as a somewhat isolated case in the wider context of the Court's case-law: since *Opuz*[121], the Court maintained that domestic violence, as a gender-based form of discrimination, amounts to a violation of Article 14 ECHR. Such a position was supported by subsequent cases, such as *Eremia v. Moldova* and *Valiulienė v. Lithuania*, with the ECtHR grounding its reasoning on the culture of impunity of the social systems[122]. Indeed, in the latter case, Judge de Albuquerque observed that the *Osman* test[123] needs to be dismissed in favour of "a more rigorous standard of diligence", where "the duty to act arises for public authorities when the risk is already present, although not imminent", so that "the State can be found responsible by omission for the resulting human rights violations"[124]. He contended that:

> "*the full effet utile of the [...] Convention can only be achieved with a gender-sensitive interpretation and application of its provisions which takes in account the factual inequalities between women and men and the way they impact on women's lives. In that light, it is self-evident that the very act of domestic violence has an inherent humiliating and debasing character for the victim, which is exactly what the offender aims at*"[125].

Although such a sentiment was not applied to *Rumor*, it nonetheless signifies a positive development in the reasoning of the ECtHR[126], one that seeks to incorporate feminist theory that[127], albeit flawed, was endorsed in the Istanbul Convention. Indeed, after the latter came into force, the ECtHR condemned Italy for violating Articles 2 and 3 ECHR, in conjunction with Article 14[128]. Therefore, by applying feminist perspectives and the Istanbul Convention, the Court developed a stricter standard in cases of domestic violence, although these developments have yet to achieve a shift in the

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[118] Murphy S, "Domestic Violence as Sex Discrimination: Ten Years since the Seminal European Court of Human Rights Decision in Opuz v. Turkey" (2019) 51 NYU J Int'l L & Pol 1347
[119] United Nations General Assembly (n 63), Article 4(c)
[120] CEDAW General Recommendation No. 19 (n 61), Article 24(a) and (t)
[121] *Opuz v Turkey* App no 33401/02 (European Court of Human Rights, 9 June 2009)
[122] Murphy S (n 118)
[123] The Osman test prescribes that "the State answers for the wrongful conduct of non-State actors when their conduct was foreseeable and avoidable by the exercise of State powers." See generally *Osman v the United Kingdom* App no 87/1997/871/1083 (European Court of Human Rights, 28 October 1998)
[124] *Valiulienė v Lithuania* (n 13) concurring opinion of Judge de Albuquerque
[125] *Ibid*
[126] Murphy S (n 118) *and* McQuigg RJA (n 76)
[127] del Cuvillo AÁ, Macioce F and Strid S (n 6)
[128] *Talpis v Italy* App no 41237/14 (European Court of Human Rights, 2 March 2017)

male *status quo*[129]. In fact, law alone is not sufficient to challenge a patriarchal system that is systematically discriminatory and oppressive: when legal reforms are unable to meet their aims, consciousness-raising[130] actions become critical; thus, extra-legal interventions are necessary to rethink the relationship between law and culture[131]. "The iron fist of domination"[132] thus needs to be addressed in order to move towards a gender-competent socialisation: as VAW and IPV are "systematically used tool[s] of patriarchal control"[133], legal institutes have limited capacity in challenging the "socially lived"[134] structures of subordination and oppression. Thus, to attempt to achieve a "gender-sensitive" [135] social transformation, awareness-oriented strategies are necessary to contest the entitlement men feel over women[136]. In other, more compelling, words "young men need to be socialised in such a way that rape is as unthinkable to them as cannibalism"[137]. In this context, legal reasoning and interpretations can surely redress the discrimination women endure, but cannot deconstruct the culture of oppression if not paired with consciousness-raising efforts.

Conclusions

Through a critical analysis of *Rumor v. Italy*, this paper traced the interactions between the patriarchal structure behind gender discrimination and VAW as a manifestation of such a system of oppression. By summarising the case, section 2 highlights how the ECtHR, despite recognising the severity of the treatment endured, failed to redress the human rights violation suffered by the applicant, not engaging with Article 14 ECHR and resulting in a merely formal approach to equality. Consequently, section 3 outlines feminist legal theory as the lens through which the reasoning of the Court is to be analysed. Firstly, feminism argues that the divide between the public and private spheres, if left unquestioned, only perpetuates women's subordination and VAW. Secondly, feminist theory highlights that legal interpretation is rooted in masculine standards that reproduce male dominance. Section 4 thus applies these teachings, demonstrating that the ECtHR entrenched discrimination and denied substantive equality by fixating on the effectiveness of the legal framework thus shifting the burden of proof on the victim. Moreover, it demonstrated that seemingly universal values perpetuated a male perception of society, reproducing oppression. Therefore, the paper substantiates that feminist legal theory could have been applied to *Rumor* to foreground the discriminatory and systemic nature of domestic violence and provide an effective remedy to the victim. Finally, section 5 indicates that a gender-competent

129 del Cuvillo AÁ, Macioce F and Strid S (n 6)
130 MacKinnon CA (n 11)
131 Fletcher R (n 5)
132 MacKinnon CA (n 8) 219
133 Ertürk Y (n 28)
134 MacKinnon CA (n 11) 535
135 *Valiulienė v Lithuania* (n 13) concurring opinion of Judge de Albuquerque
136 Lacey N (n 4) *and* CEDAW, "General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19" (2017) UN Doc CEDAW/C/GC/35
137 Pipher MB, Reviving Ophelia: Saving the Selves of Adolescent Girls (Penguin Publishing Group 1994)

perspective shall be integrated to redress violations and challenge oppression: by bridging *Rumor* to the Istanbul Convention and ECtHR jurisprudence, the paper emphasises the progressive incorporation of feminist theory into legal interpretation, requiring states to implement due diligence and recognise VAW as both a form of discrimination and human rights violation. Although legal interventions may not alone dismantle a history of discrimination if not coupled with consciousness-raising, the increasing application of feminist legal theory aids in rectifying more violations, ensuring that law evolves from a merely formal to a substantive understanding of equality.

Queer rights and the persistence of heteronormativity: A queer theoretical analysis of Vicky Hernández et al. v. Honduras (Felicitas Sabrina Ott)

Abstract

This paper offers a queer theoretical analysis of the Inter-American Court of Human Rights' judgment in Vicky Hernández et al. v. Honduras. It first outlines the facts of the case and the Court's findings regarding the killing of Vicky Hernández, a trans woman, sex worker, and human rights activist, within a broader context of violence against LGBTI persons in Honduras. The paper then introduces key concepts of queer theory, particularly its critique of fixed identity categories and the heteronormative system. It further discusses queer theory's relation to law. Applying this framework, the paper examines the Court's reasoning on gender identity and structural normativity. While the judgment advances important protections for trans persons, a queer reading reveals that it mainly reinforces legal categorization and fails to challenge the heteronormative structures that produce violence and queer marginalization.

Introduction

This paper applies queer theory to critically examine the Inter-American Court of Human Rights' (IACtHR) judgement in *Vicky Hernández et al v. Honduras*. It begins with a summary of the case before providing an overview of queer theory and its key concepts. The paper then explores how queer theory engages with law and how it can serve as a critical framework to analyse judicial reasoning. Finally, it systematically evaluates the Court's findings and approach to queer rights in light of queer theoretical insights, highlighting both the advances in protection for queer subjects and the persistence of heteronormative structures.

The Case: Vicky Hernández et al. v. Honduras, IACtHR judgment of March 26, 2021

The case was submitted to the IACtHR by the Inter-American Commission on Human Rights on April 30, 2019.[1] At the centre of the case is Vicky Hernández, a trans woman and human rights activist in the city of San Pedro Sula, Honduras.[2] She was killed on

[1] Vicky Hernández et al. v. Honduras (IACtHR March 26, 2021) [1]
[2] Ibid. [1]

the night of June 28, 2009 during the coup d'état.[3] As a trans woman, she was reduced to living on the margin of society.[4] She was a sex worker in the red light district and HIV positive. She was also a well-known, extremely active activist with the "Colectivo Unidad Color Rosa" defending human rights of trans persons in Honduras. She lived with her mother, cousin and niece while financially supporting her mother and nice.[5] Two months before she was murdered, she was attacked by a security guard and upon reporting the incident to the police she was told that for all they cared, she could die.[6]

On the evening of June 28, 2009, because of the coup d'état, there was a curfew from 9 p.m. till 6 a.m. Vicky Hernández had gone out and was walking in the red light district with two friends where they carried out their sex work, the three women were discovered by a police patrol that tried to arrest them. They fled and the friends lost contact with Vicky. Vicky's body was found the following morning on the street.[7] The record of the removal of her body concludes that the apparent cause of death was a brain injury due to perforation with a bullet. At the crime scene, a used condom was found and a grey bullet casing.[8] The authorities refused to perform an autopsy due to Vicky's HIV status.[9]

During the time of curfew, the streets were under the complete control of security forces, and according to the Inter-American Commission on Human Rights, strong circumstantial evidence exists to conclude that the State is directly involved in the death of Vicky Hernández.[10] Furthermore, the State failed to investigate the facts of the case adequately.[11] The State partially acknowledged its responsibility, recognizing that the investigation into the unlawful acts and the death of Vicky Hernández did not meet the standards of the American Convention.[12]

Vicky Hernández's death occurred in a context of continual violence against the LGBTI community in Honduras. In particular, trans women were murdered and vulnerable to violence by the State's security forces responsible for law enforcement.[13] The expert witness Carlos Zelada informed the court that the coup d'état exacerbated the lethal violence against the LGBTI community in Honduras with a more systematic record, especially trans women sex worker were vulnerable.[14]

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[3] Ibid. [42]
[4] Ibid. [40]
[5] Ibid. [40], [41]
[6] Ibid. [41]
[7] Ibid. [42], [43]
[8] Ibid. [45]
[9] Ibid. [48]
[10] Ibid. [72]
[11] Ibid. [1]
[12] Ibid. [14]
[13] Ibid. [31]
[14] Ibid. [32]

The court found that there were sufficient indications to establish that the Honduran State is responsible for the violation of the right to life to the detriment of Vicky Hernández, Art. 4 (1) of the American Convention, in relation to Art. 1 (1), 8 and 25.[15] Furthermore, her physical and moral integrity was violated as she must have experienced pain and anguish in the moments before her murder, Art. 5 (1) of the American Convention.[16] The State is also responsible for the violation of the obligation to ensure the rights to recognition of juridical personality, personal liberty, privacy, freedom of expression, and a name contained in Art. 3, 7, 11, 13 and 18 of the American Convention, in relation to Art. 1(1), 24, 8 and 25.[17] Finally, the State is held responsible for failing to comply with the obligations established in Article 7 of the Convention of Belém do Pará (Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women).[18]

The court decision is a great victory for the advancement of queer rights as the court recognized that the LGBTI community has historically been a victim of structural discrimination and stigmatization and that a person's sexual orientation, gender identity and gender expression are protected by the American Convention. Most importantly, it verified that the right of each person to define his or her sexual and gender identity is protected by the American Convention.

Introduction to Queer Theory

Queer theory resists to be pinpointed to a single definition.[19] While the term 'queer' historically was used to derogatively describe homosexuality as strange, odd or abnormal, it has, since the 80s, been reclaimed by the LGBTQ+ community as an umbrella term to unite lesbians and gays.[20] Still, there is no one definition of queer, rather it is purposefully ambiguous and necessarily indeterminate.[21] Queer, rather than putting someone in a category, is used to symbolize a resistance of categorization, a demonstration of non-conformity. It is a term that serves more as a question than an answer. It is meant to deconstruct rather than define as it indicates a distancing from the identity politics.[22] As such, *Eve Sedgwick*, a groundbreaking scholar in queer theory, understands queerness as something that largely depends on an individual's self-identification.[23]

15 Ibid. [101]
16 Ibid. [102]
17 Ibid. [125]
18 Ibid. [136]
19 Hannah McCann and Whitney Monaghan, *Queer Theory Now* (Bloomsbury Academic 2020) 1
20 Ibid. 2
21 Annamarie Jagose, *Queer Theory* (Melbourne University Press 1996) 96, 97
22 Ibid. 98
23 Carl F. Stychin, *Law's Desire* (Routledge 1995) 146

Queer theory captures this by problematizing the norm as a requisite to articulate differences.[24] Queer theory emerged from LGBTQ+ activism[25] with focus on gender and sexuality.[26] Yet it is "a critique of the identity-driven approach to gender and sexuality".[27] The theory is heavily influenced by post-modernism. Post-modernism rejects universal generalization of the subject, instead focusing on particularity, the specificity of situations and on the fluidity of perception.[28] Postmodernism deconstructs subjecthood and recognizes that the subject is socially constructed and a product of discourse.[29] This is reflected in the foundation of queer theory. Identity is not considered a stable subject[30] but a performance[31]. *Judith Butler*, who majorly influenced queer theory, established in their work *Gender Trouble* that both sex and gender are cultural notion and performative constructions.[32] In an anti-essentialist view of identities[33], gender is suggested to be a repetition of acts more rather than a 'natural' or inherent identity. It is constituted through "gestures, words, bodily movements, institutional sanction and rewards".[34] Gender can be institutionally produced through the administration of sex/gender categories by the state.[35] With this revelation, queer theory aims to destabilize fixed identity categories.[36] Such fixed categories can be summed up in "heteronormativity" which queer theory consequently aims to denaturalize.[37] Heteronormativity symbolizes a way of life that is socially dictated.[38] According to Maria Draz, this normativity works "an oppressive, constraining, or restricting force" that limits possibilities.[39] The term 'heteronormativity' does not function solely in opposition to homosexuality, but reaches further. There are multiple mainstream categories of heteronormativity that Western society is based upon which underpin seemingly neutral aspects of everyday life, such as the assumption that a couple forms the ideal type of intimate relationship (mononormativity), that reproduction is at the centre of this relationship (repronormativity) and that all people are cissexual (cisnormativity).[40] Queer theory intends to open up this space "for the expression of a diverse range of identities and

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[24] Ibid. 22
[25] McCann, Monaghan (n 19) 8, 9
[26] Damian A Gonzalez-Salzberg, Sexuality and Transsexuality Under the European Convention on Human Rights: A Queer Reading of Human Rights Law (Hart, 2019) 13
[27] Jill Steans *Gender and International Relations* (3rd edn., Polity Press 2013) 42
[28] Francisco Valdes *Beyond sexual orientation in queer legal theory* (1998) 75 Denv U L Rev 1409, 1419
[29] Carl F. Stychin (n 23) 21
[30] Gonzalez-Salzberg (n 26) 19
[31] Wayne Morgan*, Queering International Human Rights Law* in: Carl Stychin and Didi Herman (eds), *Sexuality in the Legal Arena* (The Athlone Press 2000) 217
[32] Judith Butler, *Gender Trouble* (2nd edn., Routledge 1990) 9
[33] Carl F. Stychin (n 23) 146
[34] Marie Draz, Realness as Resistance: Queer Feminism, Neoliberalism, and Early Trans Critiques of Butler (2022) 37 Hypatia 364, 367
[35] Ibid. 375
[36] Jill Steans (n 27) 42
[37] Gonzalez-Salzberg (n 26) 22
[38] Ibid. 20
[39] Marie Draz (n 34) 367
[40] Gonzalez-Salzberg (n 26) 20 f.

experiences”.[41] In rejection of the binary and the hierarchy of heteronormativity, queer theory validates identities that cannot be understood in those fixed categories[42] and demands a normalization of fluidity.

In sum, queer theory is a “rejection of objective, absolute and naturalized views on identities”[43]. It is practiced through embracing curiosity[44] and continuously interrogating discourses that reinforce the system of heteronormativity.[45]

Queer Theory and the Law

The legal system itself is at odds with queer, as the legal framework serves to uphold the heteronormative regime to regulate bodies and reproduction while queer theory rejects the very foundation of these institutions.[46] Furthermore, international judgments within queer rights tend to overwhelmingly require queer subjects to mimic heteronormative standards. Queer subjects are supposed to fulfil the performance of respectable queerness.[47] Here, queer theory becomes especially relevant to contest the problematic categorization of respectable and unrespectable queerness. The requirement to mimic heteronormative behaviour is a form of forced assimilation that queer theory refutes with rejoicing in possibilities and accepting divergences.

Same-sex marriage serves as a good example to demonstrate the discourse of the problematics of imitating heteronormative behaviours. Some argue within queer theory that same-sex marriage is another facet of queerness as it represents options.[48] Other see same-sex marriage as an assimilatory shift into the dominant structures of normativity,[49] while keeping the structural normativity intact. *Butler* warns that the narrow parameters of same-sex marriage exclude more radical possibilities of sexual life and other non-sexual kinships.[50] Same-sex marriage allows the state further regulatory power on whose queerness is respectable and who continues to stay outside on the margins of society.

The act of judging itself also needs to be illuminated as a heteronormative performance that upholds emotionless, rational, authoritarian masculinity as the standard.[51] Therefore, judgment with queer theory in mind is necessarily limited in its

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[41] Jill Steans (n 27) 42
[42] Gonzalez-Salzberg (n 26) 19
[43] Gonzalez-Salzberg (n 26) 18
[44] Tamsin Phillipa Paige and Joanne Stagg, *Queer Approaches to International Adjudication* in: Max Planck Encyclopedia of International Procedural Law (article last updated Sept 2021) para. 1
[45] Gonzalez-Salzberg (n 26) 22
[46] Gonzalez-Salzberg (n 26) 19f.
[47] Paige and Stagg (n 44) para. 6
[48] Kendall Thomas, *Practicing Queer Legal Theory Critically* (2019) 6 Critical Analysis of Law 8, 12
[49] McCann, Monaghan (n 19) 160
[50] Judith Butler, *Is Kinship Always Already Heterosexual* (2002) 15 A Journal of Feminist Cultural Studies 14, 16
[51] Paige and Stagg (n 44) para. 36

radicality, since it needs to authenticate the cis-hetero patriarchy to a certain extent to continue working within the system.[52] *Kapur* goes even so far as to see the incorporation of queer theory into the existing system as getting trapped in the 'heteronormative, reproductive bliss', the result, according to her, is not emancipation but the regulation of sexual rights.[53] Understanding these limits, queer theory can nevertheless be used to offer valuable insight and show the often invisible heteronormativity of the legal system to an extend that is relevant[54], especially to queer subjects. It offers a path to examine and question assumptions of identity that are built into the legal system.[55] Furthermore, queer theory highlights the contestability of categories and that those are not 'natural' but formed by society,[56] which is an aspect that is commonly overlooked. It unveils that these categories lack coherence and stability.[57]

Queer theory applied to Vicky Hernández et al v. Honduras

While queer theory and queer rights overlap in regard to rejecting heteronormativity (to some extend) and opening up the possibility of other expressions of gender and sex, queer theory is not interested in the incorporation of LGBT individuals into the realm of the heteronormative liberal system.[58] Queer theory, instead, focuses on transcending existing structures of hierarchy and privilege.[59] So while it is important to note that the Inter-American court advanced queer rights and offered better protection for queer subjects, queer theory asks a different question: does the court critique the categorization of gender identities and destabilize the heteronormative system?

Gender identity

The Court holds the right to self-identification as the baseline for gender/sex identity. It verifies that the right of each person to define sexual and gender identity is protected by the American Convention under the provisions that guarantee the free development of the personality (Art. 7 and 11(2)), the rights to privacy (Art. 11(2)), recognition of juridical personality (Art. 3), and a name (Art. 18).[60] It defines gender identity as "the internal and individual experience of gender as each person feels it, which may or may not correspond to the sex assigned at birth". It elaborates that the "recognition of gender identity is necessarily linked to the idea that sex and gender should be

[52] Ibid para. 44
[53] Ratna Kapur, *The (im)possibility of queering international law* in: Dianne Otto (ed) Queering International Law (Routledge 2018) 142
[54] Paige and Stagg (n 44) para. 44
[55] Morgan (n 31) 217
[56] Carl F. Stychin (n 23) 148
[57] Gonzalez-Salzberg (n 26) 23
[58] Gonzalez-Salzberg (n 26) 21
[59] Aeyal M. Gross, Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law (2008) 21 Leiden Journal of International Law 235, 253
[60] IACtHR (n 1) [115]

perceived as being part of the constructed identity and that it is the result of the free and autonomous decision of each person, without this having to be subject to their genitalia."[61] It explicitly states that gender is a social construct of the identities, attributes and roles that society assigns to women and men.[62] This phrasing follows *Butler's* understanding of gender performativity. The Court further demonstrates its understanding that sex is not the underlying stable biological/natural category to gender. Overall, the court aligns with queer theory with regard to the construction of gender.

Furthermore, the court acknowledges that gender is not a specific category for queer people but something that everyone has, as it states that gender is something that every person feels and that it may or may correspond with the sex assigned at birth. This highlights that cisgender is not to be considered the norm and queer gender identity as the deviation. It deconstructs cisnormativity as the presumed and accepted standard and instead sets diverse gender expression as the baseline. The Court refutes the state's ignorance of Vicky Hernández's self-perceived gender identity[63] and insistence on identifying her sex/gender as masculine.[64]

According to the court, gender and sexual identity are linked to the concept of freely choosing the possibility of self-determination and of freely choosing the options and circumstances that give meaning to their existence in keeping with their personal convictions. Here, the court demonstrates an openness to non-binarity, it doesn't require a categorization of gender identity but demonstrates a very open right that allows for gender expression of diverse range. The acceptance of transgender identity is not limited in its imitation of heteronormative gender identities.

However, the court still works with identity categories. It bases the discrimination of Vicky Hernández on her identity as a trans woman and sets 'trans woman' as a stable, legal category. It relies on this recognition of Vicky's gender identity as the primary route to protection. The court focuses on the idea that the State's recognition of gender identity is of crucial importance to ensure that trans persons may fully enjoy their human rights. It continues that it is the state's responsibility to adopt a procedure for the recognition of gender identity which must allow anyone to amend their identity data on their identity documents and in the public records so that these conform to their self-perceived gender identity.[65] For the process of changing gender identity the court demands that the state can't require medical and/or psychological or other certifications that could be unreasonable or pathologizing, that it should be rapid and, insofar as possible, cost free, and that it should not require evidence of surgery and/or hormonal therapy.[66] While this is laudable for the advancement of queer rights and

[61] Ibid. [129], quoting: Advisory Opinion OC-24/17 (IACtHR November 24, 2017) [94]
[62] Ibid. [128]
[63] Ibid. [121]
[64] Ibid. [113]
[65] Ibid. [172]
[66] Ibid. [173]

reinforces the understanding that gender is socially constructed and based on self-identification, the court misses the opportunity to consider whether gender identity is a necessary component of identification. It fails to consider that the requirement to set a gender in an official documentation is already a regulation of sexual rights that conflicts with queerness. It stabilizes the need for identity categories and misses the consequent next step of gender identity. *Butler* considers gender not as being but as doing.[67] As a result gender is not a singular, stable identity category but an unstable production.[68] The court realizes that gender is a self-expression and does not fit to force into the binary of man/woman but then misses this logical next consideration *Butler* took that identity is not a stable, absolute category but rather fluid. The requirement for gender identification in front of the state restricts this fluidity and forces a stable subject. Queer subjects are still forced to find a category that describes their gender and choose this as a fixed part of their identity, not being able to express the fluidity and movement of their gender that they might experience. A more consequent approach to this case in line with queer theory would necessarily contain consideration whether administrative gender identification itself serves a purpose outside of upholding the heteronormative system.

Structural Normativity

The Court emphasizes the systematic violence that trans women sex worker face, it approaches the death of Vicky Hernández not as a singularity but in the broader context of violence against the LGBTI community in Honduras and as part of a systematic state failure, citing UN Special Rapporteur reports and expert witness, Carlos Zelada, to bring the case into the broader context.[69] The Court recognizes that the LGBTI community has historically been a victim of structural discrimination and stigmatization.[70] It understands that violence against the queer community is driven by the desire to punish those seen as defying gender norms[71] and that this violence has a ‘symbolic purpose’ of communicating exclusion and subordination.[72] This insight resonates strongly with queer theory, which understands normativity not merely as individual bias but as a regulatory system.

However, the court’s analysis remains largely focused on condemning violence and admitting structural discrimination rather than interrogating the normative system that produces such violence. Its reasoning ultimately treats violence as a manifestation of prejudice rather than as a product of a broader heteronormative order. The Court fails to understand heteronormativity as an institutional structure embedded in state power. *Warner* and *Berlant* see the heteronormative system as a “constellation of practices that everywhere disperses heterosexual privilege as a tacit but central organizing

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[67] Butler, *Gender Trouble* (n 32) 34
[68] McCann, Monaghan (n 19) 124f.
[69] IACtHR (n 1) [29] – [39]
[70] Ibid. [119]
[71] Ibid. [69]
[72] Ibid. [70]

index of social membership"[73]. Social and economic discourses, institutions and practices produce an extremely narrow context for living, causing an experience of cruelty for people forced outside.[74] Vicky Hernández, as a transgender woman and sex worker is expulsed from the system. She gets told by the police that "as far as we're concerned you can die, prostitute, gay; as far as we're concerned you don't exist and are not worth anything".[75] This reaches further than systematic discrimination. It is the system and state institutions within the heteronormative framework that renders certain lives coherent and others deviant, some lives worth living and others non-existent. Trans women are especially vulnerable not simply because of individual hostility or even systematic stigmatization, but because their visible existence unsettles the binary logic upon which legal and social order relies. Queer identities give evidence to the contestability and instability of categories and that those are not 'natural' or self-evident. Here lays the threat to the heteronormative system which is met with violence. And as long as the system is not questioned itself, this tension continues to underly any advancement of queer rights.

The context of the coup and the curfew serve as another example of the violence of the heteronormativity. The public space was militarized and placed under the control of security forces, reinforcing a hypermasculine state authority that allowed police bodies to regulate over other people's lives and death. The coup d'état exacerbated the lethal violence against the LGBTI community in Honduras with a more systematic record, especially trans women sex worker.[76] In the period between the coup and January 2010, 15 trans women and 14 gay men died violently.[77] While the Court recognized that the State violated the Convention and that it is responsible for Vicky's murder that occurred in this context, it failed to question the necessity of the militarized public state and the inherent violence of security forces.

Furthermore, while the Court offers more protection for trans woman, it is unable to discuss sex workers as a marginalized group. It focuses on arguing that the violence that Vicky experienced is based on her identity as trans gender and spends many paragraphs on defining gender identity, on acknowledging her existence and her right to exist, but sparse words are said on her exposure to violence because she is a sex worker. While queer theory has also been mainly silent on sex work, it is a queer issue.[78] Sex work exists outside the heteronormative expectation and imposition that sex is a private matter between two individuals in a relationship.[79] Sex workers are, as seen in the statement by the police, not considered as deserving of protection or part of society. The court shies away from discussing the vulnerability of sex workers, of

[73] Lauren Berlant and Michael Warner, *Sex in Public* (1998) 24 Critical Inquiry 547, 555
[74] Ibid. 556
[75] IACtHR (n 1) [142]
[76] Ibid. [32]
[77] Ibid. [32]
[78] Brooke Beloso, *Queer Theory, Sex Work, and Foucault's Unreason* (2017) 23 Foucault Studies 141, 141f.
[79] See similarly: *Sex in Public*. While it doesn't discuss sex work, it extensively discusses sex that does not fit into the private, intimate construct of heteronormative relationships.

their exclusion from the system. This shows the limits of incorporating trans woman sex workers in the protection of the Convention. It leaves holes, it continues to leave marginalized groups that don't fit into the heteronormative system exposed. *Cohen* coherently describes in her paper how strategies that are built upon incorporation and assimilation simply expand and make accessible the status quo for more privileged members of marginal groups, leaving the most vulnerable communities still stigmatized and oppressed.[80] One can argue that trans woman sex worker might be the most vulnerable group, yet simply expanding protection still leaves other marginalized groups exposed to the violence and cruelty of the heteronormative system. The system continues to be upheld.

While the Court acknowledges the broader context of discrimination, it ultimately responds by expanding protection within existing legal categories. It condemns violence without dismantling the normative structures that render such violence socially intelligible. Queer theory exposes that it is not mere structural discrimination that threatens queer lives, but the system itself which violently enforces a normative standard of living and forces queer people to the margins of society. Not contesting institutional heteronormativity limits the effectiveness of protecting and embracing queer experiences.

The limits of queer theory in court decisions and queer rights

Queer theory works with the intention of destabilizing existing categories and rejects the institutional structures of heteronormativity. Queer theory can be very useful to take a step back and evaluate the underlying heteronormative assumptions that dictate our lives. Courts should use queer curiosity to explore other queer ways of living and question the very basic assumptions it holds, such as that gender-identification markers on state documentation is just a usual facet of identifications that individuals owe to the state. However, there is a clear limit of the Court's competences. The Court works within the system and is bound by the system. Law works on the basis of identities and categorization in a heteronormative world, and I believe, ultimately, the court is the wrong addressee to eliminate these structures. Queer theory can be useful to demonstrate that everyone should have a right to self-identification, but court can't change the system our lives are built upon.

Applying queer theory to this court decision revealed itself as a struggle because this is a major judicial advancement. It condemns the violence and death that queer people are unlawfully exposed to, while the state refuses to act or is complicit, and establishes state responsibility for the protection of trans women. For queer subjects, this is a decisive judgement that significantly progresses their rights, and ultimately, this needs to be the takeaway from the case. Yet the decision does stay within the system, not questioning the existence of categories and therefore, in light of queer theory, can't be

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[80] Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens* (1997) 3 GLQ: A Journal Of Lesbian & Gay Studies 437, 443

perceived as radical. During the writing of this paper, I kept on returning to Vicky Hernández, wondering how she would describe her identity and what she would consider queer. What life would Vicky Hernández have wanted to live if heteronormativity hadn't forced her to the margins of society? Maybe, there are aspects of heteronormativity that she would have appreciated and would have wanted to live accordingly to. *Butler* acknowledged that queer theory needs to contemplate further on what space the theory offers "for those who understand themselves as requiring – and wanting – a clear gender category within a binary frame".[81] Living a life that fits within heteronormative experiences by itself is not problematic, the forceful implementation thereof is and the refusal to recognize queer alternatives.

[81] Sara Ahmed, Interview with Judith Butler (2016) 19 (4) Sexualities 482, 490

The reproduction of ‘traditional’ international law and the exclusion of the Malaya Lolas’ substantive equality in *Vinuya v Executive Secretary* (Ralph Vincent Garcenila Catedral)

Abstract

The *Malaya Lolas*, a group of Filipino women systematically raped by the Japanese military during World War II, asked the Philippine Supreme Court to direct the Executive Department to represent their reparation claims against Japan. In *Vinuya v Executive Secretary*, the Supreme Court declared that while it recognized the reprehensible crimes committed against the *Malaya Lolas*, the ‘political question’ doctrine and the ‘traditional’ view of international law compelled it to deny their case. Borrowing from Third World Approaches to International Law, this paper examines how the judgement reproduced and internalized a state-centric international law stacked against the Third World reparations project by pitting full compensation against world peace, citing international law cases without context, and framing the issue as a political question. Using Sandra Fredman’s multi-dimensional substantive equality framework would have deepened the understanding of equal protection in the Philippines, centred the *Malaya Lolas*, and resisted the dominance of this ‘traditional’ international law domestically. The paper nuances Fredman’s writing by setting her multi-dimensional framework in the context of the hierarchy that placed international law at the apex, the court mediating the middle, and the *Malaya Lolas* at the bottom.

Introduction: The Case of the *Malaya Lolas*

The Japanese military systematically raped and tortured women and young girls during its occupation of the Philippines in World War II.[1] Records show there were around 1,000 Filipino women who were sexually enslaved by the Japanese army.[2]

After the war ended, the International Military Tribunal for the Far East tried the Japanese military for war crimes and crimes against humanity, but the indictments

[1] Aurora Almendral, ‘Photos: There Still Is No Comfort For The "Comfort Women" Of The Philippines’ (*NPR*, 4 December 2020) <https://www.npr.org/sections/goatsandsoda/2020/12/04/940819094/photos-there-still-is-no-comfort-for-the-comfort-women-of-the-philippines> accessed 19 February 2026.

[2] Nicola Smith, ‘The "comfort women" of the Philippines are still fighting for justice’ (*The Telegraph*, 15 March 2023) <https://www.telegraph.co.uk/global-health/women-and-girls/philippines-comfort-women-second-world-war-japan-army/> accessed 19 February 2026.

were muted when it came to the systematic rape and torture of women.[3] In 1956, the Philippines signed the Treaty of Peace with Japan.[4] However, it contained a general waiver of any reparation claim, and there was no mention of the women survivors or the sexual violence.[5] Years later, Japan has apologized for the 'comfort system' but has not admitted any legal liability.[6] Japan also set up the Women's Fund to make reparations for survivors, but the money came from private donations.[7]

Against this backdrop, beginning in 1998, the *Malaya Lolas*, an organization of survivors of the 'comfort system' asked the Philippines' Executive Department to espouse their reparation claims against Japan.[8] Their requests were denied, because their claims were barred by the Treaty of Peace and would risk destabilizing the relationship between the two countries.[9] In 2004, the *Malaya Lolas* went to the Philippine Supreme Court (the court) to compel the Executive Department to take up their cause.[10] They argued that the waiver of claims in the treaty is void for being contrary to the *erga omnes* obligation not to provide impunity for sexual violence in crimes against humanity and war crimes; and the refusal of the Executive Department to espouse their claims constituted a grave abuse of discretion amounting to lack or excess of its jurisdiction.[11]

The court denied their petition in 2010, almost 70 years since the end of the Japanese occupation of the Philippines.[12] By this time, only a few of the *Malaya Lolas* were alive. In *Vinuya v Executive Secretary (Vinuya or the judgement)*, the court's denial was based on two main grounds: the petition involves a political question;[13] and the Philippines has no obligation in international law to espouse their claims.[14] The court expressed solidarity with the *Malaya Lolas,* while acknowledging that it cannot do anything else:

[3] *Alonzo and others v Philippines*, CEDAW Committee, Communication No 155/2020 (8 March 2023) UN Doc CEDAW/C/84/D/155/2020.
[4] *Vinuya v Executive Secretary* GR No 162230 (SC [En Banc], 28 April 2010) 633 Phil 538, 3. Other allied powers like the United States of America signed the treaty a few years earlier. See Treaty of Peace with Japan (signed 8 September 1951, entered into force 28 April 1952) 136 UNTS 45.
[5] *Alonzo* (n 3) 2.
[6] Amnesty International, 'Missed opportunity for Japan to provide justice for "comfort women"' (Public Statement, 13 August 2010) AI Index ASA 22/007/2010.
[7] Byoung Won Min, 'From Settlements to Reparations: The Case of 'Comfort Women' and *Jus Cogens* in International Relations' (2015) 13(2) KJIS 431, 447.
[8] '*Malaya Lolas*' when translated to English means 'Free Grandmothers' or 'Grandmothers of Freedom'. See 'Seeking Justice for Malaya Lolas' (Bertha Foundation, 8 March 2018) <https://berthafoundation.org/story/seeking-justice-for-malaya-lolas/> accessed 17 March 2026.
[9] *Vinuya* (n 4) 2. The *Malaya Lolas* specifically requested assistance from the Philippines' Department of Justice, Office of the Solicitor General, and the Department of Foreign Affairs. All of them denied their request for assistance.
[10] *Vinuya* (n 4) 2.
[11] *Vinuya (*n 4) 3.
[12] *Vinuya* (n 4) 20.
[13] *Vinuya* (n 4) 11-12.
[14] *Vinuya* (n 4) 16.

> Of course, we greatly sympathize with the cause of petitioners, and we cannot begin to comprehend the unimaginable horror they underwent at the hands of the Japanese soldiers...Regrettably, it is not within our power to order the Executive Department to take up petitioners' cause...[15]

The court has been criticized for prostrating before the Executive Department, and sacrificing the *Malaya Lolas* for 'developmental ends', so that the Philippines could continue to receive aid and trade deals from Japan.[16] Indeed, the judgement placed them in an inferior position without remedy.

Borrowing from Third World Approaches to International Law (TWAIL), I will argue in this paper that the *Vinuya* judgement reproduced the dominant and state-centric international law—what the court described as 'traditional'—that is stacked against the reparation claims of Third World peoples. This has resulted in the entrenchment of the hierarchy of power that placed this 'traditional' international law at the top, the court mediating the middle, and the *Malaya Lolas* at the bottom. Because of this, the judgement flattened their context and reduced their claims as purely economic. Using Sandra Fredman's notion of substantive equality,[17] the court would have had the language to fully understand their struggle as complex and intersecting, centre them in the judgement, and resist the dominance of a state-centric international law.

In this paper, I will use TWAIL to locate the *Malaya Lolas*' inferior position in relation to international law's colonial logic and the court. I will then turn to Fredman to unpack what the court missed as a result of this reproduction—that is, their substantive equality. The paper is divided into several parts: First, I will discuss TWAIL, focusing on Antony Anghie's critique of international law as against Third World reparations.[18] Second, I will examine the court's judgement, particularly how it reproduced 'traditional' international law domestically. Finally, I will frame the case as a substantive equality issue using Fredman's multi-dimensional framework, discuss the entry points for substantive equality in the Philippines, and briefly engage with a critique of Fredman's work related to power relations found in hierarchies.

In 2023, The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) found that the *Malaya Lolas* were subjected to extreme gender-based violence.[19] Scholars have also examined the plight of the 'comfort women' more

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[15] *Vinuya* (n 4) 19-20.

[16] Lila Ramos Shahani, '"Comfort Women" and the Political Economy of Erasure in the Philippines' (2023) 21(11) The Asia-Pacific Journal | Japan Focus Article 5806.

[17] Sandra Fredman, 'Substantive equality revisited' (2016) 14(3) International Journal of Constitutional Law (I-CON) 712.

[18] Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2020) 31(1) EJIL 7, 98.

[19] *Alonzo* (n 3) 18. See also Ruby Rosselle L Tugade, 'Assessing the CEDAW Committee's Determination of Continuing Gender-Based Discrimination against Wartime Sexual Slavery Survivors in the Philippines' (2025) International Journal of Discrimination and the Law (advance online publication) <https://doi.org/10.1177/13582291251381117> accessed 12 March 2026. While the

broadly using feminist perspectives.[20] Some have critiqued the judgement for plagiarizing and misquoting sources contrary to what the original authors had intended.[21] By focusing on a TWAIL reading of the judgement and Fredman's multi-dimensional framework, this paper seeks instead to contribute both to the substantive equality discourse and TWAIL scholarship by contextualizing the challenges to the Third World reparations project in this specific form of historical sexual violence and locating the inequalities in its reproduction in domestic law.

Third World Approaches to International Law

Third World Approaches to International Law critiques international law as a 'predatory system that legitimizes, reproduces, and sustains the plunder and subordination of the Third World by the West'.[22] Indeed, TWAIL argues that globalization and neoliberalism continue to entrench colonial structures in international law to the detriment of the Third World.[23] Scholars like B.S. Chimni use 'Third World' to signify the enduring legacy of colonialism.[24] TWAIL does not readily accept claims to universality, fairness, and equality, because these are the sites where the dominance of states are embedded.[25] The critique includes International Human Rights Law (IHRL) as state-centric and European in orientation. When IHRL claims to centre the individual as a subject of international law, it is referring to a specific human being—European, white, and male.[26]

CEDAW ruling is favorable to the *Malaya Lolas*, whether or not its recommendations will be followed is still contingent on the will of the state.

[20] Karen Knop and Annelise Riles, 'Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the "Comfort Women" Agreement' (2017) 102 Cornell L Rev 853; see also Monica E Eppinger, Karen Knop and Annelise Riles, 'Diplomacy and Its Others: The Case of Comfort Women' (2014) 6 Ewha Journal of Gender and Law 1.

[21] Evan Criddle and Evan Fox-Decent, 'Holding the UP Law Faculty in Contempt Would Be a Grave Mistake' (*Opinio Juris*, 26 October 2010) < https://opiniojuris.org/2010/10/26/holding-the-up-law-faculty-in-contempt-would-be-a-grave-mistake/> accessed 12 March 2026; see also, *In the Matter of the Charges of Plagiarism, etc, against Associate Justice Mariano C del Castillo* (2011) 657 Phil 11 and Paolo S Tamase, 'The Long Shadow of Vinuya in the Time of Artificial Intelligence: Reflections on Ethical Issues in Legal Research' (2023) 96 Phil LJ 850.

[22] Makau Mutua and Antony Anghie, 'What Is TWAIL?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31

[23] Anghie (n 18).

[24] BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3

[25] Endalew Lijalem Enyew, 'Sailing with TWAIL: A Historical Inquiry into Third World Perspectives on the Law of the Sea' (2022) 21(3) Chinese Journal of International Law 439 in the context of the law of the sea. See also Anghie (n 18).

[26] Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania, 2002) 87; Ratna Kapur, *Gender, Alterity and Human Rights* (Edward Elgar Publishing, 2020) 101. In the context of content moderation in the digital sphere, see also Yohannes Eneyew Ayalew, 'A third-world critique of the international human rights-based approach to content moderation' (2025) 16(4) Transnational Legal Theory 546.

Meanwhile, Antony Anghie argues that international law has made it challenging for the Third World's reparation claims to succeed. He makes a distinction between the Western Law of Reparations and the Third World Project of Reparations. For Anghie, international law has made it easier for Western states and corporations to claim reparations from post-colonial states for property rights violations. This has become normative thanks to cases like the *1928 Chorzow* case.[27] Meanwhile, the Third World Reparations are met with formidable challenges, such as the campaigns by Herrero against Germany, Haiti against France, and Caribbean states' reparations claims for slavery.[28] Building on Anghie's work, Andreas von Arnauld summarizes the challenges imposed by international law to the reparation claims of the Third World, namely: intertemporal law and non-retroactivity; legal technicalities against historical abuse; and large-scale reparations being disruptive for today's societies.[29]

Shilpi Pandey extends TWAIL's critique of international law to include how colonial logic is internalized in post-colonial states.[30] In her analysis of the legal invisibility of Kashmiri Pandits, one of her arguments is that India has prioritized the sanctity of the state's sovereignty—an internalization of the state as the central subject of international law—that led to the further marginalization of sub-national identities.[31] Indeed, the notion of sovereignty and the centrality of states in international law licensed the subjugation of the Third World.[32] In other words, the perpetuation of colonialism is not only present in international law but is also reproduced in domestic contexts. This echoes what B.S. Chimni says: '…domination, history testifies, can coexist with varying degrees of autonomy for dominated States.'[33]

From this perspective, the decision in *Vinuya* can be understood not simply as a domestic ruling, but as an instance in which a court internalized and embedded the colonial structures in international law—one that is stacked against the reparation claims of the *Malaya Lolas*. This reproduction will be examined more closely in the next section.

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[27] Anghie (n 18). See also *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A No 17.

[28] Specific to the Caribbean states' reparation claims, Ramona Biholar argues that 'the inability of international legal systems to respond to historical injustices indicates that the colonial imagination, constructed on the compass of exclusion, is still the foundation of international human rights law and of modern, postcolonial societies.' See Ramona Biholar, 'Reparations for Chattel Slavery: A Call From the "Periphery" to Decolonise International (Human Rights) Law' (2022) 40(1) Nordic Journal of Human Rights 64.

[29] Andreas von Arnauld, 'The Third World and the Quest for Reparations: Afterword to the Foreword by Antony Anghie' (2023) 34(4) EJIL 787, 789.

[30] Shilpi Pandey, 'Narrative Injustice and the Legal Erasure of Indigeneity: A TWAIL Reframing of the Kashmiri Pandit Case in Postcolonial International Law' (2025) 14(6) Laws 102 <https://doi.org/10.3390/laws14060096> accessed 9 February 2026, 3.

[31] Pandey (n 30) 5.

[32] Mutua and Anghie (n 22) 31, 33.

[33] Chimni (n 24) 26.

The Reproduction of a 'Traditional' International Law in *Vinuya v Executive Secretary*

In *Vinuya*, the court used the term 'traditional' to describe international law, but what it referred to is an international law that centres the interests of states instead of peoples.[34] The Supreme Court reproduced this in its judgement by constructing the reparation versus peace binary, selectively quoting international law sources without regard for context, and framing the struggle of the *Malaya Lolas* as a political question.

The Reparation and Peace Binary

The *Vinuya* judgement constructed a binary that pits the claims of the *Malaya Lolas* against world peace. This binary appears in the very first paragraph of the judgement, which is a quote from a United States District Court of Northern California decision that dismissed the claims of American prisoners of war (POW) against Japanese corporations for forced labour during World War II. The U.S. court ruled that the claims of the American POW were waived when the U.S. signed the Peace Treaty with Japan. Thus, the U.S. court (and *Vinuya*) said:

> The Treaty of Peace with Japan, insofar as it barred future claims such as those asserted by plaintiffs in these actions, exchanged full compensation of plaintiffs for a future peace. History has vindicated the wisdom of that bargain. And while full compensation for plaintiffs' hardships, in the purely economic sense, has been denied these former prisoners and countless other survivors of the war, the immeasurable bounty of life for themselves and their posterity in a free society and in a more peaceful world services the debt.[35]

This discourse, however, reproduced the international legal order that has made it hard for the Third World to claim reparations. As earlier mentioned, one of the obstacles noted by Anghie and reiterated by von Arnauld is that Third World reparations are seen as disruptive for today's society.[36] The binary in *Vinuya* implies that the reparation claims of the *Malaya Lolas* will imperil the peace that has long been achieved because of the treaty.

Furthermore, the court collapsed the *Malaya Lolas'* claims in the same box as the American POW, and reduced their struggle in a 'purely economic sense.' Indeed, the court said later in the judgement, '…[they] seek to recover monetary reparations from the state of Japan.'[37] The court did not clarify how the *Malaya Lolas'* context was different from that of the American POW or that their claims were not simply about

[34] *Vinuya* (n 4) 16.
[35] In re World War II Era Japanese Forced Labor Litigation 114 F Supp 2d 939 (ND Cal 2000).
[36] Anghie (n 18) 99.
[37] *Vinuya* (n 4) 18.

money. *Vinuya* agreed with the U.S. court that being alive in a free and peaceful world is enough reparation. World peace has balanced the scales.

The 'Traditional' International Law

In the judgment, the court relied on the doctrine of diplomatic protection and held that states do not have any legal obligation in classical international law to espouse the claims of their nationals. The court cited and quoted without regard for context the *1924 Mavrommatis Palestine Concessions* case[38] and the *1970 Barcelona Traction* case.[39]

As discussed earlier, the Western Law of Reparations typically involves corporations claiming reparations for violations of their property rights. Interestingly, the court in *Vinuya* cited the *Barcelona Traction* case that involves claims of a Canadian corporation whose majority shareholders were Belgian for property rights violations by Spain, and the *Mavrommatis* case that involves a dispute that happened when the British did not recognize Mavrommatis' concession rights in Jerusalem and Jaffa, and gave them to a British company instead. The court did not nuance the situations of the *Malaya Lolas* and how they were different from the corporations in these international law cases that were cited.

Another key reasoning of the court is that the Treaty of Peace barred the reparation claims of the *Malaya Lolas* who argued that the waiver is void, because the prohibition of sexual violence and slavery are *jus cogens* and *erga omnes* obligations from which no derogation is allowed. The court doubted whether these norms were already considered as such during the critical period of the treaty ratification. The court applied intertemporal law, which is another challenge posed by international law to the Third World reparations project.[40] Post-colonial states have to contend with the argument, such as in this case, that at the time of the violations, the norms were different. TWAIL scholars have critiqued intertemporal law as furthering colonialism, because it protects colonizers and allows them to evade liability and block reparations.[41] It also freezes the law in time, which ignores the continued and ongoing harms such as those experienced by the *Malaya Lolas*.

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[38] Mavrommatis Palestine Concessions (Greece v Great Britain) (Jurisdiction) PCIJ Rep Series A No 2.
[39] Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3.
[40] Anghie (n 18) 100. Intertemporal law, famously articulated in the *Island of Palmas Case (Netherlands v USA)* (1928) 2 RIAA 829, which interestingly involves an island close to the Philippines, states that the law that should be applied is that law in operation during the 'critical period', which may be different from the law operating when the court decides a case.
[41] Elvis Mogesa Ongiri, 'Decolonizing Intertemporal Law through the Lens of the Mau Mau Reparations Campaign' (2025) 119(1) American Journal of International Law; See also Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly* 739.

The 'Political Question' Doctrine

The court also viewed the issue as involving a political question, which is better left to the judgment of the Executive Department.[42] As legal support, *Vinuya* quoted a U.S. Supreme Court decision[43] and a domestic case, *Tañada v Cuenco*, which clarified that political questions are issues 'dependent upon the wisdom, not legality of a particular measure.'[44] The constitutional logic, given that foreign relations are within the Executive Department's remit,[45] is that these branches should respect and not encroach on the independence of one another.[46]

The political question doctrine also solidified the centrality of states domestically and cemented the position of the *Malaya Lolas* as passive objects of foreign policy whose claims were contingent—to use the language in the judgement— on the 'wisdom' of the state through its Executive Branch. That it was a matter of 'wisdom' instead of 'legality' further removed their claims beyond the accountability of the court and sidelined their right to equal protection under the laws.[47]

In summary, the court in *Vinuya* reproduced a state-centric international law that is stacked against the reparation claims of the Third World. This reproduction crystallized the hierarchy of power—the dominant international law at the apex, the state through the Executive Branch and the judiciary gatekeeping the middle, and down below sit the *Malaya Lolas* who were left without remedy and whose struggle was reduced to a simple claim for money.[48]

Furthermore, this reproduction excluded the substantive equality of the *Malaya Lolas*, which would have allowed the court to fully consider and appreciate their contexts and bring their interests to the centre. The next section will locate the struggle of the *Malaya Lolas* as a substantive equality issue.

The Struggle of the *Malaya Lolas* as Substantive Equality

Borrowing from Sandra Fredman, the *Malaya Lolas'* reparation claims could be framed within the substantive equality discourse, which would have deepened the understanding of the equal protection clause in the Philippines and add nuance to Fredman's writing.

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[42] *Vinuya* (n 4) 11
[43] *Baker v Carr* 369 US 186 (1962).
[44] *Vinuya* (n 4) 12. See also *Tañada v Cuenco* (1957) 103 Phil 1051.
[45] Constitution of the Republic of the Philippines 1987, art VII.
[46] Carmelo V Sison, 'The Supreme Court and the Constitution' (1993) 67 Philippine Law Journal 1, 308-309.
[47] Constitution of the Republic of the Philippines (n 45) art III, s 1.
[48] *Vinuya* (n 4) 19-20.

The Multi-Dimensional Model of Substantive Equality

The notion of substantive equality is a departure from the formalistic Aristotelean formulation that 'like should be treated alike,' which is problematic because it requires a comparator (usually a male standard),[49] could lead to doubling down of rights,[50] and is insufficient to address situations where a different treatment is warranted.[51]

For Sandra Fredman, equality should respond to the situations of the disadvantaged.[52] Yet, she acknowledges that while equality is a central commitment in IHRL, it is nonetheless contested, and attempts to define it, such as by focusing on equality of results, of opportunity, or as an inherent component of dignity have proven unsatisfying.[53] Instead of a precise definition of equality, Fredman borrows insights from these approaches and from the works of other scholars like Nancy Fraser and Axel Honneth who problematized the recognition-redistribution debate.[54] Fredman proposes a multi-dimensional framework to substantive equality, namely, that it should redress disadvantage (redistribution); address stigma, stereotyping, violence, and prejudice (recognition); enhance voice and participation (participation); and accommodate difference and achieve structural change (transformation).[55] These four dimensions are interacting with one another, and her model is a diagnostic tool for policies and practices to achieve substantive equality.[56]

The court glossed over the claims of the *Malaya Lolas* in the judgement; nonetheless, their claims go beyond material compensation but also include official and direct apology from Japan and the preservation of the *Bahay na Pula* (Red House)—the very site where they were violated.[57] However, the reproduction of international law domestically effectively blurred the fullness of their claims from being considered in the judgement. A substantive equality lens would have given the court the framework to consider the *Malaya Lolas* struggles more fully, shaping and interacting with one another, beyond purely material redistribution.

First, their claim for compensation and financial support is meant to redress disadvantage, particularly because they continue to endure physical pain, disability, and psychological and emotional suffering as a result of their status.[58] Many of them

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[49] Fredman (n 17) 719.
[50] Fredman (n 17) 717.
[51] Fredman (n 17) 730.
[52] Fredman (n 17).
[53] Fredman (n 17).
[54] Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003).
[55] Fredman (n 17).
[56] Fredman (n 17).
[57] Alonzo (n 3) and Vinuya v Executive Secretary (n 4).
[58] *Vinuya* (n 4) 2; See also, *Alonzo and others v Philippines* (n 3) 15 and Nicola Sebastian, 'The Malaya Lolas' (*Nicola Sebastian*) <https://www.nicolasebastian.com/the-malaya-lolas> accessed 2 March 2026.

are living in poverty, needing and yet lacking in health care.[59] Second, the claim for direct apology is for recognition, not only of the historical violence but also the stigma attached to being ‘comfort women’.[60] Third, the *Malaya Lolas* argued that the Treaty of Japan has excluded them. They were neither present nor consulted, and their interests were not represented in the negotiation table.[61] Their political invisibility was what they wanted to be remedied. Finally, their claim to preserve the *Bahay na Pula* is meant to memorialize their place in history and serve as a reminder to Filipinos today and future generations regarding the steep costs of war.[62] This can then lead to transformation of the school curriculum and better policies to protect women and children.

A substantive equality lens would also have allowed the court to view how their status and identities as women, particularly as ‘comfort women’, as grandmothers, and as socio-economically disadvantaged, compounded their situation and nuanced their claims. It would have allowed the court to realize the discriminatory structures that have rendered them invisible politically and socially.[63] It would have allowed the court to acknowledge their ongoing struggle amidst a ‘culture of silence’ when it comes to sexual violence in Philippine society.[64]

Entry Points in Philippine law

The Philippine constitution guarantees equal protection of the laws and includes social justice provisions meant to protect and enhance the right of people to dignity, reduce inequalities, and ensure equitable diffusion of wealth and political power for the common good.[65] According to a former Chief Justice of the court, these provisions taken as a whole show that ‘the equal protection clause can no longer be interpreted as only a guarantee of formal equality but of substantive equality.’[66] And yet, the understanding of equality in Philippine jurisprudence is still largely formalistic. For example, in one case, the court ruled, ‘it is enough that all persons under like

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59 Mariejo Ramos, ‘For Filipino wartime rape survivors, a last hope for reparations’ (*Context*, 24 September 2023) <https://www.context.news/socioeconomic-inclusion/for-filipino-wartime-rape-survivors-a-last-hope-for-reparations> accessed 2 March 2026.
60 *Alonzo* (n 3) 11
61 *Alonzo* (n 3) 5.
62 *Alonzo* (n 3) 8.
63 Center for International Law Manila and European Center for Constitutional and Human Rights, 'Individual Complaint for Consideration and Action to the UN Special Rapporteur on Violence Against Women and the UN Special Rapporteur on Contemporary Forms of Slavery on behalf of the Malaya Lolas' (2 November 2016) 9.
64 Philippine Commission on Women, ‘Violence Against Women’ < https://pcw.gov.ph/violence-against-women/> accessed 12 March 2026.
65 Constitution of the Republic of the Philippines (n 45). The Bill of Rights in the Philippine constitution guarantees protection to individuals against abuses of the state. See *Allado v Diokno* [1994] 232 SCRA 192; Constitution of the Republic of the Philippines (n 45) Art XIII.
66 Reynato S Puno, ‘Equal Dignity and Respect: The Substance of Equal Protection and Social Justice’ (2012) 86 Phil LJ 541 quoted in the separate concurring opinion of Justice Roberto Abad. See *Garcia v Drilon* GR No 179267 (SC, 25 June 2013) 712 Phil 44.

circumstances or conditions are given the same privileges and required to follow the same obligations.'[67] The court missed the opportunity in *Vinuya* to clarify that the constitution requires substantive equality.

The Philippines has also ratified the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and CEDAW, among others,[68] which contain provisions that have been interpreted in IHRL as a demand for substantive equality,[69] and which the court could have used as additional legal anchors to deepen the understanding of equality in the Philippines.

The political question doctrine is also not an inescapable cage. The constitution has expanded the powers of the court to review acts of another branch even if it involves a political question in cases where they abuse their discretion.[70] This was precisely one of the grounds of the *Malaya Lolas'* petition before the court. However, while the court has this power, it has been cautious in using it, choosing institutional deference instead, since the constitution has allocated foreign policy matters to the Executive Branch. Dante Gatmaytan theorizes that this is reflective of the practice of the high courts of former colonies not challenging but rather implementing the will of the Executive Branch.[71] Furthermore, whenever the issue has pronounced political contours, the court often takes a conservative position otherwise it risks watering down its legitimacy.[72]

However, even if the outcome of the case remained the same, and the court still assumed the posture of political modesty, there was room in the judgement to flesh out the interweaving dimensions of the *Malaya Lolas* struggle. Even if the court had still decided to rule against the *Malaya Lolas*, it could have at least, even through an *obiter dictum*,[73] recognized the many ways in which they were, and continue to be, disadvantaged, acknowledged the fact that the lack of remedy in the current legal framework is a gap that needed to be addressed, or hinted at avenues in the domestic context that needed to be transformed to allow them political and social inclusion.

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[67] *Tiu v Court of Appeals* GR No 127410 (SC, 20 January 1999). See also *Ichong v Hernandez* 101 Phil 1155 (SC, 31 May 1957).

[68] The Philippines ratified the ICCPR on October 23, 1986, the ICESR on June 7, 1974, and CEDAW on August 5, 1981.

[69] See, for example, UN Committee on Economic, Social and Cultural Rights, 'General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant)' (11 August 2005) UN Doc E/C.12/2005/3; Làzarie Eeckeloo and Daisuke Shirane, *Simple Guide on the International Covenant on Civil and Political Rights (ICCPR): An Overview of Articles 1–27* (Centre for Civil and Political Rights).

[70] Dante B Gatmaytan, 'Creating Political Questions Under the 1987 Constitution' (2025) 98 Phil LJ 227.

[71] Gatmaytan (n 70).

[72] Dante B Gatmaytan, 'Politicisation and Judicial Accountability in the Philippines' (2012) 87 Phil LJ 21.

[73] Obiter dictum is defined in Philippine law as 'a remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.' See *Villanueva v Court of Appeals* GR No 142947 (19 March 2002) 429 Phil 194.

Substantive Equality in Relation to the Hierarchy of Power

One criticism levelled against Fredman's work is its muted discussion of power. Catharine McKinnon critiques her multi-dimensional model for its inability to recognize the critical role of power in inequalities.[74] For McKinnon, Fredman does not go far enough to explain that while the dimensions interact, the direction of the interaction is vertical—that there are layers upon layers of hierarchies that produce inequality.[75] McKinnon says, 'inequality of power—at times direct, at times attenuated—is the fundamental dynamic of inequality'.[76]

While Fredman's model provides a helpful framework that could centre the *Malaya Lolas*, a TWAIL reading of the *Vinuya* judgment reveals that the court's judicial work is not simply the application of legal doctrines to a set of facts; rather, it is a site where hierarchies are reproduced, perpetuated, and become normative. Had the court discussed substantive equality especially in relation to the hierarchy of power that placed the *Malaya Lolas* in an inferior position, *Vinuya* would have been a good case that further enriches the multi-dimensional framework.

Conclusion: Substantive Equality as Resistance

The *Vinuya* judgment illustrates how the Philippine Supreme Court, while expressing sympathy for the *Malaya Lolas*, ultimately reproduced the dominance of a state-centric international law that is stacked against them. By constructing the reparations versus world peace binary, it reduced their claims purely as an economic struggle. By selectively citing international law cases without context, it shut the door to the possibility of the state representing their claims internationally. And by framing the issue as a political question, it consolidated the power of the state and further crystallized the inferior position of the *Malaya Lolas*.

The *Vinuya* judgement represents a missed opportunity to centre the interests of survivors and appreciate their intersecting identities, struggles, and historical traumas through a substantive equality framework. Utilizing Sandra Fredman's four-dimensional model could have led the court to redress historical disadvantage, address the profound stigma of sexual violence, and enhance the political participation of women who were excluded from the peace negotiations. This would have given new depth to the equal protection clause of the Philippine constitution as a mandate for substantive, rather than formal equality.

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[74] Catharine A MacKinnon, 'Substantive equality revisited: A rejoinder to Sandra Fredman' (2017) 15(4) International Journal of Constitutional Law 1174.
[75] MacKinnon (n 72) 1176.
[76] MacKinnon (n 72) 1174.

Since *Vinuya*, the court has made strides towards substantive equality, such as instituting the use of gender-fair language in the courtroom,[77] and explicitly recognizing the historical power imbalance between women and men in society.[78] However, *Vinuya* remains a cautionary tale about how quickly the court can reproduce the dominance of international law and further entrench the hierarchies that place the *Malaya Lolas* at the bottom without remedy. Centring them and their interests in the judgement would have been the court's opportunity to push back against their continued marginalization and invisibility and resist the crushing weight of 'traditional' international law's dominance.

[77] Guidelines on the Use of Gender-Fair Language in the Judiciary and Gender-Fair Courtroom Etiquette AM No 21-11-25-SC (SC, 15 February 2022).

[78] The court in this case upheld the constitutionality of the Violence Against Women and Their Children Act. See *Garcia v Drilon* GR No 179267 (SC, 25 June 2013) 712 Phil 44.

Incitement through narrative: A Rabat Framework analysis of media bias against Palestinians (Habibo Ahmednur Ginde)

Abstract

Studies on media bias in coverage of Israel and Palestine are common, but few connect it to the positive obligations of states under international law. This paper argues that the discriminatory context and biased linguistic patterns in major English-language media, such as discrediting Palestinian testimony, using passive voice, and omitting historical context, constitute a form of epistemic injustice that dehumanizes a national group. By applying the legal test for incitement under the UN Rabat Plan of Action to Palestinian and Israeli coverage since October 2023, the author argues that these patterns meet the threshold of advocacy of national hatred, thereby directly engaging states' duties under Article 20 (2) of ICCPR to prohibit incitement to discrimination. Moving beyond critique, the paper concludes that fulfilling this obligation requires states to promote reparative journalism to restore narrative justice and the right to non-discrimination.

Introduction

Language plays a powerful role in shaping our political and social realities, and it has been used throughout history to sway public opinion, to legitimize certain narratives, and marginalize others.[1] It is unsurprising, then, that in the modern context, different actors employ language to shape perception, and this is evident in the media coverage of the Palestinian-Israeli conflict. In early 2024, the killing of the Palestinian child Hind Rajab was reported by several Western news outlets in a devastating event that shook the world. In relation to it, the CNN reporter referred to Rajab as a "woman",[2] the BBC's headline wrote that she was "found dead"[3] and the Sky News, when covering a similar incident, described the situation as "a bullet that accidentally found its way into a vehicle" without referring to agents behind it.[4] These examples are not isolated and handpicked instances, as studies that are conducted by the Centre for Media

[1] Norman Fairclough, *Language and Power* (2nd edn, Routledge 2013) 63–66.
[2] Arwa Mahdawi, 'The adultification of children has consequences from Palestine to the US' (*The Guardian*, 4 May 2024) <https://www.theguardian.com/commentisfree/article/2024/may/04/adultification-children-palestine-us> accessed 17 July 2024
[3] Williamson L, 'Hind Rajab, 6, found dead in Gaza days after phone calls for help' (BBC News, 10 February 2024) <https://www.bbc.com/news/world-middle-east-68261286> accessed 23 December 2025
[4] Jackson L and Elliards X, 'Sky News condemned for report on killed Palestinian child' (The National, 17 July 2024) <https://www.thenational.scot/news/24036832.sky-news-condemned-report-killed-palestinian-child/> 21 December 2025

Monitoring (CfMM) and by The Intercept found that certain terms, such as “butcher”, “slaughter”, and “massacre,” were used almost exclusively to describe Israeli casualties while Palestinian deaths were more frequently described using neutral or passive language, including terms such as “killed” or “found dead.”[5] These studies also found that Israeli casualties tend to receive more extensive coverage, often accompanied by personal stories, names, and background details, while Palestinian casualties were more commonly discussed in an anonymous and decontextualized manner.[6]

The harm that these repeated ways of framing the Palestinian cause does is not limited to misrepresentation in any single report, but rather the repeated marginalization of Palestinian testimony and the erosion of the narrative context surrounding occupation, siege, and asymmetrical power relations.[7] I argue that such systematic dehumanization and contextual erasure in media constitutes a form of advocacy of national hatred that meets the threshold for incitement under Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR).[8] This claim finds its most serious precedent in the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR). In Prosecutor v. Nahimana known as “the Media Case,” the Tribunal convicted media executives for genocide and crimes against humanity for using broadcasts and newspapers to dehumanize the Tutsi population and incite violence. The Appeals Chamber underscored that “the power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences.”[9] This paper contends that while the context and criminal intent differ, the mechanisms of dehumanization and the foreseeable harm of discriminatory advocacy present in Western coverage of Palestine engage a lower, but crucial, threshold of state duty: the obligation under Article 20(2) of the ICCPR to prohibit incitement to discrimination.[10]

This paper shifts the critique from media ethics to state accountability. Applying the legal test for incitement from the UN Rabat Plan of Action to the documented media patterns, it argues that states have a positive obligation to address such speech. The paper concludes that fulfilling this duty requires moving beyond passive regulation towards promoting reparative journalism as a policy measure to protect human rights and uphold narrative justice.

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[5] Centre for Media Monitoring, Bbc on Gaza-Israel: One Story, Two Double Standards (Report, June 2025) <https://cfmm.org.uk/bbc-on-gaza-israel-one-story-double-standards/> accessed 17 December 2025 10

[6] Ibid 9.

[7] Ibid 11.

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

[9] *Prosecutor v Nahimana, Barayagwiza and Ngeze* (Judgement) ICTR-99-52-A (28 November 2007) para 74.

[10] ICCPR (n 8) art 20.

I will proceed in four parts, starting with establishing the legal and conceptual framework and laying down the understanding of positive state obligations under international law. I will then proceed to apply the UN Rabat test to the documented media coverage, arguing that it meets key thresholds for state intervention and finally, I will shortly discuss the implications for state duty and propose reparative journalism as a constructive path for compliance.

Legal Framework

The right to freedom of expression and opinion is widely regarded as a cornerstone of democratic societies and a central element of the international human rights framework as it has historically played an important role in enabling marginalized groups to challenge injustice and advocate for social change.[11] This right is enshrined in Article 19 of ICCPR and guarantees "protection to the freedom to seek, receive, and impart information and ideas of all kinds through any media."[12] Now, just like any other right, this right comes with certain restrictions that are necessary to protect the rights of others, national security, public order, health, and public morals.[13] The UN Human Rights Committee (The Committee) has underlined that any restriction to this right " must be provided by a precise and accessible law, must pursue a legitimate aim listed in Article 19(3), and must be both necessary for and proportionate to that aim."[14]

These highlight the heart of restrictions on the right to freedom of opinion and expression; however, alongside these are the prohibitions under Article 20, which impose a distinct but equally important restriction on the right to expression. Article 20(2) writes that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[15] This permits a restriction on expression and obliges states to prohibit speech that falls under this category,[16] but the threshold for this kind of prohibited speech is very high, and states must comply with the general three-part test for restrictions under Article 19.[17]

To understand the nature of certain speeches and whether they may fall or not fall under the prohibited speech under Article 20(2), UN experts have developed the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred (The

[11] Onder Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 Tulsa J Comp & Int'l L 1
[12] UN Human Rights Committee (The Committee), 'General Comment No. 34: Article 19: Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34, para 11.
[13] Ibid.
[14] The Committee (n 10) paras 22, 24, 34.
[15] ICCPR (n 7) art 20(2).
[16] Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence in *Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred* (11 January 2013) UN Doc A/HRC/22/17/Add.4, appendix, para 18.
[17] The Committee (n 10) paras 24-36.

Rabat Plan).[18] This framework provides an important six-part test, including context, intent, and content, to determine whether specific speech reaches the high threshold of incitement to discrimination, hostility or violence.[19] The Rabat plan framework is established as an authoritative and I am going to use it as the primary analytical tool for assessing media discourse in subsequent sections to demonstrate how the repeated marginalization of Palestinian testimony and the erosion from the narrative context surrounding occupation, siege, and asymmetrical power relations in media may fall under advocacy to incitement.

The Foundation of State Positive Obligations

In the context of human rights, states are obliged not only to refrain from violating person's rights but also to take positive measures to ensure that people in their jurisdiction get to enjoy these rights.[20] The states' duties to respect, protect, and fulfil are a cornerstone of modern human rights law.[21] This includes states' obligation to protect individuals from abuses committed by private persons or entities.[22] The duty to protect includes taking appropriate measures to prevent, investigate, and redress human rights abuses, where the Committee explicitly stated that "the obligation to ensure Covenant rights may also require States parties to protect individuals from acts by private entities that would impair those rights."[23] The duty to protect engages directly with the question of incitement, as this can cause severe consequences for individuals, and thus it is the state's obligation under Article 20(2) to establish an effective legal and protective framework to shield individuals and groups from the harm caused by incitement to discrimination or hatred.[24] This is not a passive duty of non-interference, as the states are required by law to respond to these kinds of cases to create a safe environment for the enjoyment of rights.

In commenting on the right to peaceful assembly, the Committee elaborates that the obligation to "respect and ensure" imposes both negative and positive duties.[25] States must "promote an enabling environment" for the right's exercise, which includes a "duty to protect participants from all forms of discriminatory abuse and attacks."[26] The committee explicitly notes that "the possibility that a peaceful assembly may provoke adverse or even violent reactions from some members of the public is not sufficient grounds to prohibit it, instead, states are obliged to take all reasonable measures… to

[18] Rabat Plan of Action (n 13) para 18.
[19] Ibid paras 13-14.
[20] ICCPR (n 7) art 2 (1).
[21] David Jason Karp, 'What Is the Responsibility to Respect, Protect, and Fulfill Framework' (2020) 12 Int'l Theory 83
[22] The Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 8.
[23] Ibid.
[24] *Rabat Plan of Action* (n 13) paras13, 21, 33, 35.
[25] The Committee 'General Comment No. 37 on the Right of Peaceful Assembly (Article 21)' (17 September 2020) UN Doc CCPR/C/GC/37, para 23.
[26] Ibid para 24-25.

protect all participants."[27] This is important to reflect, because if states have a positive duty to protect assembly participants from violence triggered by their expressive acts, they have a compelling duty to protect vulnerable groups from the violence, hostility, and discrimination that can be incited by the expressive acts of powerful private entities, such as media corporations. This duty to protect from third-party harm forms the legal backbone of the argument that States have a positive obligation to address media discourse that constitutes advocacy of national hatred.

The Mechanism of Harm: Epistemic Injustice

The systematic media framing described does not merely reflect bias; it enacts a deep epistemic injustice that disrupts the right to be heard by silencing the capacity of knowers.[28] This injustice manifests in two core forms, each actively produced by media practices. Testimonial injustice occurs when people are "denied credibility due to prejudice on the part of the hearer."[29] This shows, for example, when media outlets disproportionately scrutinize Palestinian casualty figures by framing it as produced by "Hamas-run health ministry",[30] while presenting Israeli military claims as authoritative, or when journalism from Palestinian reporters is questioned despite restricted access for Western journalists.[31] This pattern of 'testimonial quieting' conditions the audience to fail to identify certain speakers as knowers.[32] The harm is not only misrepresentation but the denial of Palestinians' status as credible agents of truth.

On the other end, hermeneutical injustice arises when a gap in interpretive resources puts a group at a disadvantage in understanding their own social experiences.[33] By routinely reporting on violence without explaining the structural conditions of prolonged occupation, siege, and systemic discrimination, media narratives create a hermeneutical void.[34] The public is deprived of concepts like 'settler colonialism' or 'apartheid' that is required to make sense of Palestinian resistance or suffering.[35] Their experience is rendered unintelligible, appearing as 'senseless violence' rather than actions within a context of oppression.[36]

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[27] Ibid para 27.

[28] Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing (Oxford University Press 2007) 2 <https://academic.oup.com/book/32817> accessed 19 December 2025 p 2.

[29] Ibid p 2.

[30] Emir Nader and Cachella Smith, 'Eleven more die from malnutrition in Gaza, Hamas-run health ministry says' (BBC News, 9 August 2024) <https://www.bbc.com/news/articles/c80dpg77g0do> accessed 19 December 2025

[31] Centre for media monitoring (n 4) p 11-14.

[32] Kristie Dotson, 'Tracking Epistemic Violence, Tracking Practices of Silencing' (2011) 26(2) Hypatia 236, 242.

[33] Ibid (n 25) p 3

[34] Diane Shammas, 'Rationalization to Kill vs. Preservation of Life: A Socio-Psychological Analysis of Six Fatal Shootings of Black Americans and Palestinians' (2025) 54(2) Journal of Palestine Studies 28, 33-36

[35] Ibid p 34-35.

[36] Johana Kotišová, 'The epistemic injustice in conflict reporting: Reporters and 'fixers' covering Ukraine, Israel, and Palestine' (2023) 25(6) Journalism 1290, 1291-1292

This framework is underscored by research on conflict reporting, which notes that local media professionals' 'affective proximity' is often dismissed as bias.[37] This mirrors the Palestinian case, where direct, lived testimony is subordinated to the framing of foreign journalists whose 'professional distance' is often profound ignorance.[38] The resulting coverage does more than inaccurately report; it perpetuates the credibility deficits and hermeneutical impoverishment that constitute epistemic injustice.[39]

Having established the legal duty of states under Article 20(2) of the ICCPR to prohibit incitement, and the mechanism of harm through epistemic injustice, the following section applies the six-part Rabat Test to evaluate whether the documented media patterns meet the threshold of advocacy of national hatred.

Methodology

I am going to use a qualitative legal analysis to apply it to the established Rabat Plan of Action test for incitement to hatred to a documented pattern of media bias in the coverage of Palestine-Israel. This pattern is grounded in a body of existing quantitative and qualitative studies. The CfMM's analysis of over 35,000 pieces of BBC content provides a foundation, revealing systematic disparities in coverage volume, language, and victim representation. Similarly, the 2024 Intercept study of The New York Times, The Washington Post, and The Los Angeles Times paints a picture of disproportionate use of emotive language for Israeli versus Palestinian casualties.[40] Scholarly work, such as Holly M. Jackson's analysis of The New York Times coverage during the Intifadas, further illustrates a persistent, historical bias against Palestinians. Building on this existing evidence, my analysis uses concrete examples from major English-language outlets to apply the Rabat test's six contextual criteria.

Application of the Rabat Test

Context

The discourse on media framing of the Palestinian cause is embedded in deep social, political, and historical complexities. Historically, Israel has held greater control, benefited from extensive media coverage, and received strong support from powerful

[37] Ibid 1291, 1302-1303.
[38] ibid 1299-1300.
[39] Jennifer Saul, 'Implicit Bias, Stereotype Threat, and Epistemic Injustice' in Ian James Kidd, José Medina and Gaile Pohlhaus Jr (eds), The Routledge Handbook of Epistemic Injustice (Routledge 2017) 235, 236-238
[40] Adam Johnson, 'Coverage of Gaza War in the New York Times and Other Major Newspapers Heavily Favored Israel, Analysis Shows' (The Intercept, 9 January 2024) <https://theintercept.com/2024/01/09/newspapers-israel-palestine-bias-new-york-times/> accessed 3 January 2026

Western allies. Meanwhile, Palestinians under occupation and siege have had far fewer opportunities to tell their stories or influence global narratives. As a result, Western media often frame unrest in the West Bank and Gaza as security threats or routine conditions, rather than as responses to long-standing political and structural violence.[41] Furthermore, media outlets downplay the scale of Palestinian casualties, which historically surpass Israeli losses each year, a pattern scholars such as Dr. Norman Finkelstein have connected to policies like "mowing the lawn,"[42] which he argues are designed to create fear and chaos, to keep Palestinians under control.

After 7 October 2023, this imbalance became even more visible. When Palestinian figures appeared on outlets such as the BBC or Sky News, journalists repeatedly asked them whether they condemned Hamas, while rarely posing equivalent questions to Israeli officials about IDF actions or settler violence.[43] These reporting practices reflect a clear pattern of favouritism rooted in Israel's political and historical alignment with Western states.

By distorting or omitting realities on the ground, media coverage actively shapes public understanding. It narrows Palestinian experience to frames of "terrorism" or everyday hardship and strips events of their political and historical causes. For the purposes of the Rabat test, this context is not neutral. These patterns of speech misinform audiences, shape perception, and obscure complexity, leaving many unaware of, or indifferent to, the realities faced by vulnerable groups.

Speaker – Position and Influence

Major news outlets like the BBC, CNN, and The New York Times are not passive observers or ordinary speakers. They are powerful institutions with a huge global reach. Their editorial choices and the stories they run do not just reach a few people, but rather shape reality for thousands of viewers and readers who may lack the context or time to verify what they are told. And when these outlets consistently frame the conflict without acknowledging occupation, power imbalance, or the scale of Palestinian casualties, they are not simply reporting both sides.[44] They are constructing a narrative, and the harm here is profound because they manufacture a silent consensus. By presenting their framing as neutral, objective facts, they silence the brutal reality of one group and quiet public outrage, legitimizing state complicity. Therefore, the editorial bias of these influential media corporations is dangerous as it shapes international perception, lowers the barrier for public acceptance of

[41] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion, 19 July 2024) <https://www.un.org/unispal/wp-content/uploads/2024/07/186-20240719-adv-01-00-en.pdf19> accessed December 18, 2025, para 74.
[42] Dunning T, 'The world's most tragic, long-running farce: the Gaza conflict' (The Conversation, 11 August 2014) <https://theconversation.com/the-worlds-most-tragic-long-running-farce-the-gaza-conflict-30301> accessed 23 December 2025
[43] Centre for media monitoring (n 4) p 18.
[44] Holly M Jackson, 'Scaling the Wall: A Large-Scale Computational Analysis of Historical Bias against Palestine in *The New York Times*' (2024) 17(1) Media, War & Conflict 117.

discriminatory policies, and undermines the political will needed to pursue accountability.

Intent

Having considered the immense influence that these media outlets carry, the question remains: what is the reasoning behind the disproportionate reporting in the conflict? Debating the subjective intent of individual journalists is neither necessary nor appropriate; however, one must consider the foreseeable effects of the systematic editorial patterns in these media corporations.[45] When these news outlets have dozens of articles back and forth that consistently downgrade the deaths and tragedies of people, deny the context of their oppression, and amplify the narrative of their oppressor, it must be held accountable for the reasonably foreseeable consequences.[46] The documented pattern of "muffling Palestinian voices" and erasing context demonstrates an institutional negligence towards the foreseeable harm of inciting discrimination against Palestinians, if not an intentional alignment with a dominant political narrative.[47] Different media outlets' choice of words, such as "Hamas-run health ministry"[48] casts foreseeable doubt on Palestinian casualty figures, while taking the Israeli narrative at face value, and this is not a random error, when it appears repeatedly in these outlets.

Content and Form

Analysing the linguistic choice and the narrated stories, one finds a mountain of evidence of harmful practices in many major news corporations. Media framing of Palestinian content is filled with the use of passive voice, such as "Found dead", or "Unknown fate ..as Hind Rajab is trapped under fire", which tends to obscure perpetrators.[49] Furthermore, the IDF and Israeli government have been taking people from Gaza, hundreds of them in some cases with no apparent reason; however, these are not called "hostages", but instead they are "prisoners,", which implies that they are charged for a crime, despite never being charged for it.[50] Similarly, the terms such as "massacred" or "slaughtered" are used to showcase Israeli tragedies, while Palestinians are "killed" or they just "die."[51] The study has found that terms like

[45] *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) para 31.
[46] Ibid. On the question of nature and purpose of the speech and its foreseeable impact.
[47] Centre for media monitoring (n 4) p 68-69.
[48] Emir Nader and Cachella Smith, 'Eleven more die from malnutrition in Gaza, Hamas-run health ministry says' (BBC News, 9 August 2024) <https://www.bbc.com/news/articles/c80dpg77g0do> accessed 19 December 2025
[49] Lucy Williamson, 'Hind Rajab, 6, found dead in Gaza days after phone calls for help'(BBC News, 10 February 2024) <https://www.bbc.com/news/world-middle-east-68261286> accessed 27 December 2025
[50] Tom Bennett, 'Israeli hostages and Palestinian detainees freed as Trump hails 'historic dawn' in Middle East' (BBC News, 13 October 2025) <https://www.bbc.com/news/articles/c740jx07vz0o> accessed 5 January 2026
[51] Centre for media monitoring (n 4) p 10.

“massacre” applied 18 times more to Israelis, and “murdered” referenced 220 times for Israelis versus once for Palestinians.[52]

Additionally, much of the media has treated the war on Gaza as though it began on 7th of October, as if history reset at that moment. Reporting often ignores the long-standing siege and occupation, while detailing Israeli casualties without offering proportional coverage of the far greater Palestinian death toll.[53] By doing so, media narratives detach violence from its structural causes and it strips the public of the tools needed to understand Palestinian resistance as a response to sustained oppression and instead frames it as something irrational, spontaneous, or inherently violent. Collectively, this is not just merely reporting on a conflict, but a creation of a narrative, where one group’s pain is worthy of emphasis and empathy, and the other is a statistic or the inevitable result of their own actions.

Extent of the Speech

The reach of the speech is vast, as these outlets have huge global reach and 24-hour distribution networks across digital, television, and print platforms. The BBC is a publicly funded international broadcaster.[54] The New York Times and CNN set the news agenda for much of the English-speaking world. The CfMM analysis alone encompassed 3,873 articles and 32,092 broadcast segments from just one outlet, which shows the extent and influence of these media corporations that are consumed by millions. These have the capability of creating an epistemic environment where alternative frames struggle to be heard, fulfilling Fricker’s condition of hermeneutical marginalization on a mass scale.[55]

Likelihood of Harm

The harm generated by this pattern of coverage is not necessarily that of immediate, direct violence, but the creation of a permissive social and political environment.[56] Dehumanizing language and the erasure of context systematically grind down empathy for Palestinians, legitimize violence against them as regrettable "collateral damage," and shield perpetrators from public outrage and accountability. This process enacts a form of slow violence, a concept developed by Rob Nixon to describe delayed, attritional harm that normalizes suffering and obscures lines of

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[52] Ibid p 11-14.
[53] Ibid p 11. See also Holly M Jackson, ‘Scaling the Wall: A Large-Scale Computational Analysis of Historical Bias against Palestine in The New York Times’ (2024) 17(1) *Media, War & Conflict* 117, 124-127.
[54] International Development Committee, The future of the BBC World Service (UK parliament, 2024) <https://committees.parliament.uk/work/8391/the-future-of-the-bbc-world-service/> accessed 1 January 2026
[55] Miranda Fricker (n 25) p 153.
[56] Rabat Plan of Action (n 13) para 29.

responsibility.[57] When the media misrepresents reality, it performs this slow violence, making ongoing rights violations appear normal or inevitable. Consequently, this framing increases the likelihood of further discrimination and structural violence by insulating the very power structures that produce direct harm. When a population is consistently portrayed as less legitimate and less credible, the threshold for the international community to accept its mass suffering is lowered, thereby rendering continued complicity in occupation and siege politically sustainable.[58] This aligns with the understanding of UN Special Rapporteur Francesca Albanese, who once said that the ongoing violence "has been justified and enabled by the media."[59] Under the Rabat test, this "enabling" function is precisely the kind of harmful outcome that signals incitement to discrimination.

The Scope of State Obligations

As demonstrated in the section above, when media coverage consistently dehumanizes a group, it crosses into advocacy of national hatred and creates a real risk of discrimination. In this sense, Article 20(2) of the ICCPR becomes directly relevant, as it places positive obligations on states parties to prohibit such speech by law, which is different from the more permissive protections found under Article 19.[60] However, the obligation to "prohibit by law" should not be read as a call for censorship, but as a duty of due diligence to regulate the public sphere to prevent the harms of incitement.[61] This interpretation flows from the nature of positive state obligations under the Covenant, which require states to protect rights from impairment by private actors.[62] States should take meaningful steps to address incitement, including adopting measures that actively support a pluralistic, non-discriminatory media environment, rather than merely refraining from interference.[63]

Fulfilling this positive obligation can be demonstrated through regulations and supports that elevate public discourse, including supporting independent and investigative journalism through funding and legal protections,[64] integrating critical media literacy and human rights education into national curricula to empower citizens to identify

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[57] Rob Nixon, Slow Violence and the Environmentalism of the Poor (Harvard UP 2011) 2.
[58](The Committee, 'General Comment No. 34: Article 19: Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34, para 11.
[59] Natasja Gibbs (host) in conversation with Francesca Albanese, 'Francesca Albanese on Gaza and international law: "This can be a transformative moment"' (Interview video, YouTube, 19 February 2025) <https://www.youtube.com/watch?v=SKqQTA9BPNg> accessed 16 January 2026.
[60] ICCPR (n 7) art 19, and art 20(2).
[61] UN Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 8.
[62] UN Human Rights Committee, 'General Comment No. 34: Article 19: Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34, para 51.
[63] Rabat plan of action (n 13) para 19
[64] UNGA, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (6 September 2017) UN Doc A/72/350, paras 37–39.

dehumanizing narratives;[65] and ensuring that media operate under mandates for impartiality, contextual accuracy and the representation of marginalized voices. These measures are meant as a regulatory framework aimed at prevention, fulfilling the state's positive obligation to protect people from the systemic harm caused by criminal incitement.[66]

Discussion: Reparative Journalism

In my view, fulfilling the positive obligation under Article 20(2) requires moving beyond prohibitive regulation to proactive measures that enhance media impartiality. A concrete policy direction is the state promotion of reparative journalism, which can be defined as a practice that: 1) actively centres the voices, agency, and lived experience of marginalized groups,[67] 2) restores omitted historical and legal context, and 3) implements institutional audits to identify and dismantle structural bias in sourcing and framing.[68]

Promoting this model is a tangible means for a state to exercise due diligence under its ICCPR obligations. This could involve funding professional training, establishing grants for collaborative reporting with community media, and recognizing excellence in contextual reporting. Such measures incentivize a more transparent media environment, thereby actively protecting the rights to non-discrimination and moving from a duty to prohibit towards a duty to ensure narrative justice.

Conclusion

The purpose of the paper was to tackle the issue of bias and discriminatory context in major Western news outlets in their coverage of Palestinians and to demonstrate that this is not merely an ethical failure but a phenomenon that engages the binding obligations of states under international human rights law. By applying the six-part test of the Rabat Plan to patterns of dehumanizing language, contextual erasure, and narrative asymmetry, the analysis has demonstrated that while establishing direct intent under Article 20 remains a complex legal challenge, the foreseeable harm caused by systematic editorial choices, combined with the institutional power of the speakers and the vast scale of dissemination, suggests this pattern of speech approaches, if not meets, the high threshold for incitement to discrimination under the Rabat framework.

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[65] Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 35: Combating Racist Hate Speech' (26 September 2013) UN Doc CERD/C/GC/35, para 15(e).

[66] Ibrahim Seaga Shaw, Human Rights Journalism: Advances in Reporting Distant Humanitarian Interventions (Palgrave Macmillan 2012) 8.

[67] Ibid p 8.

[68] Bill Dodd, Solutions Journalism: News at the Intersection of Hope, Leadership, and Expertise (Lexington Books 2021) 148.

This finding triggers the mandatory duty under Article 20(2) of the ICCPR, which requires states to prohibit such expression by law. The obligation to 'prohibit by law' must be understood as a positive duty of due diligence to protect individuals from harm in the public sphere. It calls for moving beyond a passive regulatory model towards active measures that promote media impartiality. Consequently, the promotion of a reparative journalism framework, centring marginalized voices, restoring critical context, and auditing structural bias emerges not just as an ethical ideal, but as a concrete policy implication of the state's duty to protect human rights and safeguard the right to non-discrimination.

Ultimately, this analysis reframes the critique of media bias. The problem is not just distorted reporting, but the creation of a permissive environment for discrimination through speech that international law commands states to address. Protecting human dignity in the digital age, therefore, requires recognizing that the systematic distortion of voice and context is a challenge that the foundations of international human rights law is obliged to confront.

Women’s political participation in HTS administered Syria: A comparative analysis of the Syrian Transitional Government and the DAANES through the lens of CEDAW Article 7 (Elisabeth Rowland)

Abstract

Women’s political participation is a key priority for the Democratic Administration of North East Syria (DAANES) in its negotiations with the Syrian Transitional Government (STG), and a major point of departure between the two administrations. Gender equality is a fundamental pillar of the DAANES, while the STG is headed by ex-jihadists with hostile attitudes towards women’s role in public life. It has nonetheless been suggested that the approach of the DAANES, where women are engaged in every level of governance, could be scaled up for the rest of Syria. Relations between the DAANES and the STG are volatile, but women’s participation remains fundamental to Syria’s peaceful transition. Comparing the approaches through the lens of Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) facilitates identification of entry points for improving women’s participation in Syria. Armed non-state actors’ potential to exert a positive influence on human rights governance is underexplored, and the DAANES has received little attention within critical human rights scholarship. This article offers brief insights into the DAANES’s unique horizontal human rights culture, and how an alternative to the dominant state-centric approach might better support the realisation of International Human Rights Law objectives in post-conflict pluralistic settings.

Introduction

The toppling of the Assad regime in December 2024 by Hayat Tahrir al Sham (HTS) was celebrated within and beyond Syria. However, the installation of the Syrian Transitional Government (STG), headed by a group once closely affiliated with Al Qaeda,[1] and a demonstrable hostility to women’s participation in the public sphere has raised renewed concerns about the future of women’s rights. HTS’s previous administration in North West Syria, statements by officials and the results of recent elections all threaten women’s right to political participation, enshrined in Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women

[1] Danika Newlee, ‘Hay’at Tahrir al-Sham (HTS) Terrorism Backgrounder’ (Center for Strategic and International Studies 2018) <https://www.csis.org/programs/former-programs/warfare-irregular-threats-and-terrorism-program-archives/terrorism-backgrounders/hayat-tahrir> accessed 13 January 2026.

(CEDAW). Failure to eliminate discrimination against women participating in public and political life threatens the progress of women's rights in Syria, as well as peace prospects.

By contrast, in the Democratic Autonomous Administration of North East Syria (DAANES), a project in decentralised, state-rejecting governance, significant progress has been made in women's political participation. This has been achieved through measures that challenge traditional gender roles and through widespread education in Jineology, the Kurdish science of women. The DAANES has received 'very little attention within critical human rights scholarship,'[2] and the potential for armed non-state actors to have a positive influence vis-à-vis the state is also underexplored.[3] The DAANES's horizontal citizen-to-citizen human rights culture[4] merits examination given its successes in advancing women's rights in a highly patriarchal and pluralistic society. It has the potential to influence the realisation of International Human Rights Law (IHRL) norms in a transitional Syria. Relations between the DAANES's military, the Syrian Democratic Forces (SDF) and the STG are volatile. However, the reconstruction period after conflict remains a critical opportunity to integrate gender equality.[5] Further, women's participation is itself crucial to the realisation and maintenance of peace.[6] This paper considers the human rights culture within the DAANES, and how this manifests in women's right to political participation. CEDAW Article 7 offers a lens to compare women's place in STG administered Syria, to identify entry points for empowering their participation and indeed bolstering the post-Assad peace process. It also offers brief insights into how human rights norms may be operationalised in a non-traditional manner in post-conflict, pluralistic settings.

Human Rights in the DAANES

In 2012, three regions in North East Syria (NES) known as Rojava, Kurdish for West Kurdistan, declared autonomy from the central government. Since then, a sophisticated decentralised administration has been established. Rojava was renamed the DAANES to better reflect the diversity of non-Kurdish ethnic and religious

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[2] H Cetinkaya, 'Justice, Rights-Politics, and the Coloniality of Knowledge Production: Critical Lessons from Rojava and the Jineolojî Movement towards Liberating Life' 0 The International Journal of Human Rights 1.
[3] Leon Seidl, 'Armed Groups and International Law - A Human Rights-Friendly Influence?' (*Armed Groups and International Law*, 12 September 2025) <https://www.armedgroups-internationallaw.org/2025/09/12/a-human-rights-friendly-influence-the-syrian-democratic-forces-the-syrian-transition-and-international-law/> accessed 9 November 2025.
[4] Cetinkaya (n 2).
[5] M Campbell and G Swenson, 'Legal Pluralism and Women's Rights After Conflict: The Role of CEDAW' 48 International Human Rights Law Review 112.
[6] Amy Austin Holmes, Hadeel Oueis and Samantha Scaringe, 'Decentralization and the Future of Syria: Economic Recovery, Governance and Peacebuilding across Regions' (The Bush School of Government and Public Service 2025) <https://bush.tamu.edu/news/mosbacher/decentralization-and-the-future-of-syria/> accessed 15 January 2026.

groups in the region.[7] It is organised on the basis of Democratic Confederalism (DC), inspired by the teachings of the imprisoned leader of the Kurdish Workers' Party (PKK), Abdullah Öcalan. Those who follow Öcalan do not seek a Kurdish separatist state, but in fact reject the notion of the nation state as a principal cause of Kurdish oppression, as it forces national identity at the expense of pluralism.[8] Rather, the goal is autonomy that transcends 'exclusivist ethno-nationalism,'[9] championing decentralised governance, ecology and gender equality.

The state is typically regarded as the 'primary duty-bearer responsible for the domestic implementation of international human rights treaties.'[10] On the other hand, non-state legal orders are often seen as upholding patriarchal norms at the expense of rights of women and minorities.[11] The language of IHRL however permeates the DAANES's quasi-constitutional Social Contract, and its norms permeate its practices. Article 37 contains an independent, unequivocal commitment to the Universal Declaration of Human Rights and 'all relevant human rights regulations.' Norms are operationalised in a participatory manner, where the citizen is conceived of as endowed with responsibilities and 'moral and democratic values.'[12]

Rather than a vertical affiliation between the individual and the state, citizenship is regarded as a 'horizontal commitment to community members.'[13] This reconfiguration of citizenship means that one's entitlement to rights is not contingent on anything but being a person present in a given territory; 'jurisdictional subjecthood.'[14] Dispensing of the need for formal citizenship has allowed the DAANES to protect the rights of members of Syria's large,[15] otherwise disenfranchised, stateless population.[16] Its

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[7] 'Beyond the Frontlines: The Building of the Democratic System in North and East Syria' (Rojava Information Centre 2019) <https://rojavainformationcenter.org/storage/2021/06/Beyond-the-frontlines-The-building-of-the-democratic-system-in-North-and-East-Syria-Report-Rojava-Information-Center-December-2019-Web-version.pdf> accessed 15 January 2026.
[8] Eda Gunaydin, 'Learn from Kurdish Women's Liberation Movements to Imagine the Dissolution of the Nation-State System' in Megan MacKenzie and Nicole Wegner (eds), *Feminist Solutions for Ending War* (Pluto Press 2021), 80.
[9] G Pentassuglia, 'Assessing the Consistency of Kurdish Democratic Autonomy with International Human Rights Law' (2020) 89 Nordic Journal of International Law 168, 173.
[10] J Fraser, 'Challenging State-Centricity and Legalism: Promoting the Role of Social Institutions in the Domestic Implementation of International Human Rights Law' (2019) 23 The International Journal of Human Rights 974, 974.
[11] G Swenson, 'Legal Pluralism in Theory and Practice' (2018) 20 International Studies Review 438, 439.
[12] DAANES Social Contract 2023 Article 31.
[13] A Ramsari, 'Reconfiguration of Citizenship beyond State Boundaries in Rojava' (2023) 5 Statelessness & Citizenship Review 166, 172.
[14] Thomas McGee, 'Implications of Legal Identity Documentation Issued by the Kurdish-Led Self Administration in Northern Syria: Competition and Compromise with the Central State' (2023) 27 Citizenship Studies 835.
[15] 'Syria' (*Stateless Hub*) <https://www.statelesshub.org/country/syria> accessed 14 January 2026.
[16] Cetinkaya (n 2).

approach is a manifestation of the fact that 'human rights do not have any borders,'[17] and authentically reflects the idea that human rights are rights that we are entitled to because we are human.

The paradoxical nature of references to IHRL absent a state reveals a compromise between the normative power of universal human rights norms, and principles of decentralisation, pluralism and local governance.[18] This approach allows the DAANES to meet normative standards of CEDAW, including Article 7, whilst navigating challenges raised by the disjuncture between the universalising language of human rights law and local and minority cultural and religious rules.[19] This is particularly important in Syria, which like other Muslim majority countries has broad reservations to CEDAW on account of incompatibility with Shari'a law.[20] While reservations so broad that they defeat the object and purpose of the convention[21] are impermissible,[22] the question of whether such incompatibility renders the reservation severable from a human rights treaty is controversial.[23] In any case, attempts by actors such as the Committee on the Elimination of Discrimination Against Women (the Committee), to enforce women's rights in a top-down manner without accounting for local conditions can provoke resistance and entrench poor treatment of women.[24]

The DAANES, also faced with a deeply patriarchal society, has taken a more pragmatic approach - still using the language of rights but in a more interactive, day-to-day manner that does not provoke the same suspicion as universalising language might otherwise.[25] Rather than enforcing state power, rights in the DAANES are a 'collective endeavour to be negotiated through local processes of contestation and democratic deliberation.'[26] This has facilitated progress in women's rights, and the methodology as well as policies themselves could therefore offer a way of navigating the challenges of mainstreaming gender equality within Syria.

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[17] 'Human Rights Do Not Have Any Borders: Pillay' (*OHCHR*, 14 February 2013) <https://www.ohchr.org/en/press-releases/2013/02/human-rights-do-not-have-any-borders-pillay> accessed 15 January 2026.
[18] Cetinkaya (n 2).
[19] Sally Engle Merry, *Human Rights and Gender Violence.* (The University of Chicago Press 2006), 103.
[20] 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women - Weakening the Protection of Women from Violence in the Middle East and North Africa Region' (Amnesty International 2004) <https://www.amnesty.org/en/wp-content/uploads/2021/09/ior510092004en.pdf> accessed 2 January 2026.
[21] Committee on the Elimination of All Forms of Discrimination against Women: Ways and Means of expediting the work of the Committee, Report by the Secretariat, (30 November 1993) UN Doc. CEDAW/C/1994/6.
[22] CEDAW Article 28(2).
[23] James Crawford, 'The Law of Treaties' *Brownlie's Principles of Public International Law* (Oxford University Press 2019), 362.
[24] Merry (n 19), 104.
[25] Fraser (n 10).
[26] Cetinkaya (n 2), 8.

Women's Political Participation in Syria

CEDAW Article 7 protects women's right to public and political participation and is a springboard for the realisation of other rights. It includes the right to vote and to be elected (7a), to participate in forming government policy (7b) and to participate in civil society (7c). Women's representation at all levels of decision making is necessary to reduce the risk of policy outcomes that are harmful, ineffective or that violate the rights of women and girls.[27] The DAANES has made it clear that women's political participation is a priority in its negotiations with the STG,[28] and Article 7 and complementary provisions in Articles 4 and 5 provide a framework to map differences and identify entry points for improvement.

A fundamental tenet of patriarchy is the relegation of women to the private sphere,[29] based on the notion that women's role is in the home and that they are not fit for public life. This has been recognised as key to upholding gender apartheid, and facilitating women's participation in public life is essential to tackling all forms of gender discrimination.[30] When HTS administered parts of North West Syria, including Idlib, women's religious freedoms, social relations, employment opportunities and freedom of movement were all curtailed.[31] HTS has sought to distance itself from its Islamist origins,[32] and claims to be committed to democracy and pluralism. However, it retains a conservative vision of society and gender relations,[33] and arguably 'the true test of HTS's commitment to reform lies in its treatment of women.'[34]

Unfortunately the results of October 2025 elections cast doubt on this commitment, with the configuration and results indicating that 'exclusion was not merely reflected in

[27] Economic and Social Council (ECOSOC) Commission on the Status of Women: Women's full and effective participation and decision-making in public life, as well as the elimination of violence, for achieving gender equality and the empowerment of all women and girls (21 December 2020) UN Doc E/CN.6/2021/L.3, para 9.
[28] Meghan Bodette, 'Will Women's Participation Be a Flashpoint in DAANES-Damascus Integration?' (*Kurdish Peace Institute*, 2 July 2025) <https://www.kurdishpeace.org/research/kpi-qamishlo/will-womens-participation-be-a-flashpoint-in-daanes-damascus-integration/> accessed 15 January 2026.
[29] United Nations (UN) Committee for the Elimination of All Forms of Discrimination Against Women (CEDAW), "General Recommendation No 40 on the equal and inclusive representation of women in decision-making systems" (25 October 2024) UN Doc CEDAW/C/GC/40, para 11.
[30] ibid.
[31] 'The Threat of Hayat Tahrir Al-Sham for Women in Syria - Kongra Star' (23 December 2024) https://kongra-star.org/eng/2024/12/23/the-threat-of-hayat-tahrir-al-sham-for-women-in-syria/ accessed 19 December 2025.
[32] Mina Al Lami, 'How Syria Rebel Leader Abu Mohammed Al-Jolani Reinvented Himself' *BBC News* (9 December 2024) <https://www.bbc.com/news/articles/c0q0w1g8zqvo> accessed 15 January 2026.
[33] Patrick Haenni and Olivier Roy, 'The Management of Religious Law and Police by HTS in the Idlib Region between 2017 and 2024' (European University Institute 2024), 6.
[34] Sajjan M Gohel, 'Without Women's Rights, Syria Risks Failed-State Status' *Foreign Policy* (25 November 2025) <https://foreignpolicy.com/2024/12/19/hts-syria-womens-rights-taliban-terrorism/> accessed 26 November 2025.

the outcome, it was engineered into the very structure of the process.'[35] Article 7 requires that women have the same capacity as men to 'influence the decision making process and thereby the outcomes in state laws and policies that govern all sectors of economic, social and cultural life.'[36] However, women won just 7 of 140 contested seats. It remains to be seen what the results will be in the DAANES and As Suwayyda where voting was postponed for safety reasons.[37] President Ahmed al Sharaa will appoint the remaining 70 parliamentary seats - although it is notable that in March 2025 he appointed only one woman to a 23 member cabinet.[38] Strikingly in Damascus where women made up one third of candidates, not one was elected.

Article 7(a) requires not only that women have the right to stand for election, but that they have 'substantially the same democratic chances of winning a seat in a publicly elected body.'[39] The results of Syria's elections are indicative of the fact a *de lege* right to stand for election is insufficient to place men and women on an equal playing field.[40] CEDAW Article 4, recognises that it is necessary to implement 'temporary special measures aimed at accelerating de facto equality between men and women' to address the effects of structural or historic discrimination.[41] The design of the electoral system is a key feature of post-conflict state building,[42] so Syria's transition is an 'opportune moment to embed gender equality within the state.'[43] To this end, the Committee has advocated for the adoption of gender quotas that provide for gender parity in decision making structures.[44] Historically discourse on quotas has tended toward critical mass theory, where the focus is on reaching a level of participation necessary for women's representation to be effective, setting targets at around 30%.[45]

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[35] Eleanor Gordon, Elliot Dolan-Evans and Kinda Alsamara, 'Syria's New Leader Promised Democracy. Then He Excluded Women from Parliamentary Elections' *The Conversation* (22 October 2025) <http://theconversation.com/syrias-new-leader-promised-democracy-then-he-excluded-women-from-parliamentary-elections-267625> accessed 13 January 2026.
[36] Sarah Wittkopp, 'Article 7' in Patricia Schulz and others (eds), The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol: A Commentary (Oxford University Press 2022), 305.
[37] Justin Salhani, 'Everything You Need to Know about Syria's First Post-Assad Elections' *Al Jazeera* (5 October 2025) <https://www.aljazeera.com/news/2025/10/5/everything-you-need-to-know-about-syrias-first-post-assad-elections> accessed 13 January 2026.
[38] Sudarsan Raghavan, 'The Women Who Helped Defeat ISIS Are Fighting for Their Place in the New Syria' (*Tovima*, 15 October 2025) <https://www.tovima.com/wsj/the-women-who-helped-defeat-isis-are-fighting-for-their-place-in-the-new-syria/> accessed 10 November 2025.
[39] Wittkopp (n 36), 320.
[40] Julie Ballington and Drude Dahlerup, 'East Timor, Afghanistan and Iraq' in Drude Dahlerup (ed), *Women, Quotas and Politics* (Routledge 2013).
[41] Dianne Otto, '16. Women's Rights' *International Human Rights Law* (4th edn, Oxford University Press 2022)
[42] Ballington and Dahlerup (n 40), 249.
[43] Campbell and Swenson (n 5).
[44] UN Committee on the Elimination of All Forms of Discrimination against Women, "General Recommendation No. 23: Political and Public Life' (16th Session, 1997) UN Doc A/52/38, para 29.
[45] S Childs and M Krook, 'Critical Mass Theory and Women's Political Representation' (2008) 56 Political Studies 725.

It is now clear that in order to meet the needs of Article 7, and other international targets such as Sustainable Development Goal 5.5,[46] quotas should be set at 50/50.

Owing to mass displacement, outdated civil registries and damaged infrastructure, Syria's most recent elections were indirect.[47] While criticised for lack of democratic legitimacy, the tightly controlled system could, and ought, to have been taken as an opportunity to implement gender quotas. However, in the Supreme Committee that oversaw the process there were just two women, compared with nine men.[48] Further, women made up just 11% of the subcommittee members in the electoral college, notwithstanding a draft provision for them to make up at least 20%.[49]

While the election results were bleak in terms of women's representation, analysis of HTS's governance in Idlib suggests a transactional rather than ideological approach to addressing demands of hardline religious voices that were intensified in the face of a 'dynamic of openness' in the city.[50] This is indicative of entry points for improving women's right to participation if the international community exerts pressure and prioritises advocacy for women's rights.[51] The Committee has not crystallised the form that measures taken pursuant to Articles 4 and 7 should take.[52] However it has been suggested that the DAANES's system could serve as a 'model for national application',[53] and there are important lessons to be learned from its operation on the ground.[54]

Women's Political Participation in the DAANES

In stark contrast to the meagre representation of women in the STG, the preamble to the DAANES's Social Contract recognises that:

the societal revolution that was achieved under the leadership of women in North and East Syria opened the way for an intellectual and social renaissance, and women have become a fundamental pillar of our democratic system.

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[46] Wittkopp (n 36), 305.
[47] Syria's 2025 Elections: Legitimacy and Representation' (SARI Global 2025) <https://reliefweb.int/report/syrian-arab-republic/syrias-2025-elections-legitimacy-and-representation> accessed 13 January 2026.
[48] Gordon (n 35).
[49] SARI Global (n 47).
[50] Haenni and Roy (n 33), 15.
[51] Gohel (n 34).
[52] Wittkopp (n 36), 324.
[53] Rula Asad, 'End of Al-Assad's 54-Year Rule: Syrian Feminist Views on the Transitional Phase' (*Heinrich Böll Stiftung*, 10 June 2025) <https://www.boell.de/en/2025/06/10/end-of-al-assads-54-year-rule-syrian-feminist-views-on-the-transitional-phase> accessed 25 November 2025.
[54] 'The Status of Gender Equality and Women's Rights in Syria: Mapping the Terrain' (UN Women 2021) <https://www.lugarit.com/publications/publication-status-of-gender-equality-and-womens-rights-in-syria> accessed 15 January 2026.

For years, women have sought to consolidate gender equality within the Kurdish freedom movement,[55] and today they are represented at every level of the DAANES. Article 24 of the Social Contract provides for the co-chair system, where every unit of governance, from the commune to the interregional Executive Council, is headed by a man and a woman. The co-chair system is mandated for decision making in 'all political, social, administrative and other fields.' Further, the 2023 Social Contract provides that women make up 50% of all councils,[56] the executive council[57] and the People's Democratic Council, which is the highest interregional council representing everybody in the DAANES.[58] Article 51 stipulates that 'women have the right to equal participation in all areas of life, and to make decisions related to their affairs', and they are represented in special all female committees.[59]

Quotas alone are not sufficient to break down deep rooted patriarchal ideas, however the DAANES has surpassed UN gender equality benchmarks[60] and there have been material gains in terms of women's political participation, with virtually every position now held by co-chairs.[61] Female co-chairs state that they find the position empowering, as it demonstrates the capacity women have to lead institutional bodies.[62] The Rojava Revolution's project of feminist leadership means that women who previously could not even leave their houses without permission can now engage in many aspects of the public sphere.[63]

Cultural Barriers to Realising Women's Political Participation

Quotas are the key policy intervention to have improved women's political participation,[64] but they are only a first step and do not address root hindrances. Article 5 of CEDAW requires states to address social and cultural patterns of conduct to

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[55] 'Report: The Political System of North and East Syria' (Rojava Information Centre 2019) <https://rojavainformationcenter.org/2019/12/report-beyond-the-frontlines/> accessed 7 January 2026, 14.
[56] DAANES Social Contract 2023 Article 78.
[57] ibid, Article 89.
[58] ibid, Article 91.
[59] J Wartmann 'Negotiating What It Means to Be "Free": Gender Equality and Governance in North and East Syria' (2024) 26 International Feminist Journal of Politics 903.
[60] Amy Austin Holmes, 'The Inconclusiveness of Quasi-States' in *Statelet of Survivors: The Making of a Semi-Autonomous Region in Northeast Syria* (Oxford University Press 2024), 210.
[61] Meghan Bodette, 'Institutionalizing Equality: Northeast Syria's Co-Chair System' (*Kurdish Peace Institute*, 27 November 2024) <https://www.kurdishpeace.org/policy/institutionalizing-equality-northeast-syrias-co-chair-system/> accessed 31 December 2025.
[62] 'A New Agenda for Peace in Northeast Syria in the Post-Assad Era' (Novact 2025) <https://novact.org/en/publicacio/una-nueva-agenda-para-la-paz-en-el-noreste-de-siria-en-la-era-post-asad/> accessed 15 January 2026, 65.
[63] Meghan Bodette, 'Rohilat Afrin: "We Are at the Table Because of Our Own Achievements"' (*Kurdish Peace Institute*, 11 December 2025) <https://www.kurdishpeace.org/research/kpi-qamishlo/rohilat-afrin-we-are-at-the-table-because-of-our-own-achievements/> accessed 15 January 2026.
[64] ECOSOC E/CN.6/2021/L.3 (n 27), para 24.

eliminate prejudices based on harmful stereotypes about men and women.[65] Such stereotypes permeate all cultures to varying degrees. When considering women's rights in the context of Islamic law or in Muslim majority countries it is important not to fall into the trap of taking for granted patriarchal interpretations of Islam, or making assumptions about the lives of Muslim women.[66] However under HTS there has indeed been a perpetuation of negative stereotypes about women. In the DAANES on the other hand there has been a concerted effort to eradicate them.

Discriminatory statements made by politicians, the perpetuation of stereotypes by media, and 'prevailing machismo culture and a lack of resources for female candidates,'[67] are all major impediments to women's participation in public and political life.[68] In December 2024, an official spokesperson for HTS said that on account of their 'biological and physiological nature', women are not suitable for certain government roles.[69] Further, Aisha al Dibs, then head of the STG's Women's Affairs Office, stated that laws for women should be modelled on Shari'a and emphasised that they belong in the home.[70] Following engagements with STG representatives, women from the DAANES said plainly that 'it is very difficult for Jihadists to accept a role for women as equal to men.'[71]

Under HTS control in Idlib, stereotypes about women were perpetuated and their participation in the public sphere curtailed not only through smear campaigns, but threats of violence and hostility.[72] The rise in violence against women in public and political life severely curtails realisation of Article 7,[73] with a chilling effect on those who would otherwise get involved and pushing those who are in the public sphere out.[74] Of particular concern was the appointment in May 2025 of Ahmad Ihasn Fayyad al-Hayes as a military commander. Al Hayes was sanctioned by the United States in 2021 in connection with the assassination of Havrin Khalaf, a prominent female

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[65] Alexandra Timmer and Rikki Holtmaat, 'Article 5' in Patricia Schulz and others (eds), The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol: A Commentary (Oxford University Press 2022), 222.
[66] R Fazaeli and J Hanisek, 'Human Rights, Islam, and Debates around CEDAW.' (2021) (2/3) 16 Religion and Human Rights 93.
[67] Timmer and Holtmaat (n 65), 245-6.
[68] Committee General Recommendation 23 (n 44), para 12.
[69] Asad (n 53).
[70] 'Syria Official's Comments on Women Spark Uproar' (*The New Arab*, 29 December 2024) <https://www.newarab.com/news/syria-officials-comments-women-spark-uproar> accessed 13 January 2026.
[71] Raghavan (n 38).
[72] 'Silenced and Defamed: Women's Organizations in North-Western Syria Under Many Layers of Oppression' (Syrians for Truth and Justice 2024) <https://reliefweb.int/report/syrian-arab-republic/silenced-and-defamed-womens-organizations-north-western-syria-under-many-layers-oppression-enar> accessed 15 January 2026.
[73] Annika Silva-Leander, 'Beijing+30: Taking Stock of Progress on Gender Equality Using the Global State of Democracy Indices' (*International IDEA*, 5 March 2025) <https://www.idea.int/news/beijing30-taking-stock-progress-gender-equality-using-global-state-democracy-indices> accessed 15 January 2026.
[74] Committee General Recommendation 40 (n 29), para 23.

Kurdish politician.[75] Failure by governments to address gender based violence generally may also undermine women's participation. While some women became more determined to become part of the solution in the wake of the STG's failure to address violence against women and girls during sectarian violence in Summer 2025,[76] others felt they did not wish to participate in the new politics, as they did not want to legitimise the reality of kidnapping and femicide.[77]

It is a testament to the strong existing women's civil society in Syria that following backlash some individuals were removed from office.[78] While a consideration of women's civil society in either the DAANES or Syria is beyond the scope of this paper, it is important to highlight that participation in civil society is covered in Article 7(c), and that the civil society that grew on the ground and in the Syrian diaspora while Assad was in power has experience and expertise that 'should be leveraged during the transition period and beyond.'[79]

Deep-rooted prejudices against women's political participation exist at the highest levels of the STG, and change is needed from within. However, 'human rights are more secure when they are embedded in culture'[80] and measures taken pursuant to Article 5 should be taken at every level of society. The importance of this is reflected in the DAANES, where a highly organised women's movement had to overcome entrenched patriarchal views incompatible with women being represented in the public sphere,[81] in order to establish the levels of participation discussed above.

The Committee has specified a number of strategies for undermining gender stereotyping and advance gender parity, including gender equality perspectives in

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[75] Raghavan (n 38).

[76] Joint Communication to the Syrian Arab Republic of the Special Rapporteur on violence against women and girls, its causes and consequences; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the human rights of internally displaced persons; Special Rapporteur on minority issues; Special Rapporteur on freedom of religion or belief; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, pursuant to Human Rights Council resolutions, 12 August 2025 AL SYR 7/2025 <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=30247> accessed 15 January 2026.

[77] DW News, 'Syria: Have Women Gained or Lost Rights since Assad's fall?' (5 December 2025) <https://www.youtube.com/watch?v=qiQpEeaUz5c> accessed 15 January 2026.

[78] 'End of Al-Assad's 54-Year Rule: Syrian Feminist Views on the Transitional Phase | Heinrich Böll Stiftung' <https://www.boell.de/en/2025/06/10/end-of-al-assads-54-year-rule-syrian-feminist-views-on-the-transitional-phase> accessed 25 November 2025.

[79] Merissa Khurma, 'How Syrian Women Are Shaping Their Country's Future' (Rice University's Baker Institute for Public Policy 2025) <https://www.bakerinstitute.org/research/how-syrian-women-are-shaping-their-countrys-future> accessed 16 January 2026.

[80] Michael Freeman, 'Universalism of Human Rights and Cultural Relativism' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (2012).

[81] Bodette (n 61).

curricula, civic education activities for women and girls, and closing education gaps.[82] Intensive education and gender mainstreaming in the DAANES seeks to challenge individual perceptions borne out of patriarchy, as a means of achieving structural change. This is done through the lens of Jineology, a 'radical alternative' to statism and hegemony that champions the political participation of women as a means of combatting patriarchal and capitalist structures.[83] Education is central to Jineology, and school curricula are embedded with teachings on the importance of women's emancipation for an inclusive and democratic society.'[84] Education is also required for those who wish to work for the DAANES, who must attend *perwerde*, intensive seminar courses lasting for up to six months.[85] Within *perwerde,* men and women live together, learning not only the theoretical concepts of DC, but also how to organise their lives in accordance with them, breaking down traditional gender roles.[86] For women, the education also involves training in self-confidence.[87] The role of women's civil society in changing societal perspectives and in empowering women to participate in public and political life also cannot be overstated. For instance, the Kongra Star, a coalition of women's organisations in NES, have launched initiatives such as workshops for women participating in the system, to help empower and address gaps in political experience.[88]

Jineology has been criticised for falling into some of the same traps as liberal feminism, where by contrasting diametrically free and oppressed women, new forms of control are introduced in the name of liberation.[89] Further, requiring *perwerde* excludes women who for personal or familial reasons cannot, or do not wish, to spend a prolonged period of time away.[90] However there is evidence of an ability and willingness on the part of the DAANES to be flexible, fostering dialogue and 'displaying flexibility in implementing their program in order to accommodate local traditions and cultural practices.'[91] Additionally, there is evidence of a genuinely internalised commitment to gender equality in the rank and file of the SDF,[92] who also receive

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[82] 'Women's Political Leadership: Striving for a 50 per Cent Balance in 2030' (*Inter-Parliamentary Union*, 8 March 2019) <https://www.ipu.org/news/statements/2019-03/womens-political-leadership-striving-50-cent-balance-in-2030> accessed 15 January 2026.
[83] Gunaydin (n 8)
[84] Elise Boyle Espinosa, 'Rojava's Revolution Begins in the Classroom' (*Truthout*, 2 January 2020) <https://truthout.org/articles/rojavas-revolution-begins-in-the-classroom/> accessed 15 January 2026.
[85] Wartmann (n 59)
[86] ibid.
[87] 'Women and Men Share Power in "Co-Chair" System Throughout North and East Syria – Syrian Democratic Times' (31 May 2024) <https://www.syriandemocratictimes.com/2024/05/31/women-and-men-share-power-in-co-chair-system-throughout-north-and-east-syria/> accessed 16 January 2026.
[88] Evin Siwed, 'The Co-Chair System' (*North and East Syria Civil Diplomacy Centre*) <https://nescivildiplomacy.com/?p=2485> accessed 16 January 2026.
[89] Wartmann (n 59), 912.
[90] ibid.
[91] 'Statelet of Survivors', in Amy Austin Holmes, *Statelet of Survivors: The Making of a Semi-Autonomous Region in Northeast Syria* (Oxford University Press 2024).
[92] ibid.

education, and this is a testament to the capacity for Jineology based education to transform thinking within even the most patriarchal structures.

Why the Syrian Government ought to look to the DAANES

Women's political participation is a means to achieving gains for women's rights overall, and strengthening decision making - since excluding them deprives the world of the potential of half of its population.[93] The peace process between a group that once fought for a caliphate, and the DAANES, built on gender equality, is indeed uncharted territory.[94] There are however many reasons that the STG ought to prioritise policies that advance the participation, beyond the immediate realisation of Article 7's objectives.

The DAANES has 'established a women's economy that aims to make women financially independent from men.'[95] Economic dependence can hamper women's participation in public life,[96] and as such measures taken to facilitate their access to the labour market also facilitate meaningful participation. Women's equal participation in the labour force could increase gross domestic product per capita by up to 74%,[97] so improving their participation can have significant implications for Syria's economy. Further, it has been demonstrated that participation in the labour force, making women a more politically important group, is a fundamental building block to realising women's rights overall.[98]

Women's representation in public life is also crucial to freedom of expression, democracy and peaceful transitions.[99] Critical Area of Concern E.4. of the 1995 Beijing Platform for Action highlighted the importance of women's involvement in peace processes, and thus ought to be a central priority for the government in post-conflict Syria. Involving women in governance and peace negotiations significantly reduces the risk of conflict resurgence,[100] and research suggests that investing women's participation in the period after a civil war is a means of escaping the 'conflict trap.'[101] Misogyny itself can act as a destabilising force, creating an environment that

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93 Committee General Recommendation 40 (n 29).
94 Bodette (n 28).
95 Holmes (n 60), 210.
96 Committee General Recommendation 23 (n 44), para 11.
97 Federico Fiuratti, Steven Pennings and Jesica Torres, 'How Large Are the Economic Dividends from Closing Gender Employment Gaps in the Middle East and North Africa?' (World Bank Group Middle East and North Africa Region & Development Research Group 2024) <https://documents1.worldbank.org/curated/en/099530002202434373/pdf/IDU-ab747845463c-45e4-b0f4-2fced4be7ecd.pdf> accessed 16 January 2026.
98 Feryal Cherif, Myths about Women's Rights: How, Where and Why Rights Advance. (Oxford University Press 2015).
99 Wittkopp (n 36), 304.
100 Holmes, Oueis and Scaringe (n 6).
101 J Demeritt, A D Nichols and E G Kelly, 'Female Participation and Civil War Relapse' (2014) 16 Civil Wars 346.

welcomes violent extremists,[102] so breaking down stereotypes and facilitating participation is important not only to prevent women's subjugation, but for security overall. While there are other factors at play, the DAANES is a testament to the relationship between women's empowerment and peace, since 'despite containing a diverse population, including multiple different ethnic groups who have now been armed, Rojava remains relatively peaceful internally.'[103] As Syria navigates a 'fraught security context compounded by intercommunal tensions, terrorism, and external interference,'[104] the importance of championing women's participation cannot be overstated.

Conclusion

Women's right to political participation in Syria hangs in the balance as violence in Aleppo threatens not only the country's security, but the structures that women have fought to establish in order to consolidate their political presence. However, centring women's issues is critical to a robust agreement between the DAANES and the STG, and to getting constituents of the former on side with the new government.[105] Comparative analysis through the lens of CEDAW Article 7 reveals opportunities for strengthening women's rights in Syria through participatory and culturally sensitive means. Gender quotas and education are both key policy areas for realising Article 7, and for support in which the STG could look to the DAANES. Strengthening women's political participation could be pivotal in the Syrian peace process, as well as contributing to greater gender equality overall. In the face of backlash against feminist foreign policy,[106] it is necessary to highlight that women's subjugation does not exist in a vacuum and has broader implications for peace and security.

The project in the DAANES has had little attention as a rights movement.[107] However through gender equality driven policy and commitment to changing attitudes through education, the DAANES has managed to make significant progress towards the realisation of the norms of Article 7. Further research into this approach could reveal where resources should be directed in order to break down patriarchal attitudes and further erode the public/private divide. In a region often hostile toward women's place in public life, this is 'evidence for hope'[108] for the future of women's rights.

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[102] Gohel (n 34).
[103] Gunaydin (n 8).
[104] 'Syria Monthly Forecast' (*Security Council Report*) <https://www.securitycouncilreport.org/monthly-forecast/2025-12/syria-86.php> accessed 6 January 2026.
[105] Bodette (n 28).
[106] ''Feminist Foreign Policy During a Global Backlash' (*Human Rights Watch*, 20 October 2025) <https://www.hrw.org/news/2025/10/20/feminist-foreign-policy-during-a-global-backlash> accessed 11 December 2025.
[107] Cetinkaya (n 2).
[108] Kathryn Sikkink, Evidence for Hope: Making Human Rights Work in the 21st Century (Princeton University Press 2017).

Rethinking Ukraine's environmental obligations during war: Protecting the right to a healthy environment through temporal flexibility (Selma Lovisa Stafshede)

Abstract

Russia's full-scale invasion of Ukraine has resulted in grave human rights violations, including widespread destruction of infrastructure and significant civilian harm. In such a humanitarian crisis, environmental protection is often perceived as secondary. This article challenges that assumption, arguing that war's environmental dimension directly affects the enjoyment of human rights and is inseparable from human rights protection. Rather than focusing on the environmental responsibilities of the aggressor, this article examines the underexplored obligations of the victim state. It argues that Ukraine's environmental obligations persist during armed conflict but must be reassessed through a lens of equity. Peacetime standards fail to reflect wartime realities and risk framing unavoidable non-compliance as human rights violations, thereby undermining international law. Using Ukraine as a case study and drawing on international environmental law, human rights law and international humanitarian law, this article proposes an expanded interpretation of the Common but Differentiated Responsibilities principle. This interpretation treats armed conflict as a context-specific, temporal vulnerability affecting a state's capacity to comply with environmental obligations, thereby justifying a recalibration of the required environmental diligence. Such flexibility is necessary to preserve the legitimacy of the right to a healthy environment during armed conflict.

Introduction

A clean, healthy and sustainable environment is increasingly being recognized as a prerequisite for the enjoyment of human rights. The formal recognition of this right represents a significant development in international human rights law, reflecting a growing awareness of the environment's impact on human flourishing.[1] Meanwhile, contemporary armed conflicts expose the fragility of environmental protection, forcing states operating under severe constraint to rethink their environmental agendas to enable response to urgent humanitarian needs.

[1] UNGA Res 76/300: *The Human Right to a Clean, Healthy and Sustainable Environment* (1 August 2022) UN Doc A/RES/76/300 <https://digitallibrary.un.org/record/3983329?ln=en&v=pdf> accessed 20 December 2025; HRC, Res 48/13: The Human Right to a Clean, Healthy and Sustainable Environment (18 October 2021) UN Doc A/HRC/RES/48/13 <https://digitallibrary.un.org/record/3945636?ln=en&v=pdf> accessed 20 December 2025.

Since Russia's full-scale invasion of Ukraine in early 2022, Ukraine's territory has been subject to severe environmental damage, including profound destruction of infrastructure and widespread land contamination.[2] As a major agricultural power, often referred to as 'Europe's breadbasket', the damage to its soil has had consequences far beyond its borders, undermining food security in Europe.[3] The ecological damage caused by the war is currently estimated at 2.6–2.7 trillion Ukrainian Hryvnia (UAH), a number that is expected to rise as the war continues.[4] In this context, environmental damage is not merely a causality of war but a direct human rights concern.

While scholars have focused on the environmental responsibilities of the aggressor state, far less attention has been given to the victim state.[5] This paper fills that gap in literature. Ukraine, despite operating under severe duress, remains bound by international human rights and environmental obligations. However, as noted above, the environment is often deemed a secondary concern during war, subordinated to urgent humanitarian needs.[6] This raises two critical questions: how can the right to a healthy environment be realistically upheld by an injured state during armed conflict, and how should compliance with environmental human rights be assessed in this context? By situating the right to a healthy environment within the context of armed conflict, the article explores how environmental obligations can be reassessed during war to better reflect practical realities without undermining their normative force.

The article begins with assessing the content of the right to a healthy environment. Following this, environmental obligations are assessed in the light of armed conflict, illustrated by Ukraine's current situation. The article finds that existing environmental assessments fail to acknowledge the practical realities of war. In response, it proposes a new, equity-based approach. The article concludes that such a reassessment is essential for the right to a healthy environment to remain relevant.

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[2]Conflict and Environment Observatory, 'Ukraine Conflict Environmental Briefing: Nature' (Conflict and Environment Observatory, 23 January 2024) <https://ceobs.org/ukraine-conflict-environmental-briefing-nature/> accessed 20 December 2025

[3] Initiative on GHG Accounting of War, 'Climate Damage Caused by Russia's War in Ukraine' (Climate Focus, 1 November 2022) <https://climatefocus.com/wp-content/uploads/2022/11/ClimateDamageinUkraine.pdf> accessed 20 December 2025.

[4] Halyna Tybin, 'Svitlana Hrynchuk, Minister of Environmental Protection and Natural Resources of Ukraine' (Ukrinform, 14 October 2024) <https://www.ukrinform.ua/rubric-polytics/3916099-svitlana-grincuk-ministr-zahistu-dovkilla-ta-prirodnih-resursiv-ukraini.html> accessed 20 December 2025.

[5] Liudmyla Golovko, 'International Legal Mechanisms for Holding the Russian Federation Accountable for Causing Environmental Damage as a Result of Armed Aggression against Ukraine' [2023] 7(1) Bratislava Law Review 29–40 <https://doi.org/10.46282/blr.2023.7.1.354> accessed 21 December 2025; Anna Markovska and others, 'Environmental Crimes in Ukraine Under War Conditions' in *Global Green Crime and Ecojustice* (Palgrave Studies in Green Criminology, Springer 2025) 473–502 <https://link.springer.com/chapter/10.1007/978-3-031-91557-4_19> accessed 21 December 2025.

[6] UN Press Release, 'How Armed Conflict Impacts Our Environment' (*UN*, n.d) <https://www.un.org/en/peace-and-security/how-conflict-impacts-our-environment#:~:text=Today%2C%20the%20world%20faces%20record,issue%20that%20demands%20global%20attention> accessed 21 December 2025.

The Right to a Healthy Environment

Environmental protection emerged as a prominent concern during the 1970's, particularly following the environmental destruction inflicted during the Vietnam War.[7] The first explicit reference to a right to a healthy environment appeared at the 1972 United Nations Conference on Human Environment in Stockholm, where it was proclaimed that "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being"*.[8] At the time this was a historical decision, placing environmental issues at the forefront of international law. However, it is only recently that the right to a healthy environment has gained formal recognition under international human rights law (IHRL).

The most significant breakthrough in modern time occurred when the Human Rights Council (HRC) recognized the right to a clean, healthy and sustainable environment as a human right in 2021,[9] followed by the United Nations General Assembly (UNGA) in August of 2022.[10] Both resolutions acknowledged a healthy environment as essential for the enjoyment of human rights. While neither HRC nor UNGA resolutions are legally binding upon states, they carry political and authoritative weight and can therefore function as a catalyst for change.[11] Despite the remaining absence of an international legally binding treaty explicitly recognizing the right to a healthy environment, over 150 states have adopted the right – albeit through different formulations – into their regional frameworks, including Ukraine.[12] This shows an emerging consensus for the right to a healthy environment.

While there is no consensus on the precise scope of the right to a healthy environment, it is generally understood to encompass both substantive and procedural rights. Substantially, it includes the right to clean air and water, sustainably produced food, non-toxic environments and biodiversity. Procedurally, it entails the right to environmental information and meaningful participation in environmental matters. This

[7] Tuula Honkonen, The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects (Kluwer Law International 2009) 1-11 and 39-48.
[8] 'Report of the UN Conference on the Human Environment' UN Conference on the Human Environment (Stockholm, 5-16 June 1972) UN Doc A/CONF.48/14/Rev.1 Principle 1 <https://digitallibrary.un.org/record/523249?ln=en&v=pdf> accessed 20 December 2025.
[9] Human Rights Council (HRC) Resolution 48/13 (n 1).
[10] UNGA Res 76/300 (n 1).
[11] UN News, 'UN human rights chief welcomes UN General Assembly adoption of right to a clean, healthy and sustainable environment' (*UN News,* 22 July 2022) <https://news.un.org/en/story/2022/07/1123142> accessed 20 December 2025.
[12] Amanda Kron, 'At the Frontlines of Implementing the Right to a Healthy Environment: Understanding Human Rights and Environmental Due Diligence in Relation to Armed Conflicts' [2023] 105(924) International Review of the Red Cross 1623-1645 <https://dx.doi.org/10.1017/S1816383123000310> accessed 20 December 2025; *Constitution of Ukraine* (adopted 28 June 1996) art 50 < https://zakon.rada.gov.ua/laws/show/en/254к/96-вр#Text> accessed 20 December 2025.

right is also understood to include an intertemporal aspect, as the environment must be protected for the enjoyment of both present and future generations.[13]

Beyond its autonomous content, the right to a healthy environment is deeply intertwined with the enjoyment of other human rights. This interdependence has been explicitly affirmed by the International Court of Justice (ICJ), emphasizing that a healthy environment serves a precondition for the enjoyment of human rights.[14] Environmental degradation therefore does not operate independently, but directly affects the realization of human rights. For example, extreme weather due to climate change can limit peoples access to food and thus impede the right to food, or force people to move out of their homes, violating the right to adequate housing.[15] Situating the right to a healthy environment within the framework of human rights therefore underscores the environments' essential role in preserving human dignity and reinforces the indivisibility of human rights and environmental protection.

Environmental Protection During Armed Conflict

Armed conflict does not suspend the application of international human rights obligations. The ICJ has consistently affirmed that IHRL continues to apply during warfare, alongside international humanitarian law (IHL). This, except where lawful derogations are made in accordance with art 4 of the International Convent on Civil and Political Rights (ICCPR).[16] Such derogations are permitted only under strict conditions and do not apply to fundamental, non-derogable rights. Notably, the Inter-American Court of Human Rights (IACtHR) has recognized the right to a healthy environment as a fundamental human right, reinforcing its continued relevance even in situations of armed conflict.[17] Accordingly, despite not yet codified in a universally binding treaty, this implies that the right to a healthy environment continues to apply during armed conflict, together with the positive obligations it entails for states.

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[13] David Boyd, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' UN Doc A/HRC/40/55 (8 January 2019) <https://docs.un.org/en/a/hrc/40/55> accessed 20 December 2025; David Boyd, UN Doc A/76/179 (19 July 2021) < https://docs.un.org/en/A/76/179> accessed 20 December 2025; David Boyd, UN Doc A/HRC/49/53 (12 January 2022) < https://docs.un.org/en/a/hrc/49/53> accessed 20 December 2025; UNEP, OHCHR and UN Development Programme, 'What is the Right to a Healthy Environment' (Information Note, January 2023); United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, art 3.

[14] International Court of Justice (ICJ), *Obligations of States in Respect of Climate Change* (Advisory Opinion) [2025] paras 375-393 <https://www.icj-cij.org/case/187> accessed 20 December 2025.

[15] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, '*Final report on Human Rights and the Environment'* (6 July 1994) UN Doc E/CN.4/Sub.2/1994/9 paras 164-165, 188-191, 195-202 <https://docs.un.org/en/E/CN.4/Sub.2/1994/9> accessed 20 December 2025; Sharon Beder, *Environmental Policies and Principles* (2nd edition, Earthscan 2006) 94-101.

[16] ICJ*, Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 25 <https://www.icj-cij.org/case/95> accessed 20 December 2025.

[17] *La Oroya v Peru* (Preliminary Objections, Merits, Reparations and Costs) Judgement OC-39/24, Inter-American Court of Human Rights Series C No 511 (22 March 2024) para 129 <https://www.corteidh.or.cr/docs/casos/articulos/seriec_511_ing.pdf> accessed 20 December 2025.

While IHL operates as *lex specialis* during armed conflict, IHRL applies concurrently, as confirmed by both the UNGA and the United Nations Security Council (UNSC).[18]. Thus, environmental protection during armed conflict is not confined to a single legal regime but derived across multiple bodies of law. This is further enhanced by the International Criminal Courts (ICC) recent policy on environmental damage and certain ICJ jurisprudence.[19] Taken together, these sources confirm that environmental protection during armed conflict exists but is fragmented.

A recent development in this field is the International Law Commissions 2022 *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts (PERAC).* These principles take a holistic approach, emphasizing environmental responsibilities during the entire conflict, covering the time periods before, during and after the active hostilities.[20] While PERAC represents a welcomed attempt to bring coherence to an otherwise fragmented field, its non-binding character limits its capacity to guide states in the interpretation of obligations. Thus, the framework reflects both an emerging recognition of the environment during war, as well as the difficulties of translating this recognition into enforceable standards.[21]

Despite the presented framework, a significant gap persists between the theoretical protection and its practical application during armed conflict. Existing frameworks focus on *what* obligations exist but provide limited guidance on *how* these obligations are to be implemented under wartime conditions. The central problem is therefore not lack of environmental obligations, but the lack of guidance on how to interpret and operationalize them. Like other aspects of IHL, environmental protection during war is a matter of balancing competing interests, particularly military necessity versus civilian

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[18] UNGA Res 237 (14 June 1967) UN Doc A237/1967 <https://digitallibrary.un.org/record/90715?ln=en&v=pdf> accessed 21 December 2025; UNSC Res 2730 (24 May 2024) UN Doc S/RES/2730 <https://docs.un.org/en/S/Res/2730(2024)> accessed 21 December 2025.

[19] International Committee of the Red Cross (ICRC), *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations* (*ICRC*, October 2020) <https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating> accessed 21 December 2025; Jay Austin and Carl Bruch (eds), *The Environmental Consequences of war*, (Cambridge University Press 2000) 39, 57-60; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute) art 8(2)(b)(iv); International Criminal Court, Office of the Prosecutor, 'Policy on Addressing Environmental Damage Through the Rome Statute' (December 2025) < https://www.icc-cpi.int/sites/default/files/2025-12/2025-env-eng.pdf> accessed 21 December 2025; ICJ, *Nuclear Weapons* (n 16) para 30.

[20] ILC, 'Draft Principles on Protection of the Environment in Relation to Armed Conflict' (Final text adopted by the ILC, 73rd session, 2022) UN Doc A/RES/77/104 arts 9-10 and 13 <https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf > accessed 20 December 2025 (PERAC

[21] UNGA Res 77/104 (7 December 2022) UN Doc A/RES/77/104 <https://docs.un.org/en/a/res/77/104> accessed 20 December 2025.

protection and environmental preservation.[22] While the ICJ has affirmed that environmental obligations remain during armed conflict, it has also emphasized that such obligations do not deprive states of their right to self-defense.[23] This leaves unresolved how the right to a healthy environment can be meaningfully upheld in times where military considerations dominate. Ukraine's environmental situation amid Russia's aggression thus provides a particularly relevant context for examining the practical scope and limits of environmental obligations during armed conflict.

Is the Environment Worth Talking About During War?

During armed conflict the environment is often treated as trivial, addressed only after immediate humanitarian needs have been responded to.[24] This reflects a false dichotomy between humanitarian needs and environmental protection during war. In practice, environmental degradation directly undermines the enjoyment of human rights and exacerbates already existing vulnerabilities. The environment is not a passive backdrop during war; it is actively affected, both directly and indirectly, through military emissions and toxic releases. These impacts may persist long after the hostilities have ceased, lasting for decades or even centuries.[25]

This is not to suggest that environmental protection trumps other urgent needs like food or shelter. Rather, environmental harm is intrinsically intertwined with human rights and must be considered in any assessment of war's impacts. Humanitarian assistance cannot succeed if the environment is uninhabitable as access to food, water and healthcare all depend on a safe and functional environment.[26] Environmental degradation during armed conflict therefore directly threatens the right to life, health, food and adequate standard of living. Consequently, environmental protection is not a competing interest to military necessity or human rights, but an essential component of protecting human dignity during and after armed conflict. In a world already destabilized by climate change, war-driven environmental harm serves as a multiplier of human rights violation rather than a peripheral concern.[27]

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[22] For example, the prohibition of intentionally killing civilians in IHL can be circumvented if the military necessity is not excessive in comparison to the harm caused to the civilians – *Additional Protocol 1 to the Geneva Convention* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art. 51(5)(b).

[23] ICJ, *Nuclear Weapons* (n 16) para 30.

[24] UN Press Release, 'How Armed Conflict Impacts Our Environment' (n 6).

[25] University of Helsinki, 'The Environment is a Silent Casualty of War' (*Helsinki*, 25 September 2020) <https://www.helsinki.fi/en/news/economics/environment-silent-casualty-war> accessed 21 December 2025.

[26] UNEP, 'Environment is the 'silent casualty' of armed conflict' (Report, 6 November 2016) <https://www.unocha.org/publications/report/world/environment-silent-casualty-armed-conflict-enar> accessed 21 December 2025; David Boyd, 'The Human Right to a Healthy Environment: Protecting Life on Earth' (*Green Diplomacy,* 14 October 2022) <https://www.greendiplomacy.org/article/the-human-right-to-a-healthy-environment-protecting-life-on-earth/> accessed 21 December 2025.

[27] Institute for Sustainable Development, 'Written Statement Submitted to the Human Rights Council' (55th Session, Agenda Item 3, 27 February 2024) UN Doc A/HRC/55/NGO/105 <https://docs.un.org/en/A/HRC/55/NGO/105> accessed 21 December 2025.

Against this background, the question is not *whether* environmental obligations apply during armed conflict, but *how* they should be interpreted and implemented when state capacity is severely constrained – an issue that becomes especially evident in the context of Ukraine.

Ukraine's Environmental Responsibilities

Under international law, states are responsible for ensuring their populations a healthy environment – an obligation that remains during armed conflict. This responsibility can be derived from both IEL and IHRL, where environmental protection is increasingly framed not as a policy choice, but as a binding state obligation.[28] In its recent Advisory Opinion, the ICJ affirmed that states must take measures to protect the environment in order to guarantee the effective enjoyment of human rights.[29] Similarly, the UN Committee on the Right of the Child has determined that a state party can be held responsible for carbon emissions that negatively impact children's rights.[30] Together, these developments confirm that states bear responsibility for environmental harm affecting the enjoyment of human rights.

The continued applicability of environmental obligations during war is further confirmed by PERAC. Draft principle 7 requires states engaged in armed hostilities to take preventative measures, while draft principle 9(1) affirms that environmental damage arising from an internationally wrongful act of a state entails the international responsibility of that state.[31] Such an internationally wrongful act can stem both from acts contributing to environmental harm (for example GHG emissions) and omissions (failure to take proactive measures). A state can therefore be held responsible both for acts contributing to environmental harm – such as emissions from military activities – and for omissions, including failure to take proactive measures that could mitigate environmental harm, if seen as failure of due diligence.[32]

This preventative dimension has also been affirmed in human rights jurisprudence.[33] In *Verein KlimaSeniorinnen*, the European Court of Human Rights (ECtHR) held that states have a duty to protect its citizens against climate change and take positive obligations to prevent harm arising from it. In the mentioned case, the Court found that Switzerland had violated the right to family and private life by failing to adequately

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[28] ICJ, Obligations of States in Respect of Climate Change (n 14) paras 292, 393, 409 and 432.
[29] ibid para 403.
[30] Committee on the Right of the Child (CRC), 'Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No 107/2019' (11 November 2021) UN Doc CRC/C/88/D/107/2019, para 9.9 <https://digitallibrary.un.org/record/3995719?ln=en&v=pdf> accessed 20 December 2025.
[31] ILC, PERAC (n 20) art. 9.
[32] ICJ, Obligations of States in Respect of Climate Change (n 14) paras 137, 409 and 428.
[33] Ragnar Argren, 'The obligation to prevent environmental harm in relation to armed conflict' [2023] 105(924) International Review of the Red Cross 1208-1226 https://doi.org/10.1017/S1816383123000231> accessed 21 December 2025.

mitigate climate change, reinforcing that failure to create conditions for a healthy environment can be a human rights violation.[34] This duty to prevent is further reflected in *Principle 21 of the Stockholm Declaration,* which requires states to ensure that activities within their jurisdiction do not cause environmental damage beyond their borders. Together, these developments underline that environmental protection is not limited to refrainment from harm but also includes proactive obligations to prevent foreseeable damage.[35]

Against this framework, Ukraine remains responsible for upholding environmental obligations despite being an injured state. In addition to acknowledging the right to a safe environment in its constitution, Ukraine is also party to almost all major international treaties on climate change and pollution.[36] While Russia as the aggressor bears primary responsibility for much of the environmental harm arising from the hostilities, international law recognizes a plurality of responsibility.[37] Each state is responsible for its own contributions to environmental harm, such as lack of due diligence, irrespective of another state's additional responsibility. Ukraine therefore has a duty to mitigate environmental harm and maintain minimum environmental standards, even under constrained conditions. Since both Russia and Ukraine each have contributed to the emissions stemming from the ongoing hostilities, they can both be held responsible for their respective pollutions, if these are deemed a failure of the required level of diligence. [38]

However, given the constrained situation in Ukraine amidst Russia's aggression, it is unreasonable to hold Ukraine to peacetime environmental standards. Applying such high expectations to Ukraine risks misclassifying constrained capacity as a human rights violation, detaching environmental obligations from reality. Instead, a modified

[34] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* App No 53600/20 (ECtHR, 9 April 2024) ECHR 304, para 545, 548 and 636-638.

[35]Declaration of the United Nations Conference on the Human Environment (5-16 June 1972) UN Doc A/CONF.48/14/Rev.1, Principle 21<https://digitallibrary.un.org/record/3945636?ln=en&v=pdf> accessed 20 December 2025; Ivon Mingashang and Christian Tshiamala Banungana 'The international Responsibility of a Belligerent State in the Event of Transboundary Environmental Damage' [2024] 106(925) International Review of the Red Cross 469-496 <http://dx.doi.org/10.1017/S1816383124000432> accessed 20 December 2025; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14, para 101 < https://www.icj-cij.org/case/135> accessed 21 December 2025.

[36] Yevhen Leheza and others, 'Sources of Environmental Law: National Legislation of Ukraine and International Legal Documents' [2025] 22(3) Asian Journal of Water, Environment and Pollution 153-163 <https://doi.org/10.36922/AJWEP025160118> accessed 20 December 2025.

[37] ILC, '*Articles on the Responsibility of States for Internationally Wrongful Acts*' (Final text adopted by the ILC, 53rd session, 2001) UN Doc A/RES/56/83 art 47 <https://docs.un.org/en/a/RES/56/83> accessed 20 December 2025.

[38]*State of the Netherlands v Urgenda Foundation* (Supreme Court of Netherlands) [2019] ECLI:NL:HR:2019:2007; Monica Feria-Tinta, 'Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and Other Key Underlying Notions' [2021] 3(1) Europe of Rights & Liberties 52-71 < https://www.europedeslibertes.eu/article/climate-change-litigation-in-the-european-court-of-human-rights-causation-imminence-and-other-key-underlying-notions/> accessed 21 December 2025.

approach is required – one that balances environmental obligations with the realities faced by an injured state acting in self-defense.

Rethinking Ukraine's Environmental Obligations

As environmental obligations continue to apply during armed conflict, the central question becomes not whether such obligations exist, but how they should be assessed when state capacity is under severe duress. In general, environmental obligations are examined through a standard of due diligence, which focuses on each state's effort and capacities rather than perfect end results.[39] The ICJ has confirmed this approach, stating that due diligence is multifactorial and depends on a state's national circumstances and capacities – a reasoning affirmed by both the International Tribunal of the Law of the Sea (ITLOS) and the IACtHR.[40] Drawing on these court reasonings, this provides a basis to interpret due diligence as a standard capable of evolving to encompass new contextual circumstances.

The operationalization of due diligence varies between states in accordance with the *Common But Differentiated Responsibility principle* (CBDR) – another cornerstone of international environmental law.[41] This principle recognizes that while all states need to work together to achieve a sustainable environment, states differ in their economic development, capacities and historical contributions, justifying giving wealthier states heightened accountability. It can thus be perceived as an attempt to bring about inclusive environmental governance.[42]

Initially, the differentiation under CBDR was built upon a rigid dichotomy of developed-developing countries, categorizing states based on economic development and membership in economic organizations. This distinction was contested since developed countries argued there were nuances of developing countries. Particularly global power shifts, such as those of Brazil, China and India, highlighted the need for less stringent categorization.[43] Following this critique, the *2015 Paris Agreement* (which in itself was revolutionary for IEL) changed this stern approach to a more

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[39] ICJ, *Pulp Mills on the River Uruguay* (n 36) paras 101, 187 and 197.
[40] ICJ, *Obligations of States in Respect of Climate Change* (n 14) paras 137, 150, 231-299, 292; *Responsibilities and Obligations of States with Respect to Climate Change* (Advisory Opinion, Order of 21 May 2024) ITLOS Reports 2024, 31 para 239 <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf> accessed 20 December 2025; *Climate Emergency and Human Rights*, Advisory Opinion OC-32-25, Inter-American Court of Human Rights Series A No 23 (29 May 2025) para 236 <https://www.corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> accessed 20 December 2025.
[41] ICJ, Obligations of States in Respect of Climate Change (n 14) paras 148, 226 and 247.
[42] Tuula Honkonen, The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects (Kluwer Law International 2009) 1-11, 39-48, 67-74, 90-93 and 336.
[43] ibid 122-124, 193-195; Klaus Dingwerth and Simon Herr, 'The Reinterpretation of Common but Differentiated Responsibilities in the Climate Regime' in *The Unmaking of Special Rights* (Edward Elgar Publishing 2024) Ch 3.

context-specific one, through the phrasing of “different national circumstances”.[44] This allowed for a more individualized differentiation, recognizing other elements than solely economic development and geographic vulnerability.[45] Considering this evolution, I argue that there is room to integrate additional contextual factors into environmental assessments, to better reflect reality.

A New Approach: Armed Conflict as a Temporal Factor Affecting Differentiation Under CBDR

A contextual factor particularly relevant for assessing a state’s capacity to fulfill environmental obligations is armed conflict, which is not yet adequately captured by environmental assessments. Although courts affirm that due diligence varies between states under CBDR, armed conflict has not explicitly been recognized as a factor influencing the environmental assessment. Focus remains on structural changes and long-term indicators of developments, resulting in static categorizations. Once a state is deemed as developed or developing, reassessment is rare, even if its capacities significantly deteriorate. Adding to the issue, due diligence assessments tend to emphasize states positive developments,[46] often failing to acknowledge states temporary regression. This gap limits law’s ability to account for extraordinary circumstances beyond a state’s own control, such as externally imposed aggression.

This article therefore proposes that CBDR should expand to not only reflect state’s progressive, structural developments, but also recognize temporary regression in state capacity caused by extraordinary circumstances – such as armed conflict. Armed conflict constitutes a significant capacity-reducing condition, often causing disruption of governance, limiting a state’s ability to fulfil various commitments and obligations.[47] This is clearly illustrated in Ukraine’s ongoing crisis, where resource allocation prioritizes self-defence and humanitarian response.

Although CBDR is not formally a part of IHL, international law frequently relies on principles to guide interpretation of obligations.[48] On this basis, CBDR can function as a unique lens for contextualizing state’s environmental obligations. This is further supported considering IHL already permits certain exceptions during armed conflict,

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[44] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79 (PA), art 4(3), (4) and (19).
[45] Ara Begum and others, ‘Point of Departure and Key Concepts’ in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press 2022) Ch 1 121-196; Responsibilities and Obligations of States with Respect to Climate Change, ITLOS (n 42).
[46] ICJ, *Obligations of States in Respect of Climate Change* (n 14) para 292, stating that ‘as states develop economically their requirements of due diligence are heightened’.
[47] Paola Vesco and others, ’The Impacts of Armed Conflict on Human Development: A Review of the Literature’ [2025] 187(C) *World Development* 469-496, 7-8 <https://doi.org/10.1016/j.worlddev.2024.106806> accessed 21 December 2025.
[48] Jan Klabbers, *International Law* (4th edn, Cambridge University Press 2023) 36.

based on military necessity and feasibility.[49] Applying CBDR in wartime environmental assessments would thus complement this framework by introducing flexibility into environmental obligations without suspending them, thereby bridging long-term environmental protection and immediate humanitarian needs.

While CBDR originates from IEL, its underlying idea of equity is arguably already embedded in IHRL through the notion of progressive realization.[50] Drawing on this concept, armed conflict should be perceived as a legitimate interruption of the fulfilment of environmental obligations, allowing the temporal lowering of state's environmental responsibilities. This avoids the total suspension of environmental obligations, instead recalibrating expectations while preserving a minimum core of environmental protection. Such short-term flexibility supports an intergenerational understanding of environmental rights, safeguarding long-term outcomes by ensuring that temporary setbacks are not automatically characterized as human rights violations. Absent such temporal flexibility, IEL risks producing perverse outcomes where the injured state is held to identical environmental responsibilities as the aggressor – shifting accountability away from the perpetrator. Temporal differentiation under CBDR helps avoid reproducing this unfair outcome.

Not to ignore, this approach may be abused by states seeking to lower environmental obligations under the pretext of crisis. However, the recognition of an armed conflict under IHL requires objective legal determination rooted in verified facts, meaning that states cannot simply declare themselves to be 'at war' to evade obligations.[51] Moreover, temporal differentiation does not suspend environmental obligations altogether; it recalibrates the due diligence standard while preserving a minimum core of protection. Nonetheless, further research is needed to clarify which criteria treaty bodies or international courts should apply when determining when lowered obligations are justified, ensuring the approach operates within legal constraints rather than political opportunism.

Operationalizing Temporal Differentiation: The Case of Ukraine

Ukraine serves as an illustrative case of why a temporal approach is needed. Although Ukraine was formally classified as an 'eastern emerging economy' with great potential[52] it finds itself in a unique situation – currently defending itself against a

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[49] Additional Protocol 1 to the Geneva Convention (n 22) art. 51(5)(b).
[50] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 2(1) (ICESCR).
[51] ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law"?' (*ICRC*, April 2024) 9-11 <https://www.icrc.org/sites/default/files/document_new/file_list/armed_conflict_defined_in_ihl.pdf> accessed 20 December 2025.
[52] Eric Metreau and others, 'World Bank Country Classifications by Income Level for 2024-2025' (*World bank Blogs,* 1 July 2024) <https://blogs.worldbank.org/en/opendata/world-bank-country-classifications-by-income-level-for-2024-2025> accessed 22 December 2025.

nuclear superpower. The war has significantly (though hopefully only temporarily) reduced Ukraine's capacity to comply with peacetime environmental obligations, as they instead must prioritize immediate crisis management.[53] Under these conditions, the expectation of full compliance with peacetime environmental standards becomes detached from reality. Applying identical environmental standards in wartime as in peacetime risks imposing unjust burdens on injured states, undermining the very principle of equity that underpins international law.

Applying CBDR, recognizing armed conflict as a temporal interruption, fundamentally changes the environmental assessment of Ukraine. Under such an approach, Ukraine is no longer expected to maintain full peacetime inspection regimes, such as protecting all biodiversity or immediately remediating every polluted site. Instead, compliance focuses on harm minimization where possible, prioritizing high-risk areas like nuclear sites and toxic spill prevention. This reasoning can be directly applied to the Zaporizhzhia nuclear plant in Ukraine, which is currently under Russian occupation.[54] Under peacetime standards, Ukraine would unrealistically be expected to fully monitor and secure the facility to prevent nuclear leaks or other hazards, as it is party to several treaties regarding protection of nuclear sites.[55] However, control of the facility is practically outside Ukraine's reach. Applying temporal differentiation, Ukraine would only be required to do what is practically possible during wartime, which in extreme cases may be minimal or symbolic. This ensures that Ukraine is not unfairly penalized for survival-based decisions and avoids characterizing a victim state as a co-polluter or even a human rights violator. As long as Ukraine upholds a minimum core of environmental protection, temporary regression does not violate the right to a healthy environment. Environmental protection thus remains upheld but is not totally detached from reality.[56]

Temporal differentiation also enables fairer attribution of responsibility. Amidst Ukraine's situation, it becomes possible to distinguish Russia's deliberate environmental destruction from Ukraine's mere temporary incapacity to mitigate

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[53] Andrii Bahinskyi and Nina Potarska, 'Climate-humanitarian crisis in the Russia-Ukraine war: double vulnerabilities overlooked by the humanitarian response' (*Alternatives Humanitaires*, March 2025) <https://www.alternatives-humanitaires.org/en/2025/03/31/climate-humanitarian-crisis-in-the-russia-ukraine-war-double-vulnerabilities-overlooked-by-the-humanitarian-response/> accessed 22 December 2025.

[54] Atoms for Peace and Development (IAEA), 'Timeline of the IAEA's Response Activities to the Situation in Ukraine' (*IAEA*, September 2025) <https://www.iaea.org/interactive/timeline/169792> accessed 22 December 2025.

[55] Convention on the Physical Protection of Nuclear Material (adopted 26 October 1979, entered into force 8 February 1987) 1456 UNTS 101 (CPPNM); Treaty on the Non-Proliferation of Nuclear Weapons (opened for signature 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (NPT); Atoms for Peace and Development (IAEA), 'Communication dated 12 August 2022 received from the Delegation of the European Union to the International Organizations in Vienna' (*IAEA*, 12 August 2022) <https://www.iaea.org/sites/default/files/publications/documents/infcircs/2022/infcirc1019.pdf> accessed 22 December 2025.

[56] Gabija Leclerc, 'Russia's War on Ukraine: High Environmental Toll' (*EP Think Tank, European Parliament*, 20 July 2023) <https://epthinktank.eu/2023/07/20/russias-war-on-ukraine-high-environmental-toll/> accessed 22 December 2025.

environmental damage. For example, the environmental harm stemming from the Russian forces occupying the Zaporizhian nuclear plant would be attributed to Russia's international wrongful act, rather than Ukraine's non-voluntary failure of due diligence.[57] This allows the rightful perpetrator to be held accountable while safeguarding the integrity of the victim state.

Based on this argumentation, I argue that human rights treaty bodies should adopt wartime adjusted due diligence standards, recognizing that temporary regression caused by armed conflict sometimes is justified. While Ukraine serves as a good case for exemplifying the approach, temporal differentiation is also broadly applicable to other situations where peacetime environmental standards risk becoming normatively irrelevant. By connecting IEL and IHL with IHRL, this approach fosters coherence across fragmented regimes of environmental protection. Importantly, incorporating temporal flexibility into CBDR ensures that environmental obligations remain both achievable and meaningful even amidst the extraordinary circumstances of armed conflict.

Conclusion

This article has examined the continued applicability of the right to a healthy environment during armed conflict, using Ukraine as a case study. While the international community increasingly affirms environmental protection as a precondition for the enjoyment of human rights, the realities of war illustrate the difficulty of upholding such protection without contextual adjustment. Treating Ukraine's temporary non-compliance with environmental obligations during ongoing hostilities as a human rights violation risks detaching IHRL from practical realities and undermining its normative legitimacy.

This article has argued that, while war does not justify the total abandonment of environmental obligations, it does require their contextual reassessment. In advancing this argument, it has proposed an expanded understanding of CBDR, recognizing armed conflict as a temporal vulnerability. This justifies adjusting the required standard of environmental due diligence in such extraordinary situations.

Recognizing armed conflict as a temporary vulnerability strengthens, rather than weakens, the right to a healthy environment. By introducing a temporal lens to reassess wartime environmental obligations, obligations remain fair and operational in times of crisis. Thus, this paper contributes a perspective better aligned with wartime realities, avoiding static assessments based only on state's structural, progressive development. Further research is required to determine under which precise

[57] This, assuming that Russia's invasion of Ukraine is considered an internationally wrongful act, for example composing a violation of the non-intervention principle under The Charter of the UN (adopted 26 June 1945, entered into force 24 October 194) 1 UNTS XVI (UN Charter) arts 2(4), 2(7). This would then actualize Russia's international responsibility under ARSIWA (2001) (n 38) arts 1-2.

conditions temporarily adjusted obligations should apply and when heightened obligations should re-emerge. Ultimately, temporal flexibility of CBDR is essential if the right to a healthy environment is to remain meaningful and not merely aspirational in 21st-century armed conflicts.

The Blue Economy as a Trojan Horse: Fisheries industrialisation and the right to self-determination of coastal communities in eastern Indonesia (Mariah Agnes Matakena)

Abstract

The Blue Economy framework, while marketed as a sustainable triple-win, functions in Indonesia as a 'Trojan Horse' for export-oriented industrialisation that marginalises a traditional way of life and customary governance across the maritime periphery. Utilising a Third World Approaches to International Law (TWAIL) lens, this study argues that the legislative overhaul via the Job Creation Law, specifically mandating Government Regulation (GR) No. 11/2023 on Measured Fishing and GR No. 27/2021 concerning the Implementation of the Marine and Fisheries Sector, constitutes a regime of internal colonialism that disregards local stewardship for national GDP targets. By reclassifying traditional fishing grounds in Eastern Indonesia into industrial zones, the state creates structural barriers that interfere with the Right to Self-Determination and the non-derogable right to the 'means of subsistence' protected under the ICCPR and ICESCR. The paper concludes that while national growth is a legitimate aim, the current centralised maritime regime remains legally incompatible with international obligations as it systematically constrains the practical exercise of economic autonomy and traditional livelihoods of coastal communities.

Introduction

In a world where oceans cover approximately 71% of the Earth's surface, the maritime domain serves as the primary engine for global biodiversity and a foundational pillar of the international economy.[1] Acknowledging this importance, the 2012 Rio+20 Summit introduced the Blue Economy as a framework designed to reconcile large-scale development with the sustainable use of marine resources.[2] This framework is marketed globally as a triple-win synergy intended to foster economic growth and job creation while preserving the health of ocean ecosystems. To align with these global development expectations, Indonesia, as the world's largest archipelagic state, adopted the Blue Economy Roadmap to reconcile environmental preservation with national growth.[3] However, while the national strategy positions this transition as a

[1] UN Conference on Sustainable Development, 'The Future We Want' (19 June 2012) UN Doc A/CONF.216/L.1.
[2] 'The Future We Want' (n.1)
[3] Ministry of National Development Planning (Bappenas), *Indonesia Blue Economy Roadmap 2023-2045* (2023).

commitment to sustainable governance, it increasingly manifests as a pro-market agenda driven by foreign investment and the centralisation of maritime authority.
To operationalise this blueprint, the Indonesian State implemented a systemic legislative overhaul through the Job Creation Law (Law No. 6 of 2023), which among several agendas, reimagines the ocean as a centralised engine for industrial capital.[4] Within this omnibus framework, two pivotal regulations were introduced: Government Regulation (GR) No. 11/2023, which establishes industrial ‘Measured Fishing’ to maximise extraction, and GR No. 27/2021, which facilitates ‘National Strategic Projects’ by bypassing local spatial protections.[5] These instruments[6] do not merely manage resources; they directly intervene in the livelihoods and customary practices of coastal communities in Eastern Indonesia, potentially overriding the ancestral maritime domains (*Petuanan Laut*), an act that effectively constitutes a regime of resource enclosure[7], obstructing their ability to fulfil their right to self-determination as protected in the Common Article 1 of the International Covenant on Civil and Political Rights and The International Covenant on Economic, Social and Cultural Rights.[8] This analysis focuses on the maritime periphery of coastal communities in Eastern Indonesia, focusing on the impact of technical enclosure on traditional and customary fishers. It prioritises a socio-legal evaluation of the compatibility of Indonesia’s maritime regulations with international human rights law over empirical biological data.

This paper argues that the Indonesian State employs the ‘Blue Economy’ narrative as a Trojan Horse, where a rhetoric of sustainability masks systemic resource dispossession[9] and the marginalisation of customary governance. Behind the urgent pursuit of economic development, the state implements a regime focused on national growth at the expense of coastal communities, thereby interfering with their Right to Self-Determination.[10] To support this thesis, the analysis proceeds in three parts: first, a legal examination of the Blue Economy Roadmap and its implementing regulations, GR No. 11/2023 and GR No. 27/2021; second, an assessment of the Right to Self-

[4] Law No 6 of 2023 concerning Job Creation (Indonesia).
[5] Government Regulation No 11 of 2023 concerning Measured Fish Catch (Indonesia); Government Regulation No 27 of 2021 concerning the Organization of the Marine and Fisheries Sector (Indonesia). Both these regulations are mandated under Law No 6 of 2023 concerning Job Creation (Indonesia), which replaced the earlier Law No 11 of 2020 following a ‘conditionally unconstitutional’ ruling by the Indonesian Constitutional Court (Decision No 91/PUU-XVIII/2020). While the primary legislation was re-enacted in 2023, the implementing regulations issued under the 2020 version, such as GR No 27 of 2021, remain legally valid and mandated under the transitional provisions of the current Omnibus framework.
[6] GR No 11 of 2023 (n.5); GR No 27 of 2021 (n.5).
[7] Antony Anghie, Imperialism, Sovereignty and the Making of International Law (CUP 2005) 204–209.
[8] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 1. These instruments were ratified by Indonesia through Law No 12 of 2005 and Law No 11 of 2005, respectively. Domestically, the protection of ancestral domains (*Petuanan Laut*) is further grounded in the 1945 Constitution of the Republic of Indonesia, art 18B, which mandates state recognition of customary law communities (*Masyarakat Hukum Adat*).
[9] Anghie (n 7) 204
[10] Anghie (n 7) 204; ICESCR (n 8) art 1

Determination and the coastal communities of Eastern Indonesia; and lastly the analysis utilizes a TWAIL (Third World Approaches to International Law) framework to deconstruct the Blue Economy as a Trojan Horse, evaluating how its progressive outer shell masks technical mechanisms subordinate the sovereignty of coastal communities.

Constructing the Trojan Horse

To understand how the Blue Economy functions as a Trojan Horse, it is necessary to examine its structure. This section analyses the framework in three layers: the Global Regime (the Outer Shell), Indonesia's National Roadmap (the Inner Shell), and the specific regulatory instruments (Inside the Trojan Horse) that translate these ideas into law and operate the blue economy.

The Outer Shell: The Global Blue Economy Regime

The term 'Blue Economy' emerged as a formal global policy framework during the preparatory stages of the 2012 United Nations Conference on Sustainable Development (Rio+20), where it was reframed as the maritime counterpart to the 'Green Economy.'[11] It is structured as a triple-win strategy, an integrated model designed to foster economic growth and social inclusion while preserving ocean ecosystem health.[12] At its core, the concept advocates for the separation of socioeconomic development from environmental and ecosystem degradation.[13]

This global regime is characterised by a measured management model that requires the quantification and valuation of natural capital, including non-market services like carbon sequestration and coastal protection, to integrate these assets into formal policy decisions.[14] In practice, this transition relies on management resources that prioritise evidence-based decision-making, which seeks to standardise maritime governance into formal, state-managed systems.[15] This shift is driven by an international environment where states are incentivized to transform their maritime domains into standardized economic assets to secure global capital and

[11] World Bank and United Nations Department of Economic and Social Affairs, The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries (World Bank 2017) 1.
[12] World Bank (n 11) vi.
[13] World Bank (n 11) vi; The deliberate separation of socioeconomic growth within ocean-related sectors from the resulting environmental and ecosystem degradation. It marks a shift away from the usual model, where economic expansion is inherently tied to resource depletion, proposing instead that economic development and ocean health are compatible goals that can be achieved simultaneously.
[14] World Bank (n 11) ix. The framework encompasses traditional industries like fisheries and maritime transport alongside emerging sectors such as marine biotechnology and offshore renewable energy. These activities are propelled by global drivers, including a growing need for new sources of food, energy, and minerals to support a rising global population.
[15] World Bank (n 11) 12–15; 23.

developmental approval from international financial institutions.[16] Consequently, nations like Indonesia adopt Blue Economy roadmaps as strategic tools to centralize authority over ocean space through technocratic tools, ensuring that resources are managed as national economic assets rather than communal heritage.[17] Within this global context of 'Blue Growth', Indonesia has developed its own regulatory framework.

The Inner Shell: Indonesia's Blue Economy Roadmap

The genesis of Indonesia's current maritime policy can be traced to the 2014 'Global Maritime Fulcrum' (GMF) as a doctrine designed to reclaim the nation's identity as an archipelagic power.[18] While the GMF focused on infrastructure, Indonesia's strategic vision recently shifted into a quantifiable economic regime through the Indonesia Blue Economy Roadmap (2023–2045). Launched by the Ministry of National Development Planning (Bappenas), this model serves as the 'Inner Shell' of the maritime transition, aiming to industrialize the sector and increase its contribution to 15% of the national GDP by 2045.[19] The roadmap ensures that Blue Economy principles are 'infused' into national development plans, prioritizing measured extraction and high-capital industries.[20] By rebranding the maritime domain as a "New Engine of Growth," the state establishes a developmental imperative that justifies the transition toward centralized management.[21] This strategic shift creates the legal and political space for specific regulatory instruments to facilitate the resource dispossession at the expense of communal heritage.[22]

Inside the Trojan Horse: Indonesia's Blue Economy Regulatory Instruments

While the Blue Economy Roadmap (2023–2045) outlines the strategic vision, it lacks the legal force to reconfigure maritime space on its own. To bridge this gap, the

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[16] Jennifer J Silver and others, 'Blue Economy and Competing Discourses in International Oceans Governance' (2015) 24(2) *The Journal of Environment & Development* 135, 149.
[17] Ministry of National Development Planning (Bappenas), *Indonesia Blue Economy Roadmap 2023-2045* (Bappenas 2023) 5, 23 (identifying the ocean as a 'New Engine of Growth' for national development). See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 115 (discussing how post-colonial states often utilize international development narratives to consolidate domestic hegemony over the periphery).
[18] Somnath Hazra and Anindya Bhukta (eds), The Blue Economy: An Asian Perspective (Springer Nature 2022) 161.
[19] Bappenas (n 17) 12.
[20] Bappenas (n 17) This 'infusion' is technically executed by aligning maritime targets with the National Medium-Term Development Plan (RPJMN).
[21] Bappenas (n 17) 22 (formally defining the ocean as a 'New Engine of Growth' to reach national GDP targets). See also James C Scott, *Seeing Like a State* (Yale University Press 1998) 2 (on how developmental imperatives require the state to make complex communal spaces 'legible' for centralized management).
[22] Anghie (n 7) 204. Argues that the pursuit of development often provides legal justification for post colonial states to override internal customary sovereignty.

Indonesian State utilizes a systemic legislative overhaul to operationalize these targets, transforming policy into binding regulations. The primary legislative engine pushing this transition forward is the Job Creation Law (Law No 6 of 2023).[23] This 'Omnibus' legislation was designed to remove regulatory bottlenecks that supposedly hindered large-scale maritime investment.[24] A defining feature of this law is the centralisation of marine authority, which consolidated the power to issue licenses and manage spatial planning within the Central Government, specifically the Ministry of Maritime Affairs and Fisheries (KKP), bypassing many regional and customary approval processes.[25] This centralization is operationalized through a technical remapping of the archipelago into distinct Fisheries Management Areas (WPP-NRI). By dividing the sea into these 11 administrative zones, the state transforms fluid maritime commons into industrial units for centralized planning.[26]

To govern these new newly defined zones, the Job Creation Law mandated specific technical regulations to turn the roadmap's goals into a legal reality. Two pivotal Government Regulations (GR) serve as the primary instruments of the Indonesian Blue Economy:

- Government Regulation No 11 of 2023 on Measured Fish Catch (PIT): This regulation establishes a centralised, quota-based system known as *Penangkapan Ikan Terukur* (PIT).[27] It transitions fisheries from open stewardship to a model where catch quotas are distributed based on the business capacity of applicants, targeting the industrialisation of zones like the coastal areas of Eastern Indonesia.[28]
- Government Regulation No 27 of 2021 on the Marine and Fisheries Sector: This regulation manages maritime space through the KKPRL certificate system (*Kesesuaian Kegiatan Pemanfaatan Ruang Laut)*.[29] It allows the Central Government to fast-track 'National Strategic Projects'

[23] Law No 6 of 2023 (n 4)
[24] Law No 6 of 2023 (n 4) This Omnibus legislation was designed to remove regulatory bottlenecks that supposedly hindered large-scale maritime investment. A defining feature of this law is the centralization of marine authority, which consolidated the power to issue licenses and manage spatial planning within the Central Government, specifically the Ministry of Maritime Affairs and Fisheries (KKP). This overhaul effectively bypasses regional and local approval processes to turn the roadmap's goals into a legal reality.
[25] Law No 6 of 2023 (n 4); Online Single Submission Risk-Based Approach (OSS-RBA).
[26] Law No 6 of 2023 (n 4) arts 18–19 (amending Law No 32 of 2014). The geographical boundaries of the 11 WPP-NRI were originally established under Minister of Marine Affairs and Fisheries Regulation No 18 of 2014 as technical management units. However, the Job Creation Law and subsequent regulations (e.g., GR 11/2023) have fundamentally transformed their legal character, transitioning them from decentralized ecological zones into a centralized spatial grid used to facilitate industrial quota allocation and state-led 'National Strategic Projects.'
[27] Government Regulation No 11 of 2023 concerning Measured Fish Catch (Indonesia).
[28] GR No 11 of 2023 (n 26) art 7.
[29] Government Regulation No 27 of 2021 concerning the Organization of the Marine and Fisheries Sector (Indonesia).

(PSN), effectively granting the state the power to override regional spatial protections or conservation zones to facilitate industrial use.[30]

The Trojan Horse Breaches the Gates: The Right to Self-Determination of Coastal Communities in Eastern Indonesia

While the 'Blue Economy' framework is presented as a technocratic tool for national growth, its legal validity is constrained by the foundational rights of the communities it claims to develop. To unmask the Trojan Horse, one must measure the state's regulatory expansion against the non-derogable international and constitutional standards of self-determination.

The Right to Self-Determination as an International Instrument

The Right to Self-Determination is the foundational principle of modern international law, established by Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[31] It is defined as the right by virtue of which all peoples "freely determine their political status and freely pursue their economic, social and cultural development."[32] This framework establishes that sovereignty does not reside solely in the state apparatus but originates from the people's inherent right to control their own destiny and resources.

Key technical components of Common Article 1 include:

- The Right to Political and Economic Autonomy: Article 1(1) stipulates that all peoples have the right to pursue their own development paths, independent of external or centralised imposition.
- The Right to Natural Wealth and Resources: Article 1(2) establishes that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation.[33]
- The 'Means of Subsistence' Safeguard: Critically, Article 1(2) provides a non-derogable protection: "In no case may a people be deprived of its own means of subsistence." This ensures that any state activity, including national development projects, is legally void if it results in the

[30] GR No 27 of 2021 (n 28) ss 4, 10-12. Prior to this regulation, maritime space was governed by Regional Coastal and Small Island Spatial Plans (RZWP3K), which were maps created at the provincial level to protect local fishing and conservation zones. The new system allows the Central Government to override these local maps if a project is labeled a 'National Strategic Project,' effectively shifting control of the sea from local authorities to Jakarta.
[31] ICCPR (n 8) art 1(1).
[32] ICESCR (n 8) art 1(1).
[33] ICCPR (n 8) art 1(2).

dispossession of the resources necessary for a community's survival.[34]

The Right to Self-Determination in the Indonesian Legal Framework

Indonesia incorporated these binding international standards into its domestic legal order through Law No. 11 and Law No. 12 of 2005, which ratified the ICESCR and ICCPR, respectively.[35] Within the national framework, this right is harmonised with the 1945 Constitution, particularly Article 18B, which recognises and respects the units of Customary Law Communities (*Masyarakat Hukum Adat*) and their traditional rights.[36] Furthermore, while Article 33(3) establishes state control over natural resources, it mandates that such control must be used for the "greatest prosperity of the people", a constitutional check that aligns with the international obligation to protect the means of subsistence.[37] For coastal communities, these mandates are operationalised through sectoral laws like Law No. 27 of 2007, which recognises the ancestral maritime domains and management rights of local fishers.[38]

Self-Determination for Coastal Communities in Eastern Indonesia

The maritime landscape of Eastern Indonesia is defined by a decentralized network of thousands of villages where the local economy and legal identity are inextricably linked to the sea. For these communities, the sea is the primary means of subsistence under Article 1(2).[39] National fisheries profiles indicate that over 90% of the Indonesian fleet consists of traditional vessels with a gross tonnage (GT) of under 10.[40] A critical component of this sovereignty is the ability to follow highly migratory species, such as skipjack and yellowfin tuna, across the maritime frontiers in Eastern Indonesia,

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[34] ICESCR (n 8) art 1(2).
[35] Law No 11 of 2005 concerning the Ratification of the International Covenant on Economic, Social and Cultural Rights (Indonesia); Law No 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights (Indonesia).
[36] The 1945 Constitution of the Republic of Indonesia, art 18B.
[37] The 1945 Constitution, art 33(3).
[38]Law No 27 of 2007 concerning the Management of Coastal Areas and Small Islands (Indonesia) art 1(17). While this remains the primary framework for coastal management, the Job Creation Law centralized its core licensing and spatial planning functions. This shift allows the Ministry of Maritime Affairs and Fisheries (KKP) to override local and regional spatial protections in favor of national industrial priorities, effectively hollowing out the decentralized governance structures originally established in 2007.
[39] ICESCR (n 8) art 1(2).
[40] Ministry of Marine Affairs and Fisheries (KKP), *Kelautan dan Perikanan mandate dalam Angka 2023 (Marine and Fisheries in Figures 2023)* (KKP 2023) 42–45. This figure confirms that the Indonesian maritime sector is structurally artisanal, with vessels under 10 GT comprising over 95% of the national fleet. In the context of the Right to Self-Determination, this statistical dominance underscores that the maritime domain is not merely a commercial space for the state to allocate, but the primary 'means of subsistence' for millions of coastal citizens, whose economic survival depends on the non-negotiable access to traditional fishing grounds.

specifically in the Banda and Arafura Seas.[41] Within the framework of self-determination, this is operationalised through the guaranteed, non-negotiable access to these stocks within traditional fishing grounds.

Within this structure, a significant portion of the population operates as *Masyarakat Hukum Adat*, whose sovereignty is manifested through the management of ancestral maritime domains known as *Petuanan Laut*.[42] In regions like Maluku and Papua, these communities utilise the *Sasi* system, a traditional legal regime that facilitates localized maritime jurisdiction or governance. Theories of Legal Pluralism suggest that the strength of this governance lies in its 'closeness' to the people; local *adat* institutions act as the traditional stewards of their maritime future, aligning resource use with the socio-cultural and biological realities of the village.[43] This established subsidiarity of governance is now being overlaid by the state's Fisheries Management Areas (WPP-NRI) grid. Under current regulations, waters such as WPP 718 (Arafura Sea) and WPP 714 (Banda Sea) are reclassified into centralized administrative units. By superimposing these state-defined zones over existing Adat boundaries, the framework reconfigures the geography of access, transitioning maritime authority from the village level to the Central Government.

Discussion: Unmasking the Trojan Horse

The following analysis utilises a TWAIL framework to unmask the Blue Economy as a Trojan Horse for centralised industrial extraction. It evaluates how Indonesia's regulatory shift interferes with the Right to Self-Determination by reproducing colonial hierarchies under the guise of progress.[44] This section deconstructs how the technical mechanisms of the new government regulations in fisheries management, as a product of the Job Creation Law mandate undermindes the communal means of subsistence in Eastern Indonesia to national GDP targets, effectively silencing the sovereign architects of the sea.[45]

[41] Food and Agriculture Organization of the United Nations (FAO), *The State of World Fisheries and Aquaculture 2024* (FAO 2024) 88–92. In the Indonesian context, skipjack (*Katsuwonus pelamis*) and yellowfin tuna (*Thunnus albacares*) are characterized by high transboundary mobility, requiring artisanal fishers to maintain fluid access across administrative boundaries. See also Ministry of Marine Affairs and Fisheries (KKP), *Indonesia Blue Economy Roadmap 2023–2045* (Bappenas 2023) 15 (acknowledging the strategic importance of Fisheries Management Areas 714, 715, and 718 in the Banda and Arafura Seas for these specific stocks).
[42] Law No 27 of 2007 (n 8) art 61.
[43] Franz von Benda-Beckmann and Keebet von Benda-Beckmann, Social Security Between Past and Future: Ambition, Shifting Horizons and Realities (Berghahn Books 2007) 112.
[44] ICCPR (n 8), art 1; Anghie (n 7) 204.
[45] ICESCR (n 8), art 1(2).

International Law's Development Mandate for Growth

International law promotes a standardised narrative of development that prioritises macroeconomic growth, compelling Global South states to conform to industrial models that often clash with their traditional and demographic realities. Under the TWAIL framework, the 'Right to Development' is often weaponised by the state as a standard of civilisation based on GDP expansion.[46] For states in the Global South, entering the global economic network requires adopting these pro-growth narratives to maintain creditworthiness and modern status. This creates an epistemic trap: the state is pressured to view its natural resources purely as capital to be unlocked rather than as a commons to be stewarded. This pro-growth mandate ignores the demographic reality of Eastern Indonesia, where millions rely on artisanal systems that are ecologically stable but economically invisible to global metrics.

The UN's Sustainable Development Goal (SDG) 14 and various World Bank frameworks promote the Blue Economy as a triple-win. However, as Degrowth theories suggest, the structural requirement for constant improvement of well-being is almost always translated by states into constant increase of industrial output.[47] The global push for measured and rational fishing assumes that traditional, unmeasured practices are a leak in the global economy that must be plugged by formalisation. Consequently, the international architecture sets the stage for the Trojan Horse; it creates a global environment where the Indonesian state feels compelled to adopt a growth-first maritime regime to satisfy international economic expectations, effectively treating the state's pursuit of national development as a justification to override the local right to self-determination.

Sustainability as a Mitigating Premise

The Blue Economy narrative acts as a Trojan Horse because its promises of social inclusion and sustainability are merely mitigating premises designed to mask a core agenda of pro-growth industrialisation. When the state adopts the Blue Economy, it uses the social inclusion shell to bypass the resistance of coastal communities. However, within a neoliberal framework, inclusion usually means "inclusion into the market" on the state's terms, rather than the protection of pre-existing rights.[48]Inclusion is treated as a secondary buffer to manage the fallout of industrialisation, a way to mitigate the harm rather than a goal in itself. This is where the deception lies: the state markets the gift of sustainability while the 'soldiers' of capital-intensive growth wait inside to claim the enclosure.

The Indonesia Blue Economy Roadmap 2023-2045 prioritises the 15% GDP target as the primary success metric. While it mentions 'Blue Justice,' the technical regulations

[46] Anghie (n 7) 115.
[47] Arturo Escobar, Encountering Development: The Making and Unmaking of the Third World (Princeton 2011) preface xxv–xl
[48] BS Chimni, 'International Institutions Today' (2004) 15(1) EJIL 1.

(PIT) do not offer a degrowth alternative or a protection for subsistence; they offer a 'Fisherman's Quota' that is structurally inferior to industrial auctions. The social premise is a safety net, but the industrial goal is capital-intensive extraction. By treating social rights as a mitigation strategy rather than a foundational limit, the Blue Economy functions as a vehicle for the 'Internal Empire' to expand its hegemony into the maritime periphery under the guise of inclusive development.

Centralising Maritime Control from Jakarta to the Eastern Periphery

The Indonesian state utilises the Blue Economy framework to consolidate hegemony, shifting authority from the customary architects of the periphery to the centralised capital. Indonesia, as a growing economy, views the Blue Economy as a strategy to position the nation as a prominent participant in global economic governance. However, this national ambition translates into Internal Colonialism. The state replicates the colonial 'Civilising Mission' by viewing the Arafura and Banda Seas as empty or under-utilised resources.[49] The capital (Jakarta) acts as the metropole, extracting measured value from the Eastern periphery (Maluku/Papua) to fuel national GDP targets.[50]

This is technically executed through GR No. 11/2023 (PIT) and GR No. 27/2021 (Spatial Control). Previously, these waters were governed by decentralised, customary practices (*Sasi/Petuanan Laut*). Suddenly, they are reclassified into industrial zones WPP 714 (Banda Sea) and WPP 718 (Arafura Sea). The freedom of the commons is replaced by a monitored regime where the state, for the first time, sees the water through a satellite and a tax code, just as global Blue Economy concepts demand. This centralisation of power proves that the Blue Economy is a tool for domestic hegemony, allowing the state to domesticate the wild maritime periphery for the benefit of the national treasury.

Technical Enclosure vs. Biological Reality

The technical operationalisation of 'Measured Fishing' ignores the biological and customary realities of Eastern Indonesia, effectively criminalising the traditional way of life. Customary law communities in Eastern Indonesia have a way of life dependent on the seasonal migration of fish (specifically Skipjack and Yellowfin tuna). Their stewardship is fluid, moving with the frontlines. The state's quota system, however, is fixed and territorial. It assumes that fishers can be confined to a specific coordinate or a specific 'Fisherman's Quota' regardless of where the fish actually are. In the Arafura and Banda Seas, tuna migration frontlines shift based on thermoclines and

[49] Anghie (n 7) 204.
[50] Chimni (n 49) 15 EJIL 1–2, 14–16. Chimni argues that the emerging 'Imperial Global State' pressures Third World states to align their domestic laws with the interests of a transnational capitalist class, implementing global economic standards that invariably marginalise their own subaltern populations.

monsoons.[51] If a community's traditional fishing grounds are reclassified as a specific zone and their quota is fixed to a different area, the fisher becomes a poacher the moment they follow the fish.

Furthermore, this technical mismatch facilitates a profound economic injustice where resource-rich peripheries are bypassed by the wealth they generate. By prioritising business capacity, the state grants rights to the industrial fleet with the capital mobility to follow migratory stocks, while the traditional communities' mobility is constricted. GDP growth is concentrated in the centre, leaving the Eastern periphery to bear the environmental and social costs of extraction without securing resource security. This is evidenced by the stark reality that regions like Papua maintain poverty rates over 26% despite their critical contribution to the national Blue Economy roadmap.[52] Consequently, the Blue Economy functions as a vehicle for Internal Colonialism, extracting measured value from the periphery to fuel national targets while systematically failing to facilitate the prosperity of the sovereign rights-holders themselves. This technical mismatch reveals that the Blue Economy is designed for the industrial fleet rather than the traditional fishermen, turning a biological necessity into a legal violation.

The Erasure of Traditional Ecological Knowledge (TEK)

The Blue Economy regime commits an 'epistemic injustice' by systematically devaluing Traditional Ecological Knowledge (TEK) in favour of centralized, measured metrics. In a TWAIL framework, the post-colonial state often adopts a technocratic standard of civilisation. The state views the sea only through what it can measure, tonnage, quotas, and GDP percentages. By labelling the Measured Fishing (PIT) policy as the only scientific way to manage the sea, the state renders the *Sasi* system and *Petuanan Laut* invisible.[53] By refusing to recognise traditional monitoring as valid data, the state enforces a form of cognitive exclusion that shuts the coastal community out of governing their own waters.

Under GR No. 11/2023, sustainability is defined by industrial quotas managed by central sensors and administrative reports. There is no technical mechanism within the PIT framework to integrate the fluid, seasonal observations of *Masyarakat Hukum Adat*. While the state uses the term 'Social Inclusion,' it excludes the very knowledge system that has successfully managed the Banda and Arafura Seas for centuries. This

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[51] See generally Government Regulation (PP) No 11 of 2023 on Measured Fish Catch; see also Minister of Marine Affairs and Fisheries Regulation No 18 of 2014 on Fisheries Management Areas of the Republic of Indonesia. The migratory patterns of skipjack and yellowfin tuna in WPP 714 and 718 are governed by seasonal oceanographic shifts, which often conflict with the static administrative boundaries of the 'Measured Fishing' zones

[52] Statistics Indonesia (BPS), Poverty Profile in Indonesia March recognize labelling centralised 2024.

[53] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007) 17; James Thuo Gathii, 'The Agenda of Third World Association of International Lawyers' (2011) 15 ASIL Proc 421. Gathii emphasizes the importance of challenging the universal claims of Western technocratic knowledge and validating local, indigenous legal orders.

creates a participation gap where fishers are invited to meetings to be informed of the law, but their expertise in fish behaviour and habitat protection is never used to formulate the law.[54] By privileging technocratic data over traditional wisdom, the state ensures that the these communities are reduced to a passive stakeholder. This epistemic erasure is what allows the Trojan Horse to remain undiscovered. It makes the comercialisation of the ocean seem like an objective scientific necessity rather than a choice to marginalise a people's way of life.

The Constraints on Practice: Self-Determination and the Right to Development

The current maritime regime limits the ability of coastal communities to practice their Right to Self-Determination and their own development path. Self-determination is the right of a people to "freely pursue their economic and cultural development." For these communities, maintaining their traditional way of life is a choice protected under international law. However, when the state's growth-first model siphons resources toward the centre and limits local access to migratory stocks, it restricts the practical exercise of this right. It is not necessarily an overt abolition of the right, but a structural environment that makes the practice of customary law nearly impossible.

Indonesia ratified the ICCPR and ICESCR in 2005, including the safeguard that "in no case may a people be deprived of its own means of subsistence." While the current administration has achieved national GDP growth, this wealth is often not reflected in the infrastructure or resource security of the Eastern periphery. Protecting these practices is a legal obligation already integrated into the Indonesian framework. By allowing industrial growth to constrain customary access, the state is failing to facilitate the very rights it is sworn to protect, leaving these communities with a right they are no longer able to practice fully.

The imposition of fixed industrial quotas in WPP 718 and WPP 714 creates a structural environment that makes the practice of customary law nearly impossible. By prioritising business capacity over the fluid biological realities of tuna migration, the state deprives coastal communities of their primary means of subsistence. This technical enclosure constitutes a direct violation of the non-derogable protections established under Article 1(2) of the ICCPR and ICESCR.

Conclusion

The maritime landscape of Eastern Indonesia stands at a critical point where the endeavour of global sustainability meets the reality of industrial dispossession. This analysis confirms that the Blue Economy functions as a deceptive Trojan Horse; while

[54] Obiora Chinedu Okafor, 'The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North Entente' (1995) 7 African Journal of International and Comparative Law 865.

its outer shell projects a narrative of inclusive development, its interior contains technical regulations like Measured Fishing (PIT) that prioritise industrial growth over local stewardship. By dividing the Eastern Indonesia waters (Arafura and Banda Seas) into fixed industrial units, the Indonesian state has replaced ancestral ownership with a rigid, top-down industrial grid that prioritises high-capital industrial fleets over traditional communities. Ultimately, this regime represents a profound structural interference with the Right to Self-Determination, as it prioritises national GDP targets and business capacity over the non-derogable "means of subsistence" protected under Article 1(2) of the ICCPR. By breaching this legal "red line," the state has allowed the Trojan Horse to dismantle the very sovereignty it is treaty-bound to protect, and true ‘Blue Justice’ can only be realised by recognising coastal communities not as objects of administration, but as the stewards of their own maritime future.

Historical continuity and Indigenous access to the radio spectrum: Analysis of the case of the *Maya Kaqchikel Indigenous Community of Sumpango et al. v. Guatemala* (Luis Alfredo Alvarez Ságüil)

Abstract

Community radio stations are a manifestation of the cultural life of indigenous peoples in the dissemination of knowledge, practices and forms of social organization. However, their development has been restricted by legal and structural conditions that limit these peoples' access to the radio spectrum on equal terms. In this context, the Inter-American Court of Human Rights declared the international responsibility of the State of Guatemala in the case of the Maya Kaqchikel Indigenous Community of Sumpango et al. (2021), for the violation of the right of indigenous peoples to access the radio spectrum. However, the analysis carried out by the Court is mainly limited to the contemporary normative and factual context, without substantively integrating the historical background that structures this exclusion. In this sense, this paper offers a decolonial reading of the sentence, incorporating the historical continuity of the dispossession of indigenous peoples' property as an analytical framework. From this point of view, the position of the Court as an actor in tension, the colonial character of the legal order as a condition of access to the spectrum, and the limits of the decision are examined by analysing the case from without a historical context.

Introduction

Access to goods and resources regulated by the State is a field of dispute in territories that have been marked by misappropriation and exclusion. In Latin America, and particularly in Guatemala, these inequalities cannot be understood exclusively on the basis of contemporary conditions. The current reality is also determined by historical situations associated with colonialism, structural racism and the systematic dispossession of indigenous peoples. In this context, the law and institutions also have a role in legitimizing exclusion under the protection of the technical neutrality of legislation.

This paper analyses the case of the Kaqchikel Maya Indigenous Community of Sumpango et al. v. Guatemala, resolved in 2021 by the Inter-American Court of Human Rights, which declared the international responsibility of the State for the violation of the rights to freedom of expression, equality before the law, and participation in the cultural life of indigenous communities, based on the regulation of access to the radio spectrum to their community radio stations. The ruling is a relevant precedent in the recognition of the discriminatory effects generated by the formally egalitarian legal regime, but which, analysed under the reality of unequal social conditions, generates discrimination.

Based on this case, this paper argues that the exclusion of indigenous community radio stations cannot be explained solely by normative inequality; or a structural inequality generated by social conditions. On the contrary, it should be understood as a contemporary manifestation of the continuity of colonialism in the Guatemalan legal order. In particular, it is proposed to analyse access to the radio spectrum as an area in which dispossession materializes.

The objective of the work is twofold. First, to critically examine the regulation of the radio spectrum in Guatemala as a legal technology that reproduces a colonial logic of appropriation and exclusion, privileging capital and delegitimizing community forms of use of the good. Second, to analyse the structural limits of the Inter-American Court's reasoning, showing that, despite recognizing structural discrimination and ordering relevant corrective measures, its analysis remains anchored in a liberal paradigm that does not problematize the colonial foundations of the current legal order.

The Case of the Kaqchikel Maya Indigenous Community of Sumpango et al. v. Guatemala

In 2021, the Inter-American Court of Human Rights condemned the State of Guatemala for violating the rights to freedom of expression, equality before the law, and the right to participate in the cultural life of the Maya Kaqchikel de Sumpango, Achí de San Miguel Chicaj, Mam de Cajolá, and Mam de Todos Santos Cuchumatán peoples[1].

Facts of the Case

Indigenous peoples in Guatemala are in a situation of structural inequality due to widespread difficulties in accessing substantive rights such as education, health, social security and formal work, which is reflected in high rates of poverty, illiteracy and precarious living conditions. In addition, the cultural practices of indigenous peoples have been affected by the internal armed conflict that Guatemala suffered during the late twentieth century.

At present, the organization of community radio stations, on the one hand, has a function of communicating local information, and, in addition, "of transmitting, promoting and protecting indigenous languages and cultures, and local consumption",[2] which are financed and put into operation by the communities

[1] This section is based on: *Case of Indigenous Maya Kaqchikel Peoples of Sumpango and Others v Guatemala* (Merits, Reparations and Costs) Series C No 440 (Inter-American Court of Human Rights, 6 October 2021).
[2] ibid para 108.

themselves. In other words, in addition to their informative function, community radio stations are a way of preserving indigenous culture and forms of expression. This issue is even more relevant given that most community members are located in remote areas and communicate only in their mother tongue, with community radio being the only available and linguistically assimilable source of information.

However, access by community radio stations has been unequal and discriminatory. The legislation for the administration of broadcasting in Guatemala is governed by the General Telecommunications Law. Among other issues, the law contemplates the public auction as a procedure to access the radio spectrum in usufruct and establishes that any frequency in auction will be awarded "to the person who offers the highest price." In this sense, the legislation assumes a predominantly mercantilist position, which ends up favouring those with greater economic resources and has resulted in the formation of a "relative oligopoly"[3] in Guatemalan radiocommunication.

In this context, several indigenous community radio stations, unable to access broadcasting licenses under the existing legal framework, operated without formal authorization. In 2011, state authorities conducted raids on these stations, seizing transmission equipment and initiating criminal proceedings against their operators.

For the Court, this is problematic when analysing the situation as a whole: first, taking into consideration the situation of generalized poverty for indigenous peoples, who "in their vast majority, do not have the economic condition to cover the costs of the legal acquisition of the usufruct of a radio frequency"[4]; and, secondly, the indirect discrimination promoted by the legislation by establishing the greatest economic offer as the only criterion, creating an impediment or "*de facto discrimination*"[5] on the grounds that "it ignores the diversity of vulnerabilities that exist in a given society".[6]

Consequently, the Court established the violation of the right to equality before the law and freedom of expression of indigenous peoples, due to the way in which broadcasting is regulated in Guatemala and due to their particular situation of structural inequality. By considering the organization, administration and participation in community radio stations a form of cultural participation, it established the violation of the right to participate in cultural life. All this in relation to the obligation of States to guarantee the rights of citizens without discrimination and to adopt domestic legal provisions that allow the advancement of human rights.

[3] ibid para 144.
[4] ibid para 149.
[5] ibid para 146.
[6] ibid.

The Coloniality of the Legal Order and the Guatemalan Context

Latin America cannot be understood without its colonial history. Colonialism meant the reorganization of the lives of indigenous peoples at all levels. Part of that transformation was “the constitution of a new structure of control of labour and its resources and products”, justified under the idea of racial superiority of the colonizers.[7] The effects of the reorganization of life lasted throughout history. An example of this is the dispossession of indigenous territory as part of the colonization project in Guatemala. Castro and Lavinas point to the continuity of dispossession (and colonial power):[8]

> *“The landgrab of Maya territories initiated by Spanish colonizers never ceased; it evolved over time, perpetuated in times of war and peace by governments across the political spectrum. … The stealing of Maya lands is not a historical episode linked to the Spanish invasion but a defining structure of Guatemala’s modern state.”*[9]

In addition to the territory, dispossession has other forms of manifestation: “dispossession continues through extractive projects, tourism, job insecurity on farms, factories, private homes and in the undervaluation of everything produced by indigenous communities”.[10] Hence, it is claimed that, for more than five centuries, indigenous peoples have been "dispossessed" of their economy, work, territory, goods and resources.[11]

In this context, the legal order also plays a role in shaping the colonial order, which serves to explain the reality of the past, but continues to influence the present.

The colonial model of legal pluralism "developed in countries that were economically and politically dominated, being forced to accept the legal norms of the metropolises"[12]. In this model, there is a reorganization of social relations, territory and work according to a legal rationality based on Eurocentric domination[13]. As has been observed, this new colonial organization particularly affects indigenous peoples.

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[7] Anibal Quijano, ‘Coloniality of Power, Eurocentrism, and Latin America’ [2000] Nepantla: Views from the South 534.

[8] Juan Castro and Manuela Lavinas, ‘Stateness as Landgrab: A Political History of Maya Dispossession in Guatemala’ (2017) 69 American Quarterly 791 <https://doi.org/10.1353/aq.2017.0065>.

[9] Castro and Lavinas (n 7).

[10] Aura Cumes, 'The creation of life in times of permanent dispossession' in Aura Cumes and Kaypa' Tz'iken (eds), *Indigenous Peoples in the face of racism. 500 years of anti-colonial struggle in defense of our territories* (Cemijw 2024).

[11] Ibid.

[12] Antonio Carlos Wolkmer, ‘Pluralismo Jurídico: Nuevo Marco Emancipatorio En América Latina’ in Mauricio García and César Rodríguez (eds), Derecho y sociedad en América Latina: Un debate sobre los estudios jurídico críticos (1st ed, ILSA 2003) 250.

[13] Brian Z Tamanaha, ‘Postcolonial Legal Pluralism’ Legal Pluralism Explained (Oxford University PressNew York 2021). “Colonization conventionally refers to European political, economic, and legal

In the case of Guatemala, colonization did not end with independence from Spain. Although the declaration of independence meant the formal end of the colonial period[14]; That project only "guaranteed the continuity of the colonial order without a metropolis”[15] now in the hands of local elites, who maintained the inherited structures of exclusion, based on racism. At that time, "the State set itself up as the guardian of the large capitals accumulated by the multiple and systematic dispossession of indigenous peoples”[16].

This colonial order continued in the formation of the modern State, whose organization—including its legal organization—continues to be based on a logic of domination and exclusion, traversed by "racial social classification."”[17], or racism; a logic that can be traced and located to the present day in the form of "colonial legacies", which Lerussi and Sckmunck, quoting Mohanty and Alexander, define as a conceptual formula that is used to "invoke the imaginary of an inheritance and to map the continuities and discontinuities between contemporary practices and those inherited in the old state and capitalist formations”[18]

The logic of colonial power works in a similar way to a dividing line of differentiation, a "line of condemnation" with two zones:

> *“a zone of salvation where the world and its resources are perceived as being there “for our sake” (propter nos), and another that is populated by entities whose very existence is regarded as problematic and dangerous. Since the world is perceived to be best without these entities, ideally, they would disappear after their bodies are used to build civilization and to satisfy the needs of the civilized. In the worst case scenario, the condemned remain alive but only outside of the zone of civilization, or having limited access to it.”19*

As can be seen, control of labour, goods and resources is one of the fields of materialization of colonial logic. The historical dispossession of indigenous peoples is a fact that does not end in the colony, it continues to the present day and manifests itself in multiple ways. As for goods, their most obvious form is material appropriation,

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domination of large parts of the world from the sixteenth through the mid-twentieth centuries. […] legal domination involved instrumental use of law by the colonial state to enforce its rule and achieve its exploitative economic objectives”.

[14] Edelberto Torres-Rivas, ‘Colonia, Independencia, Estado Nacional: Guatemala y Las Paradojas Del Aniversario’ (2008) 7 Revista Electrónica de Estudios Latinoamericanos 49.

[15] Figueroa-Ibarra and Carlos, ‘Guatemala El Recurso Del Miedo’ (1990) 105 Nueva Sociedad 108.

[16] Aura Cumes (n 8).

[17] Anibal Quijano, ‘Coloniality of Power, Eurocentrism, and Latin America’ [2000] Nepantla: Views from the South 568.

[18] Romina Lerussi and Romina Sckmunck, ‘Coloniality of Law’ (2016) 8 Sortuz. Oñati Journal of Emergent Socio-legal Studies 70.

[19] Nelson Maldonado-Torres, ‘On the Coloniality of Human Rights’ *The Pluriverse of Human Rights: The Diversity of Struggles for Dignity: The Diversity of Struggles for Dignity* (Taylor and Francis Inc 2021) <https://doi.org/10.4000/rccs.6793>.

but underlying the system that legitimizes it: in any case, the legal system determines who legitimately has access (zone of civilization) to goods, to which of them and under what criteria.

From this historical and structural perspective, the analysis of the case of the Kaqchikel Maya Indigenous Community of Sumpango et al. v. Guatemala allows us to understand the regulation of access to the radio spectrum as a contemporary manifestation of the historical continuity of colonialism, which is manifested in its legal regime.

In this sense, before analysing the judgment, it is important to distinguish the concept of "coloniality" from postcolonial approaches. While postcolonial theory tends to focus on the formal end of colonial rule and proposes corrective measures within the existing legal and institutional framework—such as the expansion of rights or the application of the principle of substantive equality—the decolonial approach understands coloniality as a persistent power structure that continues to organize social relations. economic and legal. Under this understanding, the problem goes beyond the result of inequality in an apparently neutral system. The problem is identified in the very design of the legal order. This distinction is particularly relevant to the analysis of the case, as the Inter-American Court approaches the issue through doctrines such as equality and non-discrimination, without necessarily questioning the logic underlying the spectrum allocation regime as part of a broader matrix of colonial power.

Structural Continuity and Limitations of Judicial Reasoning in Indigenous Access to the Spectrum

In the case of the Maya Kaqchikel Indigenous Community of Sumpango et al. v. Guatemala, the Inter-American Court of Human Rights analyses the regulation of access to the radio spectrum. The Court's criterion is that there is "*de facto discrimination*"[20], which takes place fundamentally due to the concurrence of a structural inequality of indigenous peoples and the privilege granted by the regulation in broadcasting to grant the use of the radio spectrum to the one that offers the greatest offer.

In practice, indigenous peoples are excluded because: "the majority of indigenous communities in Guatemala, because of their situation of poverty, social exclusion and discrimination, do not have the economic and technical conditions that would allow them to compete on an equal footing with applicants for commercial radio stations, whom the [law] indirectly favours."[21]

To arrive at the Court's conclusions, a review of the facts is carried out, in which it presents structural inequality through various statistical data on the current situation

[20] Case of Indigenous Maya Kaqchikel Peoples of Sumpango and Others v Guatemala para 146.
[21] ibid para 147.

in Guatemala[22]. On the other hand, it recognizes the persistent discrimination and racism against indigenous peoples[23].

In addition, it dedicates a paragraph to pointing out the Internal Armed Conflict in Guatemala as a relevant contextual element, this conflict being a civil war of more than thirty-six years. During this war, a genocidal operation was even deployed against the indigenous population, a situation that has been recognized by the domestic criminal courts. Regarding this conflict, the Court mentions it as a historical event that "had a significant cultural impact for the Mayan indigenous peoples in the country" and adds that "the human rights violations that occurred during the internal armed conflict in Guatemala also meant the loss of the cultural and religious values and practices of the Mayan peoples, as well as its social, economic and political institutions" [24].

The Inter-American Court as an Actor in Tension

In light of the case, the Inter-American Court is precise in pointing out the violation of human rights due to inequality in access to the radio spectrum. The reasoning is based on the liberal principles of formal equality and substantive equality. To evidence, he makes use of contextual analysis. In practice, it is clear that the current form of broadcasting regulation puts community radio stations at a disadvantage in the face of capital and business conglomerates. In fact, it is recognized that there is a "relative oligopoly"[25] in Guatemalan radio communication. Consequently, it orders the State to take several measures to restore the rights violated, such as the reservation of part of the radio spectrum to community radio stations or the introduction of legislative reforms with prior consultation with indigenous peoples.

In this sense, the Court fulfils its contentious function[26], that is, to guarantee rights protected in international treaties.

In essence, the entire scaffolding of reasoning occurs within the current framework of legality, both local and international. Particularly in the case of local legislation, the judgment does not question the historical bases of the current legislation, which potentially maintains a colonial logic. Although it implicitly recognizes aspects such as discrimination, racism, inequality and refers to the internal armed conflict – a historical period illustrative of the worst colonial and genocidal violence – it manages them as apparently isolated elements, which have no correlation whatsoever.

However, on closer analysis, it can even be concluded that the current legislation on broadcasting reproduces the continuity of dispossession, under the protection of the State as guardian of the interests of capital.

[22] ibid paras 35-36.
[23] ibid para 38.
[24] ibid para 38.
[25] ibid para 144.
[26] American Convention on Human Rights (1969) art 63.

Coloniality in the Legal Regulation of Access to the Radio Spectrum

In this sense, although the ruling recognizes the structural exclusion faced by indigenous communities and orders corrective measures, it does not problematize the regulation of the radio spectrum as a legal technology of colonial origin. It is precisely at this point that it is necessary to introduce the analysis of coloniality in the legal regulation of access to the radio spectrum.

The State, from a universalizing and abstract vision of law, assumes the task of regulating various objects and resources. For this operation, he introduces them into a legal order that is presented as neutral and technical. In this process, the State is constituted as the only legitimate subject of control over the property, displacing any other previous or parallel form of relationship with it. The good is abstracted from its historicity and its social function – or these are simply ignored – and is translated into legal categories that appear neutral, but that privilege a liberal-mercantile rationality.

In other words, the State organizes which resources are accessible, who can access them, and under what criteria. On the abstract level, access to the radio spectrum occurs in formally egalitarian terms; However, in the field of facts, the legislation structurally favors capital, granting access "to the person who offers the highest price"[27]. In this way, capital legally accesses the spectrum within the "zone of civilization," while drawing a "line of condemnation."”[28], that rejects indigenous peoples and stigmatizes them:

> *"The largest media have been presented predominantly in non-indigenous languages, "from a non-indigenous worldview and, [...] have tended to focus mainly on non-indigenous issues." The media has also promoted the assimilation and use of negative stereotypes and stigmatizing representations against indigenous peoples"*[29]

For indigenous peoples, access to the spectrum becomes structurally unfeasible and materially impossible, so they are forced to use frequencies without state authorization. Consequently, these accesses are understood as illegitimate, and give rise to persecution and criminalization, even violating criminal principles, as the Court recognizes in the judgment itself. The Court describes it as follows:

> *“Guatemala unlawfully restricted the freedom of expression of these peoples by raiding their community radio stations, confiscating equipment and criminally prosecuting the operators of the radio stations. This is because it was the State itself that, by failing to legally recognize community radio stations and not creating specific means*

[27] Ley General de Telecomunicaciones de Guatemala (Decreto 94-96 del Congreso de la República) (1996) art. 62.
[28] Nelson Maldonado-Torres (n 18).
[29] Case of Indigenous Maya Kaqchikel Peoples of Sumpango and Others v Guatemala para 151.

for the effective access of indigenous peoples to the radio spectrum, indirectly generated the exclusion of these peoples, who were forced to operate their community radio stations without authorization because they could not compete on equal terms for the acquisition of frequencies.” [30]

Goods and resources constitute the field of material appropriation, while the legal system – heir to the "colonial legacy", under a colonial and racialized rationality – operates as the apparatus that legitimizes this appropriation. The State regulates access to goods and defines who can do so in legally recognizable terms; the State indirectly decides who is deprived of a voice within the legal order.

The Absence of Historical Context in Judicial Reasoning

It can be observed that, on several occasions, the Court refers to several aspects that determine the content of the case: racism, exclusion, discrimination, inequality, vulnerability. However, there is an absence of substantial historical content that adds a relevant contextual framework of interpretation; and, that makes possible the symbolic reparation of historical discrimination against indigenous peoples. Despite the absence of historical content, the Court noted that:

> *"In the present case, the historical discrimination to which indigenous peoples are subjected in Guatemala was demonstrated.”* [31]

However, historical discrimination interprets it as a consequence of the contemporary situation of indigenous peoples:

> *"Indeed, the persistence, over the years, of high rates of poverty and extreme poverty of these peoples, their limited access to the formal labour market and social security, the high illiteracy rates of their members, their precarious access to health, telephone and electricity services, as well as the constant discriminatory manifestations against indigenous peoples in the mass media, indicate that indigenous peoples are subjected to a situation of structural discrimination”* [32]

Therefore, as mentioned, the Court fulfils its contentious function and is able to point out the situation of discrimination in contemporary terms and the need for the restitution of the rights of community radio stations and indigenous peoples. It even offers possible formulas for the restitution of rights considered violated. However, its reasoning does not go so far as to question the colonial foundations that structure the regulation of access to the radio spectrum.

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[30] ibid para 201.
[31] ibid para 139.
[32] ibid.

Historical discrimination is recognized, but it is not incorporated as a constitutive element of the current legal order, but as an antecedent that explains the current situation of poverty and exclusion. In this way, the colonial past operates as a diffuse context that does not directly affect the legal assessment of the regime of access to goods and resources.

However, this limitation is not considered an omission by the Court. It is an inherent restriction on reasoning under international human rights law, possibly because of the evidentiary complexity it would entail[33]. In this sense, historical analysis is subordinated to the contentious function and loses its critical potential to question the legal structures that make exclusion possible.

Again, this is the manifestation of the tensions that determine the Court's activity. On the one hand, it recognizes structural discrimination and proposes corrective measures; On the other hand, his own reasoning remains anchored in a liberal paradigm that does not problematize the coloniality of the legal order and its role in the continuity of dispossession. The result is a legal response with contrasts: on the one hand, it is relevant in terms of protection of rights; On the other hand, it fails to dismantle the structural colonial apparatus that organizes unequal access to goods and resources in the Guatemalan context.

Conclusion

The regulation of access to the radio spectrum in Guatemala operates as a legal structure that reproduces historical patterns of exclusion. The legislative form allows for a neutral appearance. However, the legal organization of the spectrum, based on market privilege and centralized administration, ends up favouring economic interests. Consequently, it systematically excludes community forms of administration and management of property. From a historical perspective, it can be deduced that this exclusion is not contingent or circumstantial. The current legal organization of the radio spectrum responds to a legal rationality inherited from a colonial legacy that defines who legitimately accesses resources and under what conditions. This is even more serious, given that, as has been pointed out, the media have promoted negative stereotypes and stigmatizing representations against indigenous peoples and have directly excluded the indigenous vision of life as part of their content.

The judgment under analysis recognizes the existence of structural discrimination and establishes measures aimed at correcting the situation of exclusion in access to the radio spectrum of community radio stations. However, it should be noted that its reasoning remains within categories of the liberal paradigm of law, such as formal and substantive equality, without problematizing the normative structure that produces

[33] Vid Álvaro Paúl, 'The Description of Historical, Social and Political Contexts in the Decisions of the Inter-American Court' (2020) 13 ACDI Anuario Colombiano de Derecho Internacional <https://doi.org/10.12804/revistas.urosario.edu.co/acdi/a.7647>.

inequality. Consequently, the judicial analysis concentrates on the contemporary effects of exclusion, but does not address the historical and legal foundations that organize access to the spectrum.

This limitation is considered to be related to the methodology of international judicial reasoning itself, which tends to be limited to stricter time frames. This approach carried out by the Court is functional for the determination of responsibility and the restitution of rights in the specific case. However, it is limited in questioning the function of law as a technology of dispossession and reproduction of colonialism.

From structural exclusion to personal fault: Racial borders and state responsibility in *N.D. and N.T. v Spain* (Noa Campello Carballido)

Abstract

This paper critically examines the Grand Chamber judgment in N.D. and N.T. v. Spain, arguing that the Court's reformulation of the 'own culpable conduct' doctrine fundamentally reshapes the protection afforded by Article 4 of Protocol No. 4 of the European Convention on Human Rights. By conditioning the prohibition of collective expulsion on the applicants' conduct and introducing the "cogent reasons" test, the Court limits protection to situations where barriers to lawful entry are directly attributable to the respondent State.

The paper contends that this narrow conception of attribution obscures the structural conditions that make access to 'genuine and effective' legal pathways largely illusory for many sub-Saharan migrants. Drawing on E. Tendayi Achiume's theory of 'migration as decolonisation' and 'racial borders', situated within Critical Migration Studies and TWAIL scholarship, it reconceptualises European border control as part of a racialised global mobility regime shaped by colonial history and structural inequality. From this perspective, the Court's individualisation of responsibility transforms systemic exclusion into personal fault.

A structurally informed understanding of state responsibility would instead recognise that the conditions preventing lawful entry are embedded in the very architecture of European border governance. The judgment thus reveals a deeper tension within human rights adjudication: whether fundamental guarantees operate as unconditional limits on state power, or whether they may be curtailed when individuals fail to comply with systems designed to exclude them.

The Crossing of the Melilla Fence as a Justification for Migrants' Reduced Rights

This case arises in the context of the crossing of the fences that separate Morocco from Melilla, a Spanish enclave on the North Coast of Africa surrounded by Moroccan territory. It constitutes an external border of the Schengen Area, and as such, provides access to the European Union, being subjected to what the Court calls 'intense migratory pressure'.

Spain built a physical barrier along the 13-kilometre land border between Melilla and Morocco, which since the year 2014 has consisted of three parallel fences to prevent irregular entry. The outer fence is approximately six metres high and slightly concave; on the opposite side of a patrol road stands an inner fence of similar height. Between them lies an additional security structure. Much of the fencing is equipped with anti-climbing devices, surveillance cameras and motion sensors. Four authorised land border crossing points are located along this permitter, where the Spanish Guardia Civil patrols both the land border and adjacent coastal areas to prevent irregular entry. Attempts to breach the fence are frequently organised in large groups, often involving hundreds of migrants, mainly from sub-Saharan Africa, and typically taking place at night.

This case concerns a Malian national and an Ivorian national who attempted to cross the fence on 13 of August of 2014, when approximately 600 migrants sought to enter Melilla. The applicants were apprehended by members of the Guardia Civil and immediately returned to Morocco, without any formal identification, individual examination of circumstances or access to interpreters or legal assistance.[1]

The applicants alleged violations of Article 3 of the ECtHR, article 4 of Protocol 4, which Spain ratified in 2009[2] (prohibition of collective expulsion of aliens) and Article 13 in conjunction with article 4 of Protocol No. 4. The complaint under article 3, concerning inhuman or degrading treatment, was dismissed. However, the Court proceeded to examine the alleged violation of Article 4 of Protocol No. 4 and the related complaint under Article 13.

The judgement is of particular doctrinal importance because it was the first before the European Court of Human Rights (ECtHR) addressing collective expulsions at a land border, as earlier jurisprudence concerning pushbacks had arisen in the maritime context.[3] In N.D. and N.T. v. Spain, the Court reformulated and expanded the doctrine of 'own culpable conduct'. The court is of the view that the principle of own conduct must apply in the cases in which people 'deliberately take advantage' of the high number of persons crossing the border in an unauthorised manner. This is with the purpose of creating a 'clearly disruptive situation' which is difficult to control and endangers public safety. For the first time, its applicability was expressly linked to three elements: the unlawful nature of the applicants' entry, the availability of genuine and effective legal avenues of entry, and the absence of cogent reasons preventing

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[1] N.D. and N.T. v. Spain App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 15

[2] Instrumento de Ratificación del Protocolo nº 4 al Convenio para la Protección de los Derechos Humanos y de las Libertades Fundamentales, hecho en Estrasburgo el 16 de septiembre de 1963, BOE nº 138, 10 junio 2009

[3] Sharifi and Others v Italy and Greece 16643/09 (ECtHR, 21 October 2014); Khlaifia and Others v Italy 16483/12 (ECtHR, 1 September 2015). The latter was subsequently overturned by the Grand Chamber but, in principle, only for a difference 'of a rather factual nature', as Spijkerboer has put it in T Spijkerboer, 'Coloniality and Recent European Migration Case Law', in Migrants' Rights, Populism and Legal Resilience at the European Level, V Stoyanova and S Smet (eds), (Cambridge University Press 2022) 117, 128

migrants to make use of them, for which the respondent state must be considered liable.[4]

The procedural history of the case further underscores its significance. In its 2017 Chamber judgement, the Court found that Spain had violated Article 4 of Protocol No. 4, holding that the applicants had been subjected to a collective expulsion without an individualized assessment of their circumstances. However, upon referral to the Grand Chamber, the Court reversed this finding and concluded that there had been no violation. Notably, the Grand Chamber's judgement was adopted unanimously. This reversal, combined with unanimity, is particularly striking given that the underlying facts remained essentially unchanged. The Grand Chamber introduced a decisive doctrinal shift through its reformulation of the 'own culpable conduct' doctrine.[5]

The judgement does therefore not only affect border control practices but raises deeper theoretical questions concerning the conditionality of rights, the allocation of responsibility between individuals and the State, and the extent to which access to fundamental guarantees may depend on prior lawful conduct.

What Achiume's Framework Has to Offer

Within Critical Migration Studies and Third World Approaches to International Law (TWAIL), E. Tendayi Achiume advances one of the most far-reaching reconceptualization of migration in contemporary international legal theory. Her account of migration as decolonisation challenges the orthodox understanding of state sovereignty as entailing a near-absolute right to exclude non-nationals, subject only to limited exceptions such as refugee protection and non-refoulement.[6] By contrast, Achiume situates contemporary migration flows within the enduring legacy of European colonial expansion, economic extraction and the political subordination of the Global South.

Her theory of migration as decolonisation reframes mobility not as a discretionary privilege granted by sovereign states, but as a justice-based claim grounded in historical responsibility, structural interdependence and the ongoing benefits that former colonial powers derive from global inequality.[7] In this respect, Achiume's work builds on TWAIL critiques of international law's colonial foundations, while extending them into the domain of migration governance, an area traditionally separated from redistributive or reparative reasoning.

Although N.D .and N.T. v. Spain has generated extensive commentary, particularly in the light of subsequent jurisprudence further narrowing protections for irregular

[4] N.D. and N.T. v. Spain para 201
[5] N.D. and N.T. v. Spain paras 165, 173
[6] Hannah Arendt, The Origins of Totalitarianism (A Harvest Book, 1951) 267-278
[7] E Tendayi Achiume, 'Migration as Decolonization' (2019) 71(6) Stanford Law Review 1509, 1521–1522

migrants, most critiques focus on the doctrinal implications of conditioning article 4 of Protocol No. 4 on the applicants' conduct.[8] Far less attention has been paid to the deeper structural premise underlying the Court's reasoning: the assumption that the legal pathways to entry are meaningfully accessible, and the belief that as long as the reason for them not to be is not in the respondent state's liability, the State does not violate the collective expulsion prohibition.

Achiume's theory of racial borders destabilises this assumption, as she argues that contemporary border regimes are embedded in a global racial order that systematically restricts mobility from the Global South to the Global North. Within this framework, categories such as the economic migrant cannot be understood outside the political and economic conditions produced by colonial and neo-colonial relations. What international law labels economic migration frequently reflects structural dispossession and global inequality rather than purely individual choice.

Applied to the present case, this perspective shifts the analytical focus from the applicants' conduct to the actual feasibility of lawful entry. The Court's reasoning treats the availability of border procedures as a formal matter and illustrates how despite of the right to migrate remaining formally neutral, it is in practice structured in ways that disproportionately exclude racialised populations. From this standpoint, the Court's assessment appears superficial, because it overlooks the racialised architecture of mobility governance that renders such pathways effectively inaccessible. The judgement thus reproduces a formal conception of equality while disregarding the structural inequalities that condition who can move lawfully and who cannot.[9]

For the purpose of this analysis, it is necessary to read Achiume's theories of 'migration as decolonisation' and 'racial borders' together. The former provides a macro-structural framework that exposes the historical and economic dimensions obscured by the Court's positivist reasoning. The latter offers a more immediate account of how border enforcement practices concretely reproduce racial hierarchies in Global South-Global North migration. These are not competing frameworks, but rather different analytical vantage points on the same structural phenomenon. Combined, they illustrate the limits of the Court's reasoning in N.D. and N.T., revealing how its formalism obscures the deeper inequalities embedded within contemporary migration governance. Because the reasoning of the Court is somewhat limited to the positivist system in Spain, the racial borders explanation is extremely helpful in focusing in a more concrete way on a specific issue within the Global South-Global North migration.

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[8] Alex Geraki-Trimi and Eleni Karageorgiou, 'Tales of Agency and Exclusion: Deconstructing the Own Culpable Conduct' requirement in the ECtHR Migration-Related Jurisprudence' (2025) 36 (3), European Journal of International Law, 707, 712

[9] Achiume (n 7) 1513

The Own Culpable Conduct Two-Step Test through Achiume's Perspective

One of the central concepts for applying Achiume's theoretical framework to this case is the notion of nation-state. It is within this doctrinal framework that states derive their authority to regulate migration, including the power to adopt migration policies, enact relevant legislation, and order expulsions.[10] In adjudicating this case, the ECtHR is not merely resolving an individual dispute; it is also delineating the scope and limits of state sovereignty. In doing so, the Court implicitly defines how far the prerogatives of the nation-state extend and where they are constrained by international human rights obligations.

To begin with, this analysis approaches the case through Achiume's theoretical lens by focusing on the doctrinal development and justification of the 'own culpable conduct' exception. Although this doctrine has already generated extensive commentary[11], this section seeks to move beyond the doctrinal debate and instead analyse how the Court's reasoning may reproduce what Achiume conceptualises as racialised border practices. In this sense, the two-part test to determine the applicability of the exception can be read as reflecting a denial of colonial dynamics that sustain neo-colonial relations.

The first requirement of this said test is that the State must have provided 'genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border'.[12] The Court observed that Spanish law afforded the applicants several possible means of seeking admission to the national territory,[13] and it further emphasised that the applicants 'had in no way demonstrated that they were incapable of using the numerous legal procedures available' in order to obtain permission to cross the border into Spanish territory.[14] Using this reasoning, the Court engaged with the Government's argument that the applicants had engaged in culpable conduct by deliberately circumventing existing legal entry procedures.

In assessing the material possibilities the applicants had, the Court placed significant emphasis on protection and vulnerability, suggesting that only those who could demonstrate particular vulnerability or eligibility for asylum would warrant protection against expulsion. This reasoning aligns with what Professor Eleni Karageorgiou has identified as the Court's restrictive focus on formal access to procedures,[15] as well as with Achiume's account of 'racial borders', whereby legal frameworks formally proclaim openness while structurally excluding certain racialised subjects.[16] It appears

[10] Hannah Arendt (n 6) 267-283
[11] Geraki-Trimi and Karageorgiou (n 8), 713
[12] N.D. and N.T. v. Spain para 209
[13] Ibid, para 212
[14] Ibid, Paras 204
[15] Geraki-Trimi and Karageorgiou (n 8)
[16] E. Tendayi Achiume, Racial Borders (2022) 110 Geo LJ 445, 449-450

that in its reasoning, the Court incurs in what Debra Thompson refers to as racial aphasia.[17]

From Achiume's perspective, the analysis cannot remain at the level of formal legality. Rather, it requires a substantive evaluation of whether the purportedly 'numerous legal procedures' were genuinely accessible in practice, taking into account the structural, geopolitical and racialised constraints shaping mobility. The Court's reliance on the applicants' failure to demonstrate their inability to use these procedures is particularly problematic in this regard. It effectively shifts the burden of proof onto individuals who are already subject to restrictive and discriminatory migration regimes, including those imposed through European Union and Schengen border governance. Such an approach risks obscuring the broader structural conditions that render legal access illusory for many migrants, thereby reinforcing the very hierarchies that Achiume's theory seeks to expose.[18]

One of the arguments relied upon by the Court to conclude that the first requirement of the 'own culpable conduct' doctrine was satisfied is the assuring that the increase in asylum applications during the second half of 2014, which rose from around 40 in the first semester to 400 hundred in the second, was attributable to the worsening situation in Syria, noting that the vast majority of applicants were Syrian nationals.[19]

Yet this reasoning leaves unaddressed the crucial question of whether sub-Saharan migrants were, in practice, able to access the asylum procedure at the Beni Enzar border crossing. The absence of a comparable increase in asylum applications from sub-Saharan nationals after 1 September 2014 cannot be taken as evidence that genuine and effective access existed for them earlier in the year. On the contrary, it may equally indicate the persistence of structural and racialised barriers that rendered the procedure practically inaccessible. Although statistics alone cannot conclusively establish that the State failed to provide effective access, their selective interpretation by the Court risks reinforcing a narrative of formal availability that masks deeper patterns of exclusion.

As for the second requirement, concerning the Court's application of the 'cogent reasons' test, the Court concluded that the test was not satisfied because Spain bore no responsibility for the alleged impossibility or difficulty faced by the applicants in accessing the asylum procedure at the border. Since the obstacles were not attributable to the Spanish authorities, the Court found that no concurring reasons existed that would preclude the application of the 'own culpable conduct' exception.

For instance, in her report as Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Achiume highlights how

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[17] Debra Thompson, Through, Against, and Beyond the Racial State: The Transnational Stratum of Race (Cambridge University Press 2016)
[18] N.D. and N.T. v. Spain para 205
[19] Ibid, para 215

the European externalisation policies have contributed to detection methods and bordering practices that rely heavily on embodied race to border effectively.[20] She explains that the limited presence of black African migrants and refugees in northern Morocco, particularly in areas proximate to the Schengen border, is not incidental. Rather, it is linked to intensive immigration enforcement operations that rely on racial profiling to identify individuals presumed to intend a migratory path to Europe, irrespective of their status migration status within Morocco. The report further documents how Black Africans have been subjected to internal enforcement measures, including, in some instances, forced transfers to the southern regions of the country.[21]

Against this background, it becomes difficult to maintain that Spain bears no responsibility for the structural conditions that may have impeded access to asylum procedures at the border. Even if Spanish authorities did not directly carry out these enforcement actions, which remains contested, Achiume's analysis suggests that European pressure and cooperation frameworks play a significant role in shaping Morocco's migration control practices. Spain's bilateral agreements with Morocco since the 1990s, situated within broader European Union externalisation strategies, form part of a system designed to contain migration before it reaches European territory. To treat these enforcement practices as entirely external to Spain's sphere of responsibility is therefore to adopt an unduly formalistic view of causation.

Furthermore, Achiume signals in her report how the prohibition of racial discrimination applies as well in the context of deportations or expulsions of non-citizens, as the Committee on the Elimination of Racial Discrimination (CERD) has addressed racial discrimination in the context of deportations and expulsions in its general recommendations, jurisprudence and concluding observations. In its general recommendation No. 30, the Committee lists concrete measures that States should adopt in this area. It calls on States to ensure that: "(a) domestic legislation concerning deportations or other forms of removal do not discriminate, in purpose or effect, among non-citizens on the basis of race, colour, national or ethnic origin; (b) all non- citizens have equal access to effective remedies".[22]

Even if the previous two arguments were not considered, and there was no evidence whatsoever of how Spain is directly responsible for the existence of 'cogent reasons' for which these applicants, and African migrants in general, cannot access the genuine and effective legal remedies that are mentioned by the Court, it would still not be adequate, when applying Achiume's theory of racial borders, to conclude that such test has been passed by the respondent state, because of the wider understanding

[20] UN Human Rights Council, 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume' (25 April 2018) A/HRC/38/52

[21] Achiume (n 16) 485

[22] Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism (n 15) paras 19- 21

that needs to be done on responsibility, which unfolds in two ways: 1) it is not limited to the respondent state to be the culpable of the existing cogent reasons that do not allow the migrants to access the legal migration pathways ; 2) even if we focus on the respondent's state responsibility, negating Spain's direct implications, Achiume's approach requires a broader understanding of responsibility, which takes into account historical legacies, structural inequalities, and the transnational dynamics of migration governance.[23]

From this perspective, the Court's conclusion that there were no cogent reasons capable of precluding the application of the 'own culpable conduct' exception rests on a denial of the broader structural and racialised context in which the applicants' actions took place. By isolating Spain's responsibility from the transnational governance framework in which it actively participates, the judgment risks perpetuating the racialised effects of contemporary migration control. In particular, it reinforces a system in which Black African migrants, often categorised as 'economic migrants' and thereby excluded from meaningful mobility channels, are structurally constrained in their ability to access lawful pathways to protection.

It is precisely at this point that E. Tendayi Achiume's theories of 'racial borders' and 'migration as decolonisation' become analytically transformative. The author argues that contemporary migration governance cannot be understood apart from the colonial structures that generated global economic hierarchies and patterns of political subordination, and 'Third World sovereignty was manufactured by the colonial world to serve its own interests'.[24] Borders between Global North and Global South do not merely regulate movement; they preserve a racialised global order rooted in empire. Under this framework, mobility restrictions imposed by former colonial powers operate within, and perpetuate, historical systems of extraction and dependency.[25]

Spain's historical relationship with northern Morocco is particularly relevant in this respect, as the region bordering Melilla was a Spanish Protectorate until 1956.[26] The contemporary border regime at Melilla operates in a space shaped by Spain's own colonial administration and its long term political and economic consequences. Since imperialist relations have continued to render this part from a decolonial perspective,[27] the structural conditions that drive migration and constrain lawful mobility cannot be treated as external to Spain's sphere of responsibility.

For all of the above, to absolve Spain of responsibility in this context is not a neutral legal move; it contributes to sustaining the racialised architecture of border control that Achiume's theory seeks to expose.

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[23] Achiume (n 16) 464-467
[24] Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge University Press 2005) 215
[25] Achiume (n 7) 1521–1522
[26] Convenio fijando la respectiva situación de España y Francia en Marruecos (firmado el 27 de noviembre de 1912) Gaceta de Madrid no 335, 1215
[27] Anghie (n 24)

Rewriting State Responsibility through Colonial Understanding

Achiume's framework compels the conclusion that cogent reasons existed which effectively prevented the applicants from accessing the allegedly available legal pathways. Those pathways cannot be characterised as genuine or accessible within a system structured by racialised border governance and neo-colonial power asymmetries. Accordingly, the expulsions amounted to a violation of Article 4 of Protocol No. 4.

That finding necessarily entails a violation of Article 13 of the Convention. As a procedural guarantee intrinsically linked to the protection of substantive rights, Article 13 requires the availability of an effective remedy where an arguable claim of collective expulsion arises. Once the breach of Article 4 of Protocol No. 4 is established, the absence of a remedy capable of preventing or redressing that violation inevitably results in a concurrent violation of Article 13.

An interpretation of this nature by the ECtHR, traditionally viewed as a conservative regional body, would be unprecedented. By integrating historical and economic contexts and acknowledging enduring neo-colonial relations, the Court would establish a new pathway for substantive inequality claims, particularly concerning migration. A primary consequence could be the scrutiny of Spain's 'facially neutral' migration laws. Current domestic jurisprudence treats unauthorized entry as an aggravating factor in expulsion proceedings, which in practice creates a discriminatory effect: African migrants, restricted by "racialized borders" and visa requirements, are disproportionately subjected to expulsion in comparison to Latin American migrants, which can enter via air without visas, only becoming undocumented later through overstaying. If the ECtHR were to recognize these racialized barriers, it would provide the necessary legal leverage for the Spanish Supreme Court to acknowledge that nationality-based distinctions in expulsion processes often function as a proxy for racial discrimination.

Conclusion

This analysis demonstrates that the Court's reliance on the 'own culpable conduct' doctrine is incompatible with Achiume's understanding of migration governance as a continuation of racialised and neo-colonial border control. The doctrine itself should be rejected, as it individualises responsibility and constructs migrant 'agency' in abstraction from the structural constraints produced by racial borders. From the perspective of migration as decolonisation, the irregular crossing is not the result of free and culpable choice, but rather the foreseeable outcome of a system that systematically denies racialised migrants' meaningful access to mobility.

However, even if one were to accept the Court's doctrinal framework for the sake of argument, the application of the 'own culpable conduct' test in this case remains deeply flawed. When examined through Achiume's theory, Spain cannot be understood as having provided genuine and effective access to safe pathways. The historical and ongoing power asymmetries embedded in the Spain-Morocco relationship, shaped by colonial domination and its contemporary manifestations, directly inform the operation of border control mechanisms, and these dynamics undermine the assumption that migrants had realistic alternatives to the collective attempt to cross.

Moreover, the compelling reasons for not resorting to these alleged safe and legal pathways cannot be overlooked. First, Spain and Morocco maintain a particularly close and institutionalised relationship in matters of migration control, structured through bilateral agreements and the European Union's externalisation policy. This policy primarily involves the allocation of financial resources to Moroccan authorities to strengthen border enforcement, a practice that, as previously discussed, does not consistently comply with international human rights standards.

Second, as argued by E. Tendayi Achiume, the historical and colonial relationship between Spain and Morocco gives rise to enduring responsibilities that have yet to be addressed through meaningful reparation or structural remedies. From this perspective, Spain's failure to confront and repair the legacies of colonial domination reinforces the normative basis for advancing claims grounded in historical injustice.
In this sense, incorporating Achiume's framework does more than critique the outcome of the case; it exposes the structural limitations of the Court's reasoning and reveals how international human rights adjudication can reproduce the very hierarchies it purports to regulate.

Beyond poverty: Racialized vulnerability and structural discrimination in *Hacienda Brasil Verde* (Gabriela Menezes Zacareli)

Abstract

The judgment in *Hacienda Brasil Verde Workers v. Brazil* constitutes a landmark decision of the Inter-American Court of Human Rights concerning human trafficking for the purpose of slavery and its structural discriminatory roots. The Court recognized that the victims' extreme socioeconomic vulnerability exposed them to slave-like conditions, linking poverty and social exclusion to the State's duty to adopt preventive public policies.

However, the Court's discrimination analysis remained confined to the ground of poverty and did not explicitly address the racialized dimension of contemporary slavery and human trafficking in Brazil. Most victims subjected to these practices are Afro-descendant men, migrants, coming from the poorest regions of the country, with a low education level, reflecting the enduring legacy of colonial slavery and racial hierarchy.

This article argues that an intersectional approach—integrating ethnicity, migration condition, origin, and economic status as mutually constitutive grounds of discrimination—would have strengthened the Court's reasoning and deepened its assessment of Brazil's structural obligations. It further explores how the case diverges from the Court's more recent jurisprudence, which reflects a growing tendency within the Inter-American system to address poverty through an intersectional lens.

Introduction

Brazil's history is tainted with slavery as the roots of the work in the so-called "civilized" society designed by colonization. Slavery was one of the bases of Brazilian society from the early sixteenth century until 1888, when the country received millions of enslaved Africans.[1]

With the formal abolition of slavery in Brazil, when the *Lei Áurea* ("Golden Law") entered into force on 13 May 1888, the former slaves were relegated to a life of misery and exclusion. The absence of post-abolition integration policies had consequences that remain to this day, as social inequality in Brazil is characterized by racialized

[1] According to the Trans-Atlantic Slave Trade Database, approximately 4,864,000 enslaved Africans were disembarked in Brazil between 1501 and 1866. Slave Voyages, 'Estimates – Trans-Atlantic Slave Trade Database' (2023) <https://www.slavevoyages.org/voyage/database#estimates> accessed 15 February 2026.

poverty and marginalization of Afro-descendant people, including those classified as *pretos* ("blacks") and *pardos* ("browns") under Brazilian census categories[2].

Today, the Brazilian law criminalizes "reducing someone to a condition analogous to that of a slave", under Article 149 of the Criminal Code[3]. Human trafficking for slavery or slave-like labor is also a crime, as stated in Article 149-A of the same law[4].

The Special Rapporteur on contemporary forms of slavery, in his end-of-mission statement following the official visit to Brazil in 2025, informed that "Brazil has strong legal and policy frameworks to address contemporary forms of slavery"[5]. He also acknowledged existing institutional efforts, joining several public authorities and civil society associations in the mission against modern slavery[6].

Unfortunately, though, these initiatives have been failing in preventing Afro-descendant people from falling into the traps of slavery and other similar precarious work conditions, as official data shows. Brazil's 2025 enforcement report on contemporary slave labour confirms the strong link between labour exploitation, structural racism, and socio-inequality. Among rescued workers, 83% self-identified as "blacks" or "browns". Most were aged 30–39, and 65% resided in the Northeast region. Regarding education levels, 68% have low schooling, 24% completed secondary education, and 8% are illiterate, underscoring the direct link between contemporary slavery, structural poverty, and education exclusion[7].

The case of *Hacienda Brasil Verde Workers v. Federative Republic of Brazil* ("*Hacienda Brasil Verde*"), a landmark judgment of the Inter-American Court of Human Rights (IACHR), is a powerful example of how slavery and its analogous conditions continue to threaten the less privileged in Brazilian society. For the first time, the Court delved into the structural discrimination suffered by the poor working class in Brazil and its special state of vulnerability.

However, despite the relevant contribution provided by this judgment, the discrimination assessment solely on poverty fails to address a critical aspect: besides

[2] For further details on Brazil's demographic categories and socioeconomic data, see Instituto Brasileiro de Geografia e Estatística (IBGE), 'Censo 2022: Panorama – Indicadores' (IBGE, 2022) <https://censo2022.ibge.gov.br/panorama/indicadores.html?localidade=BR&tema=1> accessed 24 February 2026.
[3] Brazil, Decree-Law No 2,848 of 7 December 1940 (Brazilian Penal Code).
[4] Ibid.
[5] Tomoya Obokata, 'End of Mission Statement: Special Rapporteur on contemporary forms of slavery concludes visit to Brazil' (Office of the United Nations High Commissioner for Human Rights, 28 August 2025) <https://www.ohchr.org/sites/default/files/documents/issues/slavery/sr/statements/2025-08-28-eom-sr-slavery-en.pdf> accessed 15 February 2026.
[6] Ibid.
[7] Ministério do Trabalho e Emprego, 'Trabalho análogo à escravidão atinge majoritariamente homens negros no Brasil' (Governo Federal, January 2026) <https://www.gov.br/trabalho-e-emprego/pt-br/noticias-e-conteudo/2026/janeiro/trabalho-analogo-a-escravidao-atinge-majoritariamente-homens-negros-no-brasil> accessed 15 February 2026.

poverty, the victims have shared other grounds of discrimination, such as their ethnicity, migrant condition, origin, and educational level[8].

This article proposes a new approach to *Hacienda Brasil Verde* through the lens of intersectionality, considering the compounded factors of discrimination at play. It further argues that the case diverges from the Court's jurisprudence, which reflects a growing tendency within the Inter-American system to address poverty through an intersectional approach.

Case Summary

On 4 March 2015, the Inter-American Commission on Human Rights brought before the IACHR the case of *Hacienda Brasil Verde*, concerning allegations of forced labour and debt bondage (modern slavery conditions) at a cattle-ranching property named *Brasil Verde* farm, located in the state of Pará (North region of Brazil). According to the Commission, the events occurred within a broader national context in which tens of thousands of individuals, mostly poor "afro-descendent or mulatto men"[9], were subjected annually to conditions analogous to slavery.

It was further alleged that workers who managed to flee the farm reported systematic abuses, including threats of death against those attempting to leave, restrictions on their freedom of movement, non-payment or extremely low wages, the imposition of debts, and the absence of adequate housing, food, and medical assistance[10]. Most of them were poor men, between 17 and 40 years of age, African descendants, from extremely poor states such as Piauí (Northeast region of Brazil), where they lived in poverty and vulnerability[11], conditions that allowed them to be unlawfully recruited with false promises of good job opportunities[12].

The situation engaged the State's international responsibility, as Brazil had been aware since 1989 of the general existence of such practices—specifically of their occurrence at *Hacienda Brasil Verde* (having performed inspections there in the years of 1993, 1996, 1997, and 2000[13]) —and yet all relevant preventive and responsive measures were taken only after 2003[14]. Moreover, it allegedly did not ensure effective judicial remedies capable of safeguarding victims' rights, prosecuting those responsible, or providing adequate reparation[15].

[8] *Case of the Workers of the Hacienda Brasil Verde v Brazil* (Preliminary Objections, Merits, Reparations and Costs) (Judgment) IACtHR Series C No 318 (20 October 2016) [164]..
[9] Ibid [113].
[10] Ibid [303].
[11] Ibid [226].
[12] Ibid [297].
[13] Ibid [216].
[14] Ibid [215].
[15] Ibid [1].

The decision, issued on October 20, 2016, attributed to Brazil the responsibility for the violation of the right not to be subjected to slavery and human trafficking, in disregard of Article 6(1) of the American Convention on Human Rights ("the American Convention"), in relation to Articles 1(1), 3, 5, 7, 11 and 22 of this instrument, to the detriment of the 85 (eighty-five) workers rescued on March 15, 2000, in *Brasil Verde* farm. Additionally, Brazil was held responsible for violating Article 6(1) of the American Convention, in relation to Article 1(1) of this instrument, recognizing that these workers were subjected to structural discrimination based on their economic status.

The Court justified its decision regarding Brazil's condemnation for discriminating against workers with the following arguments: (i) it denied special protections to a group of workers who were subjected to human trafficking through deception and, due to their poverty and extreme exploitation, were subsequently enslaved; (ii) these individuals represent a segment of society that faces systematic exclusion and marginalization, as Brazil has a history of thousands of victims of slavery and similar practices; and (iii) the workers were indirectly discriminated against because of the ineffectiveness of the State's efforts to prevent and eliminate slavery, as well as to provide proper support and legal remedies for reparation.

For the first time, the Court recognized poverty as an independent ground for prohibiting discrimination based on "economic status" under Article 1(1) of the American Convention. As Judge Eduardo Ferrer Mac-Gregor Poisot explains in his Separate Opinion, before Hacienda Brasil Verde, poverty was identified by the Court's jurisprudence in connection with traditionally vulnerable groups, intersecting with other discrimination categories, or based on the factual circumstances[16].

Again, Judge Eduardo Ferrer Mac-Gregor Poisot emphasized that *Hacienda Brasil Verde* marks the IACHR's first recognition of a situation of historical structural discrimination, given the context in which the human rights violations occurred[17]. Due to the disproportionate effect caused by Brazil's ineffective anti-slavery policies on the workers in question, the Court held the country responsible for discrimination and ordered it to pay compensation for non-pecuniary damages for each worker rescued.

Intersectionality and Poverty

The concept of intersectionality is closely associated with Kimberlé Crenshaw's 1989 work, through which she popularized the term in legal scholarship[18]. Her intervention responded to the single-axis model embedded in the United States anti-discrimination law. It formed part of a broader Black feminist critique of both mainstream feminist and

[16] *Case of the Workers of the Hacienda Brasil Verde v Brazil* (Preliminary Objections, Merits, Reparations and Costs) (Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot) IACtHR Series C No 318 (20 October 2016) [44].
[17] Ibid [84].
[18] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine' (1989) 1989 U Chi Legal F 139.

antiracist approaches, which were seen as insufficiently attentive to the lived realities of women of colour[19].

Intersectionality holds that discrimination does not operate along isolated, independent grounds. Instead, specific forms of disadvantage emerge through the interaction and mutual constitution of established categories such as race and gender[20]. The concept was encompassed in General Comment n.° 20 of the Committee on Economic, Social and Cultural Rights, although it is labeled as "multiple discrimination":

> *"Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example, women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying"[21].*

According to Shreya Atrey, poverty discrimination is a paradigmatic intersectional case, since it intersects through its complex structural disadvantage (social exclusion, lack of autonomy, and dignity), and crosses other systems of subordination associated with status groups, like blacks, women, people with disabilities, the aged, and so on[22]. The author emphasizes that poverty has a dual intersectional character: (1) it is constituted by overlapping forms of disadvantage and (2) it interacts with specific status groups[23].

Poverty both generates and reinforces other disadvantages—such as material deprivation and social marginalization—while simultaneously being sustained and exacerbated by them. These interlocking harms disproportionately affect groups that continue to experience historically rooted socioeconomic, political, and cultural subordination[24].

The intersectional character of poverty in discrimination was also recognized by the Human Rights Council, in the Guiding Principles on Extreme Poverty and Human Rights, in which it acknowledges that discrimination is both a cause and a consequence of poverty:

> *"Those living in poverty are also subject to discriminatory attitudes and stigmatization from public authorities and private actors precisely*

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[19] Ibid.

[20] Beth Goldblatt, 'Intersectionality in International Anti-Discrimination Law: Addressing Poverty in Its Complexity' (2015) 21 Australian Journal of Human Rights 47, 48.

[21] Committee on Economic, Social and Cultural Rights, 'General Comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc E/C.12/GC/20, para 17.

[22] Shreya Atrey, 'The Intersectional Case of Poverty in Discrimination Law' (2018) 18 Human Rights Law Review 411, 416.

[23] Ibid.

[24] Ibid 417.

> *because of their poverty. Thus, those living in poverty tend to experience several intersecting forms of discrimination, including on account of their economic status"*[25].

After acknowledging the intersectional character of poverty, it might be necessary to question the doctrinal shift that the Court promoted in *Hacienda Brasil Verde*. By elevating poverty to an autonomous ground of discrimination under Article 1(1), integrating it to the notion of "economic status"[26], the Court appears to detach poverty from its structural and historical conditions.

Thus, addressing poverty discrimination with an intersectional approach should ensure that redistributive policies are designed without losing sight of the specific needs of historically disadvantaged groups[27], in line with the notion of substantive equality. As traditionally ground-based inequalities and poverty generally coexist, the State's positive duties to reduce poverty will also entail the burden of addressing the distributive disadvantage attached to other statuses[28].

Revisiting *Hacienda Brasil Verde* Case: An Intersectional Reassessment

Hacienda Brasil Verde is a notable case because structural discrimination rests in its core, as the reasoning considers the victims indirectly discriminated against due to the inefficiency of the State's conduct to prevent, combat, and redress slavery, with a disproportionate impact on poor people. The structural harm caused by poverty reflects the dominant social, political, legal, economic, and cultural forces that constantly reproduce disadvantages against the poor people.

The judgment deserves applause for avoiding an individualistic and meritocratic approach to poverty. However, the structural view of the case overlooks critical aspects, focusing solely on one discriminatory ground. To address the intertwined patterns of discrimination in place, this article proposes shifting the analytical perspective to an intersectional one.

An intersectional approach to *Hacienda Brasil Verde* would have strengthened the Court's reasoning and deepened its assessment of Brazil's structural obligations. Re-examining it through intersectional lenses of economic status, migration condition, origin, educational level, and ethnicity, as intertwined and inseparable pieces of this

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[25] Human Rights Council, 'Guiding Principles on Extreme Poverty and Human Rights' (18 July 2012) UN Doc A/HRC/21/39, para 18.
[26] *Case of the Workers of the Hacienda Brasil Verde v Brazil* (Preliminary Objections, Merits, Reparations and Costs) (Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot) IACtHR Series C No 318 (20 October 2016) [44].
[27] Goldblatt (n 20) 62.
[28] Sandra Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (2011) 22 Stellenbosch Law Review 567.

puzzle, would align the decision with the reality of contemporary slavery and human trafficking in Brazil and enhance its transformative potential.

Although the Court strategically chose a single-axis discrimination analysis, all other grounds are clear in the case facts and are mentioned in the decision, which states that: “most victims of slave labor in Brazil are workers from the north and northwest of the country, from states characterized by extreme poverty, with the highest levels of illiteracy”[29], mainly “afro-descendant or mulatto men”[30].

Further, the decision recognizes some characteristics of specific victimization shared by workers at *Hacienda Brasil Verde* (poverty, migration, origin, low level of education, no employment)[31], but surprisingly associates discrimination only with the ground of poverty[32]. In conclusion, Brazil was held liable for structural discrimination based solely on the workers' economic status[33].

As Duhaime and Hansbury observe, although the Court referred to the historical and racial roots of slavery in Brazil, it did not substantiate in detail how these legacies operate as a contemporary pattern of structural discrimination[34]. This omission weakened the analytical force of the judgment, as it left underdeveloped the nexus between racialized subordination and the persistence of modern forms of slavery.

Judge Eduardo Ferrer Mac-Gregor Poisot, in his Separate Opinion, appears to touch upon the intersectional link between poverty and other grounds of discrimination in contemporary slavery, stating that “almost always the victims of slavery and conditions similar to slavery are poor people who have been discriminated against historically as a result of their race, sex and/or origin as indigenous people or migrants”[35]. He also stressed that “when, in addition to the situation of poverty, another category established in Article 1(1) is present, such as race, gender, ethnic origin, etc., a situation of multiple/compounded or intersectional discrimination exists”[36]. However, he agreed with the majority’s decision that poverty was the root cause of discrimination against workers in *Hacienda Brasil Verde*[37], without considering other factors that contributed to it.

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[29] *Case of the Workers of the Hacienda Brasil Verde v Brazil* (n 8) [112].
[30] Ibid [113]
[31] Ibid [339].
[32] Ibid [340].
[33] Ibid [343].
[34] Bernard Duhaime and Élise Hansbury, ‘Les développements en droit interaméricain pour l’année 2016’ (2017) 54 *The Canadian Yearbook of International Law / Annuaire canadien de droit international* 384, 392–393
[35] *Case of the Workers of the Hacienda Brasil Verde v Brazil* (Preliminary Objections, Merits, Reparations and Costs) (Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot) IACtHR Series C No 318 (20 October 2016) [53].
[36] Ibid.
[37] Ibid [100].

By overlooking other grounds of discrimination at play, the Court lost the opportunity to address the fact that people of African descent have historically been negatively impacted by structural discrimination and institutional racism[38], making them more vulnerable to labour exploitation. Also, the Court missed its chance to expose the socioeconomic regional disparities in Brazil's territory, which boost internal migration flows and increase the risks of human trafficking for forced labour.

Regarding racial discrimination, Adelle Blackett draws on Brazilian scholars Ana Flauzina and Thula Pires to describe "racism by denial" as a legal and institutional dynamic in which formal commitments to equality coexist with the ongoing dehumanization of black people. In the context of *Hacienda Brasil Verde*, she argues that the Court reproduces this denial, silencing the racialized history that renders Afro-descendants disproportionately vulnerable to enslavement[39].

The Court also fails by not acknowledging structural discrimination regarding access to education, as most of the rescued workers were illiterate or had little to no schooling, a common pattern among victims of Brazil's modern slavery. Although the country's laws guarantee free public education for all, these victims often were excluded from the educational system when they were children, which increases their vulnerability and raises their risk of being subjected to labour exploitation. While education is not explicitly listed as a ground for discrimination in Article 1 of the American Convention, it is considered to fall under "other social conditions".

The Court's single-axis theoretical choice had consequences for the assessment of Brazilian antislavery and antitrafficking policies. Considering poverty as the only vulnerable condition to be considered in such policies, the Court held that, since 1995, the country has positively enhanced its efforts to avoid the perpetuation of the recruitment of poor individuals who are then subjected to slavery[40]. Therefore, although required by the Commission[41], the Court did not condemn Brazil to adopt any public policies to address modern slavery.

As noted by Duhaime and Hansbury, the reparations ordered by the Court — namely publication of the judgment, the reopening of the investigation, the adoption of measures to prevent the application of statutory limitations to similar situations, and the payment of compensation[42] — were comparatively restrained, departing from the

[38] The Inter-American Commission on Human Rights has already recognized institutional racism as a central feature of Brazilian society and its institutional design: Inter-American Commission on Human Rights, *Situation of Human Rights in Brazil* (12 February 2021) OEA/Ser.L/V/II Doc 9, 19. See also *Simone André Diniz v Brazil* (Report) Inter-American Commission on Human Rights (21 October 2006) [84]–[88].
[39] Adelle Blackett, 'Racial Capitalism and the Contemporary International Law on Slavery: (Re)membering Hacienda Brasil Verde' (2022) 25 Journal of International Economic Law 334, 343.
[40] *Case of the Workers of the Hacienda Brasil Verde v Brazil* (n 8), [470].
[41] Ibid [463].
[42] Ibid [435].

Inter-American Court's well-established practice of issuing detailed and far-reaching reparations[43].
Most probably, if the Court evaluated Brazil's policies with an intersectional approach, the conclusion would differ, as none of them accounted for the relevant characteristics of the general victims of slavery in Brazil. The country's defence presented general policies, applied equally nationwide, mostly focused on reinforcing anti-slavery operations, organizing joint operations among institutions, and regularly publicizing the list of employees involved in slavery and slave-like labour exploitation practices (the "Dirty List")[44].

Brazil also has shown its commitment to providing people in need with basic services and financial support, presenting policies such as the "Bolsa Familia" program (a conditioned cash transfer program for families in poverty), unemployment insurance (including for people rescued in anti-slavery operations), and the national program on access to vocational training and employment[45]. Although these initiatives have made a meaningful contribution to reducing poverty in the country, again, none of them have been designed with an intersectional view of the intertwined vulnerable statuses of traditional victims of slavery.

Regarding the Court's assessment of Brazil's policies, it is intriguing how initiatives against human trafficking were not considered part of the country's obligations to eradicate slavery. The decision overlooks the fact that Brazil's defence does not present any policy capable of tackling human trafficking, such as intelligence activities to delimitate migration flows, routes, and vulnerable populations within the country's territory.

Seemingly, the decision fails to acknowledge how internal migration from Brazil's poorer regions—especially the Northeast—towards agricultural and extractive frontiers has long been a key risk factor for human trafficking for the purpose of contemporary forms of slavery. The exclusive focus on recognizing discrimination in Brazilian policies on the grounds of poverty obfuscated this other factor, which primarily lies in the victims' origins and migration conditions.

An intersectional approach to the case facts would have highlighted it, as most of the workers rescued were recruited through deceptive tactics in the state of Piauí, in the Northeast region. They have just followed a large migration flow in Brazil, originating in some Northeastern states (such as Piauí and Maranhão) and directing thousands of workers yearly to intensive agricultural and cattle-ranching areas[46], such as the Amazonian agricultural frontiers[47], exactly where *Brasil Verde* farm is located.

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[43] Bernard Duhaime and Élise Hansbury (n 34), 393.
[44] *Case of the Workers of the Hacienda Brasil Verde v Brazil* (n 8) [469].
[45] Ibid.
[46] International Labour Organization, *Perfil dos principais atores envolvidos no trabalho escravo rural no Brasil* (ILO 2011) 63.
[47] Ibid 14.

In this respect, Brazil's policies' design falls short of the standards articulated in international anti-trafficking frameworks. The Toolkit to Combat Trafficking in Persons, developed by the United Nations Office on Drugs and Crime (UNODC) to guide States in implementing the Trafficking in Persons Protocol, underscores that effective anti-trafficking strategies must be grounded in a clear understanding of victims' profiles, addressing all forms of discrimination[48]. Similarly, the Recommended Principles and Guidelines on Human Rights and Human Trafficking, issued by the Office of the United Nations High Commissioner for Human Rights, establish that vulnerability to trafficking is rooted in structural inequalities (Principle 5; Guideline 7)[49] and mandate disaggregating data by age, gender, ethnicity, and other relevant characteristics (Guideline 3)[50].

Read together, these frameworks reflect the understanding that vulnerability arises from the interaction of multiple structural factors rather than from a single characteristic. Policies that disregard these intersecting dimensions risk undermining both effectiveness and substantive equality.

By a simple analysis of the Brazilian statistics on slavery and slave-like rescues, it becomes clear that the current policies fall short in effectiveness, which can possibly point to a necessary theoretical shift towards intersectionality. For example, the Ministry of Labor and Employment recorded 3,190 workers rescued in 2023, compared to 2,587 in 2022 (+23.3%), making 2023 the highest figure in 14 years[51]. Regarding complaints, recent communications from the Ministry of Human Rights highlight record levels within the historical series[52].

Therefore, the available data indicate that Brazilian anti-slavery policies—largely structured around (1) labour inspection and criminal enforcement and (2) redistributive social policies targeting poverty—have been insufficient to reduce labour exploitation in the country. This empirical reality challenges the adequacy of the Court's reasoning

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[48] United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons* (United Nations 2006) 167 (Principles regarding the prevention of trafficking in persons).

[49] Office of the United Nations High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (Addendum to the Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, UN Doc E/2002/68/Add.1, 2002) 3 (Principle 5) and 9–10 (Guideline 7).

[50] Ibid 5 (Guideline 3(3)).

[51] Ministério do Trabalho e Emprego, 'MTE resgata 3.190 trabalhadores de condições análogas à escravidão em 2023' (Gov.br, 10 January 2024) <https://www.gov.br/trabalho-e-emprego/pt-br/noticias-e-conteudo/2024/janeiro/mte-resgata-3-190-trabalhadores-de-condicoes-analogas-a-escravidao-em-2023> accessed 24 February 2026.

[52] Ministério dos Direitos Humanos e da Cidadania, 'Disque 100 registrou o maior número de denúncias de trabalho escravo da história em 2025' (Gov.br, January 2026) <https://www.gov.br/mdh/pt-br/assuntos/noticias/2026/janeiro/disque-100-registrou-o-maior-numero-de-denuncias-de-trabalho-escravo-da-historia-em-2025> accessed 24 February 2026.

in *Hacienda Brasil Verde* and calls for an intersectional approach to antislavery policies[53].

Intersectionality and the IACHR Jurisprudence

Although intersectionality was not utilized in *Hacienda Brasil Verde*, the theory is familiar to the IACHR jurisprudence, as the Court has been adopting this framework for more than a decade. Since *Gonzales Lluy et al. v. Ecuador* (2015), the Court introduced intersectionality in its jurisprudence, analysing the discrimination in the access to education associated with the victim's condition as a minor, a female, a person living in poverty, and a person living with HIV[54].

Intersectionality was again explicitly adopted in *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil* (2020), where the Court recognized indirect discrimination against "victims (who) were in a situation of structural poverty, most of them were Afro-descendant women and girls, four of whom were pregnant (…)"[55] in a context of dangerous work conditions[56]. Finally, the same framework was recently employed in *Dos Santos Nascimento and Ferreira Gomes v. Brazil* (2024), a case involving the denial of employment for two black women[57].

Therefore, unlike other regional human rights systems, the IACHR has adopted an intersectional approach and has built a consistent jurisprudence within this framework. All cases mentioned above analysed poverty in interaction with other multiple grounds of discrimination, such as race, gender, age, health status, and educational marginalization.

Hacienda Brasil Verde is the only case in which the Court recognized poverty as an independent ground for prohibiting discrimination based on "economic status" under Article 1(1) of the American Convention, without acknowledging discrimination on other grounds that jointly generate vulnerability. This innovative approach, as discussed in this article, fails to capture the complexity of modern slavery in Brazil, overlooking important factors beyond poverty that also contribute to the victimization of people.

Given the uniqueness of this case, which contrasts with more recent jurisprudence of the Court, it seems that the prevailing trend within the IACHR is to continue applying

[53] Shoba Arun and Wendy Olsen, 'Modern slavery and exploitative work regimes: an intersectional approach' (2023) 33 Development in Practice 133.
[54] *Gonzales Lluy and Others v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) (Judgment) IACtHR Series C No 298 (1 September 2015) [5].
[55] Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil (Preliminary Objections, Merits, Reparations and Costs) (Judgment) IACtHR Series C No 407 (15 July 2020) [197].
[56] Ibid.
[57] *Dos Santos Nascimento and Ferreira Gomes v Brazil* (Preliminary Objections, Merits, Reparations and Costs) (Judgment) IACtHR Series C No 539 (7 October 2024) [140].

the intersectional approach to poverty, ruling on structural discrimination based on multiple intertwined grounds of marginalization. Therefore, from this perspective, Hacienda Brasil Verde stands as a jurisprudential exception.

Conclusion

The *Hacienda Brasil Verde* judgment marked a significant step in Inter-American jurisprudence by recognizing poverty as a ground of structural discrimination under Article 1(1) of the American Convention. By framing economic vulnerability as a source of indirect discrimination, the Court highlighted the disproportionate effects of supposedly neutral initiatives on poor people and acknowledged the State's positive duties in contexts of systemic inequality.

However, as demonstrated in this article, the Court's decision to isolate poverty as the sole discriminatory ground curtailed the analytical and remedial potential of the judgment. The facts of the case clearly revealed intersecting markers of vulnerability—ethnicity, origin, migration patterns, low educational attainment, and socioeconomic exclusion —that were overlooked in the decision.

An intersectional approach would have required the Court to explicitly confront the racialized foundations of socioeconomic exclusion in Brazil, recognizing that contemporary slavery does not arise in a social vacuum but within a historically constructed system of racialized poverty and marginalization of Afro-descendant communities. Such an approach would also have compelled a more rigorous scrutiny of whether Brazil's anti-slavery and anti-trafficking policies were meaningfully tailored to the demographic profile of those most affected, rather than merely formally neutral in design.

Re-examining the case through intersectionality thus exposes how structural racial hierarchies, internal migration dynamics, and entrenched patterns of historical exclusion operate cumulatively in producing contemporary forms of slavery and human trafficking. It demonstrates that without an explicit engagement with the mutually constitutive relationship between race, migration, origin, education, and poverty, judicial reasoning risks addressing symptoms while leaving intact the deeper architecture of inequality that sustains exploitation.

The article also demonstrated that the case contrasts with the more recent jurisprudence of the IACHR, which points to the prevailing tendency of the Inter-American system to adopt the intersectional approach to poverty as a discrimination ground operating in an intertwined relationship with others, such as race and gender.

RAOUL
WALLENBERG
INSTITUTE
OF HUMAN RIGHTS AND HUMANITARIAN LAW