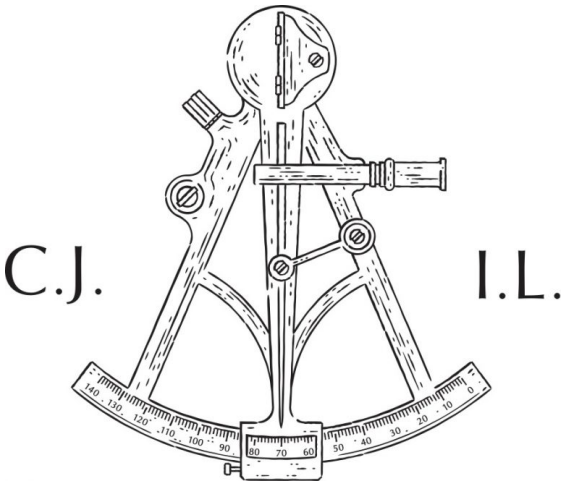

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TOWARDS A GLOBAL PLASTICS TREATY: EXPLORING THE CIVIL LIABILITY ELEMENTS IN ADDRESSING PLASTIC POLLUTION

*Eugene Cheigh**

ABSTRACT

Plastic pollution has emerged as a global concern, posing significant threats to the environment and humanity. Recognizing the urgent need to address the detrimental effects of plastics, the members of the United Nations have agreed to establish a binding global treaty on plastic pollution by 2024. This ambitious treaty aims to regulate the full life cycle of plastics, encompassing production, usage, and disposal. However, negotiations over the treaty remain ongoing.

This paper seeks to propose an international legal mechanism that can contribute to the ongoing and future plastics treaty negotiations. Specifically, it suggests the incorporation of civil liability elements into the plastics treaty. Drawing insights from the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, this paper explores the key elements of civil liability under the liability regime of international environmental law and applies them to plastic pollution. By adopting those elements, those involved in hazardous activities throughout the full life cycle of plastics can be held liable for the damage caused, even when they have exercised due care. This incorporation upholds international legal principles, such as the polluter pays principle; enhances efficiency in invoking liability claims; and bolsters efforts to mitigate plastic pollution. Thus, it is crucial to proceed in a manner that maximizes the effectiveness of the civil liability elements when incorporating them into the plastics treaty because it will signify substantial progress not only in combating plastic pollution but also in advancing civil liability itself.

Keywords: plastic pollution, plastics life cycle, plastics treaty, civil liability, polluter pays principle.

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I. INTRODUCTION

Plastics, which can take centuries to decompose in the environment, are ubiquitous worldwide, polluting every corner of the planet.[1] The Drina River in the Balkans, known for its emerald color and breathtaking scenery, is now clogged with huge islands of plastic waste.[2] About 40% of the plastic waste exported from the United Kingdom has been illegally dumped, burned, left to pile into mountains, and spilled into rivers in Turkey.[3] This plastic waste ultimately ends up in the ocean, where an estimated 171 trillion plastic particles now pollute the waters, weighing around 2.3 million tons in total.[4] Plastic pollution not only endangers marine species, but also poses a threat to food safety, human health, and coastal tourism, while contributing to climate change.[5] Plastics threaten human health by extracting, transporting, and transforming fossil fuels and emitting toxic chemicals during the early stages of production.[6] In addition, microplastics and the associated chemicals in plastic consumer products and packaging can cause developmental impacts, endocrine disruption, and cancers.[7] Therefore, due to the growing concern over the impact of plastics on both the environment and humans, the United Nations (UN) members have adopted Resolution 5/14 to establish an international legally binding treaty on plastic pollution by the end of 2024, which aims to regulate the full life cycle of plastics: production, usage, and disposal.[8] This global plastics treaty is expected to be the most significant environmental multilateral agreement on climate change since the Paris Agreement.[9] However, negotiations to craft and develop the treaty are ongoing and contentious.[10]

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* Author Eugene Cheigh is an S.J.D. Candidate at the American University Washington College of Law.

[1] DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 11 (6th ed. 2022).

[2] Eldar Emric, *Islands of Garbage Clog Rivers, Threaten Dam in Balkans*, AP NEWS (Jan. 5, 2021, 4:11 PM), https://apnews.com/article/environment-waste-management-montenegro-europe-serbia-861a91e61d9f5f138a30dfc84c815ef6.

[3] *See* Greenpeace, *Trashed: How the UK is Still Dumping Plastic Waste on the Rest of the World,* Plastic Report (May 17, 2021) (showing that of the 688,000 tons of plastic packaging waste, 209,642 tons were exported from the United Kingdom to Turkey).

[4] Marcus Eriksen et al., *A Growing Plastic Smog, Now Estimated to be Over 170 Trillion Plastic Particles Afloat in the World's Oceans—Urgent Solutions Required*, PLOS ONE, Mar. 8, 2023, at 5 https://doi.org/10.1371/journal.pone.0281596.

[5] Int'l Union for Conservation of Nature, *Marine Plastic Pollution,* Issues Brief (Nov. 2021), https://www.iucn.org/resources/issues-brief/marine-plastic-pollution [hereinafter IUCN].

[6] DAVID AZOULAY ET AL., PLASTIC & HEALTH: THE HIDDEN COSTS OF A PLASTIC PLANET 61 (Amanda Kistler ed. 2019).

[7] *Id.*

[8] U.N. Env't Assembly Res. 5/14, ¶ 1, 3 (Mar. 7, 2022).

[9] Jamie Hailstone, *Plastic Pollution Deal 'Marks A Triumph By Planet Earth'*, FORBES (Mar. 2, 2022, 10:28 AM), https://www.forbes.com/sites/jamiehailstone/2022/03/02/plastic-pollution-deal-marks-a-triumph-by-planet-earth/?sh=b748c8728a23.

[10] *See*, *e.g.*, Valerie Volcovici, *Countries split on plastics treaty focus as U.N. talks close*, REUTERS (Dec. 2, 2022, 11:54 PM), https://www.reuters.com/business/environment/countries-split-plastics-treaty-focus-un-talks-close-2022-12-03/ ("The first round of negotiations on a global plastics treaty ended . . . with agreement to end plastic pollution but a split on whether goals and efforts should be global and mandatory, or voluntary and country-led.").

This paper aims to propose an international legal mechanism that can be taken into account during the plastics treaty negotiations and even after its formation. Specifically, it suggests the incorporation of civil liability elements into the plastics treaty, which can be derived from other international environmental treaties.[11] In Part II, the paper will navigate the definition, causes, and risks of plastic pollution. By providing a comprehensive understanding of the environmental, social, and economic impacts of plastic pollution and taking notice of the potential risks to human health posed by plastics during their production and usage, it will support the urgent need for effective global regulation. In Part III, the paper will critically examine the existing treaty-based regulations on plastic pollution and assess their limitations. Subsequently, it will present a brief overview of ongoing plastics treaty negotiations, along with the key considerations under deliberation. In Part IV, the paper will explore the elements of civil liability which are derived from the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (Basel Liability Protocol) applicable to plastic pollution.[12] Then, it will present the rationale for incorporating the civil liability elements into the plastics treaty.

II. UNDERSTANDING PLASTIC POLLUTION: DEFINITION, CAUSES, AND RISKS

As the relentless increase in disposable plastic production has exceeded the global capacity to effectively address it, plastic pollution has emerged as one of the most pressing environmental issues.[13] The COVID-19 pandemic has exacerbated this issue due to the public demand for and improper disposal of single-use face masks and gloves, and plastic packaging from takeaway services, e-commerce outlets, and express delivery.[14] To grasp the urgent need for effective global regulations on plastic pollution, Part II covers its definition, causes, and risks. It also describes the potential risks that plastics pose to human health during production and usage.

A. DEFINITION OF PLASTIC POLLUTION

[11] *See* Malgosia Fitzmaurice, *International Responsibility and Liability*, *in* THE OXFORD HANDBOOK OF INT'L ENV'T L. 1010, 1025 (Daniel Bodansky et al. eds., 1st ed. 2008) (noting that several key elements from the civil liability regimes for nuclear and oil pollution have become typical and are widely replicated in other treaty-based civil liability regimes).

[12] U.N. Env't Programme, Conf. of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal on their Fifth Meeting, U.N. Doc. UNEP/CHW.5/29 (1999). *See* HUNTER ET AL., *supra* note 1, at 957, 968 (stating that parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which serves as the foundation for the Basel Liability Protocol, reached an agreement in 2019 to treat mixed, unrecyclable, and contaminated plastic waste as hazardous waste).

[13] Laura Parker, *The World's Plastic Pollution Crisis Explained*, NAT'L GEOGRAPHIC (May 20, 2022), https://www.nationalgeographic.com/environment/article/plastic-pollution.

[14] *See* Xiangzhou Yuan et al., *The COVID-19 Pandemic Necessitates a Shift to a Plastic Circular Economy*, 2 NATURE REVS.: EARTH & ENV'T 659, 659 (2021) (measuring that the estimated amount of plastic waste reached over 530 metric tons in the first 7 months of the COVID-19 outbreak, surpassing the pre-pandemic level of approximately 400 metric tons in 2019).

Global plastic production has increased significantly over the past fifty years, rising from 20 million metric tons (MMT) in 1966, to 381 MMT in 2015.[15] In addition, plastic production is predicted to continue to rise, with an estimated increase of 200% and 350% by 2035 and 2050, respectively.[16] Plastics are synthetic materials that can have thermoplastic, thermoset, or elastomeric properties made from petrochemicals, natural gas, or biologically-derived sources and used in diverse applications such as packaging, building construction, household and sports equipment, vehicles, electronics, and agriculture.[17] However, because these plastics often accumulate in the environment at a faster rate than they can be dispersed, diluted, decomposed, recycled, or stored harmlessly without negatively affecting the environment and humans, they become a form of pollution known as plastic pollution.[18] This issue generally happens to petrochemical-based plastics, but is not limited to them,[19] as even bio-based plastics are non-biodegradable and can persist in the environment.[20] Furthermore, plastics can be classified into macroplastics and microplastics depending on their size. Macroplastics are large plastic debris, while microplastics are small plastic fragments, typically less than 5 millimeters, that derive from the breakdown of macroplastics.[21] As such, it is imperative to seek comprehensive solutions to eliminate or reduce the persistence of plastics in the environment, regardless of their composition or size.

B. CAUSES OF PLASTIC POLLUTION

Plastics are molded into various products with varying lifespans, ranging from short-lived packaging to long-lasting durable items, but they eventually end up as plastic waste.[22] Out of the total plastic waste generated globally, only 9% is recycled, 19% is incinerated, and 50% goes to sanitary landfills, while 22% is disposed of in uncontrolled dumpsites, burned in open pits, or leaked into the environment.[23] This mismanagement of plastic waste is a significant contributor to plastic pollution,[24] especially when it involves uncontrolled open landfills, dumping, and eventual leakage into the ocean.[25] Also, developing countries,

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[15] NAT'L ACAD. SCI., ENG'G, & MED., RECKONING WITH THE U.S. ROLE IN GLOBAL OCEAN PLASTIC WASTE 33 (2022).

[16] *Id.*

[17] *Id.* at 19.

[18] *See* Charles Moore, *Plastic Pollution*, ENCYC. BRITANNICA (last updated Dec. 27, 2023), https://www.britannica.com/science/plastic-pollution; Jerry A. Nathanson, *Pollution*, ENCYC. BRITANNICA (last updated Dec. 29, 2023), https://www.britannica.com/science/pollution-environment.

[19] Moore, *supra* note 18.

[20] NAT'L ACAD. SCI., ENG'G, & MED., *supra* note 15, at 33.

[21] Matthew Cole et al., *Microplastics as Contaminants in the Marine Environment: A Review*, 62 MARINE POLLUTION BULL. 2588, 2589 (2011); Richard C. Thompson et al., *Lost at Sea: Where Is All the Plastic?*, 304 SCI. 838, 838 (2004).

[22] NAT'L ACAD. SCI., ENG'G, & MED., *supra* note 15, at 47.

[23] ORG. FOR ECON. COOP. AND DEV., GLOBAL PLASTICS OUTLOOK: ECONOMIC DRIVERS, ENVIRONMENTAL IMPACTS AND POLICY OPTIONS 14 (2022).

[24] U.N. Env't Programme, Intergovernmental Negotiating Comm. to Dev. an Int'l Legally Binding Instrument on Plastic Pollution, Including in the Marine Env't, *Plastics Science*, ¶ 28, U.N. Doc. UNEP/PP/INC.1/7 (Sept. 13, 2022) [hereinafter INC].

[25] Jenna R. Jambeck et al., *Plastic Waste Inputs from Land into the Ocean*, 347 SCI. 768, 768 (2015).

whether they generate their plastic waste or import it from other countries,[26] frequently struggle with the mismanagement of plastic waste due to insufficient infrastructure and limited capacity.[27]

C. UNCONTROLLED OPEN LANDFILLS OF PLASTIC WASTE

Sanitary landfilling is the predominant approach to managing plastic waste.[28] The process involves depositing, moving, and compacting the waste while using a draining layer and gas wells to remove and capture leachates and gases emitted from the waste.[29] Afterward, an impermeable layer is placed as a cap on the landfill, sometimes accompanied by soil and grass.[30] Following the closure of the landfill, at least thirty years of monitoring is necessary to ensure proper management.[31] However, in the case of uncontrolled open landfills, there is a risk of releasing harmful leachates containing substances like ammonia and mercury, as well as gases, such as methane, carbon dioxide, nitrogen, and other trace gases.[32] These releases contribute to climate change and pose a significant threat to wildlife habitats, ecosystems, and human health.[33]

D. DUMPING OF PLASTIC WASTE

Unlike controlled and regulated landfills, dumping involves depositing waste at sites that have no regard for the environment or regulations.[34] Regardless of its legality, plastic waste has been dumped in various areas, including land, rivers, and oceans. In the United States, for example, the mass of illegally dumped plastic waste in 2016 ranged from 139,900 to 414,600 metric tons (MT), accounting for 0.33 to 0.99% of plastic waste generation.[35]

The amendments to the Basel Convention aim to restrict the international plastic waste trade by introducing a system of Prior Informed Consent for exports of plastic waste.[36]

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[26] *See Basel Plastic Waste Trade Violations Rampant One Year After Amendments Entry into Force*, BASEL ACTION NETWORK (Feb. 25, 2022), https://myemail.constantcontact.com/Plastic-Waste-Trade-Violations.html?soid=1114999858498&aid=TjuIS3s34Ao (arguing that despite the regulations imposed by the Basel Convention on plastic waste trade, the United States and European countries persist in illegally exporting plastic waste to Mexico, Malaysia, India, Vietnam, Indonesia, and Turkey).

[27] *See* Parker, *supra* note 13 ("Plastic pollution is most visible in developing Asian and African nations, where garbage collection systems are often inefficient or nonexistent.").

[28] *See* ORG. FOR ECON. COOP. AND DEV., *supra* note 23.

[29] NAT'L ACAD. SCI., ENG'G, & MED., *supra* note 15, at 55.

[30] *Id.*

[31] *Id.*

[32] Kayla Vasarhelyi, *The Hidden Damage of Landfills*, UNIV. COLO. BOULDER ENV'T CTR. (Apr. 15, 2021), https://www.colorado.edu/ecenter/2021/04/15/hidden-damage-landfills.

[33] *Id.*

[34] Shawn Manaher, *Dump vs Landfill: When to Use Each One? What to Consider*, THE CONTENT AUTH. (last visited Dec. 27, 2023), https://thecontentauthority.com/blog/dump-vs-landfill.

[35] Kara Lavender Law et al., *The United States' Contribution of Plastic Waste to Land and Ocean*, SCI. ADVANCES, Oct. 30, 2020, at 6, https://www.science.org/doi/10.1126/sciadv.abd0288.

[36] Conf. of the Parties to the Basel Convention, Rep. on the Conf. of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its fourteenth meeting, U.N. Doc. UNEP/CHW.14/28, at 57-58 (May 11, 2019) [hereinafter COP to the Basel Convention].

However, despite the existence of treaty regulations, the United Kingdom (hereinafter "the U.K.") relies on illegally exporting and dumping plastic waste overseas, mostly to Turkey, where the capacity for plastic waste management is limited.[37] Such dumping practices continue, and have resulted in elevated levels of toxic chemicals, known as persistent organic pollutants (POPs), in Turkish dumping areas, posing significant risks to human health.[38]

1. PLASTICS WASTE LEAKAGE INTO THE OCEAN

In most cases, plastic waste originating from the land ultimately finds its way into the ocean through various pathways, including coastal recreational activities, wastewater effluent, refuse site leachate, wastewater treatment systems, rivers, and extreme weather events like hurricanes or flooding.[39] In 2010, approximately 275 MMT of plastic waste was generated in 192 coastal countries, with 4.8 to 12.7 MMT entering the ocean.[40] Without action to reduce this leakage, annual plastic flows to the ocean are expected to triple from 11 MMT in 2016 to 29 MMT in 2040, exacerbating the already pressing issue of marine plastic pollution.[41]

2. RISKS OF PLASTIC POLLUTION TO THE ENVIRONMENT AND HUMANS

Roughly two-thirds of all plastics ever produced have been released into the environment, where they remain as either macroplastics in the ocean or microplastics in the air, agricultural soils, water supplies, and even within the human body.[42] When associated with plastic pollution, this pervasive presence of plastics substantially threatens wildlife habitats and species, particularly in the ocean, jeopardizes food safety, threatens human health, disrupts coastal tourism, and contributes to the ongoing challenge of climate change.[43]

3. WILDLIFE HABITATS AND SPECIES

Plastic pollution harms marine habitats and species through entanglement, ingestion, smothering, and chemical leaching.[44] One example is the improper disposal of ghost fishing

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[37] *See* GREENPEACE, *supra* note 3; *see also* WRAP, *Plastics: Market Situation Report 2021 Plastic Packaging*, 15 (2021); ENVIRONMENT, FOOD, AND RURAL AFFAIRS COMMITTEE, THE PRICE OF PLASTIC: ENDING THE TOLL OF PLASTIC WASTE, 2022-23, HC 22, at 40, 42 (UK).

[38] GREENPEACE, GAME OF WASTE: IRREVERSIBLE IMPACT 19–21 (2022).

[39] *See* W.C. LI et al., *Plastic Waste in the Marine Environment: A Review of Sources, Occurrence and Effects*, 566 SCI. TOTAL ENV'T 333, 335 (2016) ("Land-based sources of plastic debris contribute 80% of the plastic debris in the marine environment . . . .").

[40] Jambeck et al., *supra* note 25, at 770.

[41] THE PEW CHARITABLE TRUSTS & SYSTEMIQ, BREAKING THE PLASTIC WAVE: A COMPREHENSIVE ASSESSMENT OF PATHWAYS TOWARDS STOPPING OCEAN PLASTIC POLLUTION 25 (2020).

[42] AZOULAY ET AL., *supra* note 6, at 5.

[43] IUCN, *supra* note 5.

[44] TEKMAN ET AL., IMPACTS OF PLASTIC POLLUTION IN THE OCEANS ON MARINE SPECIES, BIODIVERSITY AND ECOSYSTEMS 6–7 (Bentley ed. 2022) (stating that marine animals can become entangled in items from abandoned

equipment, such as gillnets, pots and traps, and fish aggregation devices, which ensnare marine animals, impeding their movement and hindering their ability to breathe, feed, and reproduce.[45] These pollutants alter and degrade marine habitats by inflicting physical damage through abrasion, shearing, and smothering, while also changing the physical and chemical composition of marine sediments.[46] Also, the accumulation of macro- or microplastics in the bodies of marine animals leads to blockage of the intestinal tract, inhibition of gastric enzyme secretion, reduced feeding stimuli, decreased steroid hormone levels, delays in ovulation, and failure to reproduce.[47]

4. FOOD SAFETY AND HUMAN HEALTH

Microplastics contaminate shellfish and a wide variety of commercially important fish species.[48] Additionally, these particles are found in various consumable products, including canned sardines and sprats, salt, beer, honey, sugar, and even human drinking water.[49] Through these living things and food products, plastic pollution transfers microplastics and plastic-associated chemical additives to top predators and humans through the food chain, raising concerns about food safety and human health.[50] The presence of microplastics in the human body can be linked to inflammation, genotoxicity, oxidative stress, apoptosis, and necrosis, which over time may result in tissue damage, fibrosis, and cancer.[51]

5. COASTAL TOURISM

The impact of marine plastic pollution on coastal tourism[52] is substantial, as it diminishes the appeal of tourist destinations, decreases revenue, and imposes significant economic costs for site upkeep and cleaning.[53] For instance, in Orange County, California, one of the coastal areas in the United States, the estimated economic loss in tourism spending is $414 million when plastic waste is doubled.[54] This is particularly devastating for countries

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fishing gear, ingest plastic particles, be smothered as plastics block light, food, and oxygen, and suffer cell and brain damage from harmful chemical substances leaching out of plastics).

[45] KARLI THOMAS ET AL., GHOST GEAR: THE ABANDONED FISHING NETS HAUNTING OUR OCEANS 9, 11 (2019).

[46] *Id.*

[47] LI et al., *supra* note 39, at 339.

[48] Luís Gabriel Antão Barboza et al., *Marine Microplastic Debris: An Emerging Issue for Food Security, Food Safety and Human Health*, 133 MARINE POLLUTION BULL. 336, 341 (2018).

[49] *Id.* at 342.

[50] AZOULAY ET AL., *supra* note 6, at 54.

[51] *Id.* at 61–62.

[52] *See Study on Specific Challenges for a Sustainable Development of Coastal and Maritime Tourism in Europe*, at 167, COM (2016) final (June 2016) (describing that coastal tourism includes beach-based recreation activities such as swimming, surfing, and sunbathing, land-based activities in the coastal area, and commercial or manufacturing businesses associated with these activities).

[53] IUCN, *supra* note 5.

[54] ABT ASSOCIATES, THE EFFECTS OF MARINE DEBRIS ON BEACH RECREATION AND REGIONAL ECONOMIES IN FOUR COASTAL COMMUNITIES: A REGIONAL PILOT STUDY 40 (2019).

heavily dependent on coastal tourism.[55] In Unguja Island, Zanzibar, where coastal tourism contributes 28% of their GDP, the annual economic loss due to plastic pollution is estimated to be $13.75 million.[56]

6. CLIMATE CHANGE

Beyond the risks posed mostly to marine ecosystems and humans, plastics also make a significant contribution to global greenhouse gas emissions and climate change.[57] Plastics floating on the ocean's surface release methane and other greenhouse gases as they degrade.[58] Additionally, microplastics in the ocean may interfere with the ocean's capacity to absorb and sequester carbon dioxide by reducing the ability of phytoplankton to fix carbon through photosynthesis and by impairing the metabolic rates, reproductive success, and survival of zooplankton, which plays a crucial role in transferring the carbon to the deep ocean.[59]

E. RISKS TO HUMAN HEALTH POSED BY PLASTIC PRODUCTION AND USAGE

Since oil, gas, and coal are the primary feedstocks for producing plastics, the process of extracting, transporting, and transforming these fossil fuels into plastic resins and additives releases toxic substances into the air, water, and soil.[60] Human exposure to these substances may cause impairment of the nervous system, reproductive and developmental problems, cancers, genetic impacts leading to record levels of low birth weight, and leukemia.[61] Using plastic products and packaging also results in ingesting or inhaling large amounts of microplastics and toxic substances, which can adversely affect human health, leading to development impacts, endocrine disruption, and cancers.[62] Plastic pollution, resulting from the mismanagement of plastic waste, poses threats to wildlife habitats and species, food safety and human health, coastal tourism, and global temperatures. Moreover, the production and use of plastics have adverse effects on human health.

III. INTERNATIONAL LEGAL REGULATIONS ON PLASTIC POLLUTION

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[55] *See Paradise Lost in the Plastic Tide*, WATER WITCH (last visited Dec. 28, 2023), https://waterwitch.com/combating-plastic-pollution-in-the-ocean-sea-cleaner/ (indicating that tourism plays a significant role in the global economy, representing 12% of GDP, and predominately concentrated in coastal areas, providing essential income for developing countries).

[56] ALISTAIR MCILGORM & JIAN XIE, THE WORLD BANK, THE COSTS OF ENVIRONMENTAL DEGRADATION FROM PLASTIC POLLUTION IN SELECTED COASTAL AREAS IN THE UNITED REPUBLIC OF TANZANIA 30–31 (2023).

[57] *See* ORG. FOR ECON. COOP. AND DEV., *supra* note 23, at 16 ("In 2019, plastics generated 1.8 gigatonnes (Gt) of greenhouse gas (GHG) emissions – 3.4% of global emissions – with 90% of these emissions coming from their production and conversion from fossil fuels.").

[58] LISA ANNE HAMILTON ET AL., CIEL, PLASTIC & CLIMATE: THE HIDDEN COSTS OF A PLASTIC PLANET 3 (2019).

[59] *Id.* at 4.

[60] AZOULAY ET AL., *supra* note 6, at 61.

[61] *Id.*

[62] *Id.*

In light of growing concerns about the risks of plastic pollution and plastics themselves, the UN members have adopted Resolution 5/14 to establish an international legally binding treaty on plastic pollution by the end of 2024, which aims to regulate the full life cycle of plastics: production, usage, and disposal.[63] Notably, the G7 members, consisting of the U.S., Japan, Germany, France, the U.K., Italy, and Canada,[64] have demonstrated their commitment to ending plastic pollution and constructively engaging in the development of the treaty.[65] Part III briefly addresses the ongoing negotiations over this global plastics treaty, while critically analyzing the existing treaty-based regulations on plastic pollution and identifying their limitations.

A. TREATY-BASED REGULATIONS ON PLASTIC POLLUTION

The United Nations Environment Assembly (UNEA)[66] recognizes the following existing treaties applicable to plastic pollution as complementary instruments: the International Convention for the Prevention of Pollution from Ships (MARPOL), the Basel Convention, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention), the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention), the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention), the United Nations Framework Convention on Climate Change (UNFCCC), and the Convention on Biological Diversity (CBD).[67]

1. MARPOL

The MARPOL and its subsequent protocol is a treaty regime that regulates both the operational discharge and unintentional release of pollutants such as oil, garbage, plastics, and sewage from ships.[68] Annex V of the MARPOL is designed to regulate the prevention of pollution by garbage from ships, and it prohibits the disposal of all plastics, including but not limited to synthetic ropes, synthetic fishing nets, and plastic garbage bags.[69] Nonetheless,

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[63] U.N. Env't Assembly, *supra* note 8.

[64] *See What Does the G7 Do?*, COUNCIL ON FOREIGN RELATIONS (last updated June 28, 2023, 3:00 PM), https://www.cfr.org/backgrounder/what-does-g7-do ("The G7 is an informal bloc of industrialized democracies . . . that meets annually to discuss issues such as global economic governance, international security, and energy policy.").

[65] G7 Ministers' Meeting on Climate, Energy & Env't, *G7 Climate, Energy & Env't Ministers' Communique*, ¶¶ 37–38 (Apr. 16, 2023), https://www.env.go.jp/content/000128270.pdf.

[66] *See What You Need To Know About the UN Environment Assembly*, UNEP (Feb. 18, 2022), https://www.unep.org/news-and-stories/story/what-you-need-know-about-un-environment-assembly (describing that the UNEA is the world's foremost environmental decision-making body, where representatives of the 193 UN members, business leaders, civil society and environmentalists gather to highlight the most pressing environmental issues and create the architecture for future environmental governance).

[67] U.N. Env't Assembly, *supra* note 8, at 2.

[68] HUNTER ET AL., *supra* note 1, at 785.

[69] Maritime Annex International Convention for the Prevention of Pollution from Ships, MARPOL Annex V regul. 3(1)(a), Nov. 2, 1973, 2 I.L.M. 1319 (entered into force Dec. 31, 1988).

the disposal of plastics from ships is allowed in certain situations where the disposal is necessary to secure the safety of a ship or its crew, or to save life at sea; where damage to a ship or its equipment results in the escape of plastics; or where there is an accidental loss of synthetic fishing nets or synthetic material incidental to the repair of such nets, provided that all reasonable precautions have been taken.[70] Considering the longstanding practice of plastic discharge into the ocean from maritime vessels,[71] the MARPOL serves to mitigate marine plastic pollution. However, it is important to note that the MARPOL only regulates the disposal of plastics from "ships," while approximately 80% of marine plastic pollution comes from land-based sources.[72]

2. BASEL CONVENTION

The Basel Convention establishes a global notification and consent system, known as the Prior Informed Consent procedure, for the trade of hazardous or other waste and requires states to manage and dispose of those wastes in an environmentally sound manner.[73] Initially, plastic waste was traded as low-risk or no-risk waste commodities.[74] However, in 2019, parties to the Basel Convention decided to include certain types of plastic waste and mixtures in the categorized list of Annexes II, VIII, and IX.[75] Consequently, the trade of mixed, unrecyclable, contaminated, and hazardous plastic waste now is subject to the Prior Informed Consent procedure, which involves the export state's written notification and the import state's written consent.[76] In addition, states are restricted from trading plastic waste not destined for environmentally sound recycling, recovery, or disposal such as landfill and incineration.[77] Nevertheless, the lack of binding guidelines for "environmentally sound management of hazardous wastes or other wastes," and the absence of provisions for indicators, targets, timelines, or reporting on the reduction of plastic waste generation or trade create challenges in measuring progress at the national, regional or global level.[78]

3. ROTTERDAM CONVENTION

The Rotterdam Convention bans the export of specific chemicals listed in its Annex III unless the importing country has given Prior Informed Consent.[79] As plastics may include

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[70] *Id.* art. 7.

[71] Jambeck et al., *supra* note 25, at 768.

[72] Luisa Cortat Simonetti Goncalves & Michael Gerbert Faure, *International Law Instruments to Address the Plastic Soup*, 43 WM. & MARY ENV'T L. & POL'Y REV. 871, 899 (2019).

[73] HUNTER ET AL., *supra* note 1, at 947.

[74] Linda Del Savio, *The Role of Trade in Governing Plastic Pollution*, 27 OCEAN & COASTAL L.J. 1, 19 (2022).

[75] COP to the Basel Convention, *supra* note 36, at 57–58 (Annex II listing plastic waste and mixtures; Annex VIII listing hazardous plastic waste; Annex IX listing clean plastic waste for recycling).

[76] HUNTER ET AL., *supra* note 1, at 968; COP to the Basel Convention, *supra* note 36, at 57–58.

[77] Savio, *supra* note 74, at 20; COP to the Basel Convention, *supra* note 36, arts. 4(2), 4(9), Annex IV.

[78] *See* Karen Raubenheimer & Alistair McIlgorm, *Can the Basel and Stockholm Conventions Provide a Global Framework to Reduce the Impact of Marine Plastic Litter?*, 96 MARINE POL'Y 285, 287 (2018) (arguing that the Technical Guidelines provide general guidance for environmentally sound management of hazardous waste or other waste, emphasizing material recycling over landfill, but these guidelines are non-binding).

[79] HUNTER ET AL., *supra* note 1, at 917–18.

hazardous chemicals, such as polychlorinated biphenyls (PCBs) listed in Annex III,[80] the Rotterdam Convention has the potential to reduce the production of PCBs-containing plastics.[81] Still, the Rotterdam Convention does not apply to "waste," limiting its regulatory scope for plastic waste.[82]

4. STOCKHOLM CONVENTION

The Stockholm Convention aims to reduce and eliminate POPs, categorizing them into three Annexes, with Annex A specifically regulating the production and use of chemicals that are scheduled to be phased out.[83] The chemicals used as flame retardants for plastics listed in Annex A are polybrominated diphenyl ethers (PBDEs), hexabromocyclododecane (HBCDD), hexabromobiphenyl (HBB), and Short-chain chlorinated paraffins (SCCPs).[84] These chemicals are restricted from trade and allowed only for environmentally sound disposal, permitted uses, or purposes under Annex A.[85] Similar to the Rotterdam Convention, the Stockholm Convention has the potential to reduce the production of POPs-containing plastics.[86] However, unlike the Rotterdam Convention, the Stockholm Convention provides for the environmentally sound disposal of plastic waste containing or contaminated with POPs, excluding options such as recovery, recycling, reclamation, and direct or alternative uses of POPs.[87] Yet, the Stockholm Convention does not apply to other plastics without POPs, such as packaging for food and beverage, which accounts for approximately 36% of all plastics produced.[88]

5. UNCLOS

The UNCLOS provides the first global framework on all aspects of the law of the sea, encompassing comprehensive obligations to protect and preserve the marine environment as set out under Part XII.[89] The broad definition of marine pollution[90] enables marine plastic

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[80] U.N. Env't Programme, CHEMICALS IN PLASTICS: A TECHNICAL REPORT 23 (2023); Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Annex III, Sept. 11, 1998, 2244 U.N.T.S. 337 (entered into force Feb. 24, 2004) [hereinafter Rotterdam Convention].

[81] Sen Wang, *International Law-Making Process of Combating Plastic Pollution:* Status Quo*, Debates and Prospects*, 147 MARINE POL'Y 1, 3 (2023), https://doi.org/10.1016/j.marpol.2022.105376.

[82] *Id.*; Rotterdam Convention, *supra* note 80, art. 3, ¶ 2(c).

[83] HUNTER ET AL., *supra* note 1, at 926.

[84] U.N. Env't Programme, *supra* note 80, at 51; Stockholm Convention on Persistent Organic Pollutants, Annex A, May 22, 2001, 2256 U.N.T.S. 119 (entered into force May 17, 2004) [hereinafter Stockholm Convention].

[85] Stockholm Convention, *supra* note 84, art. 3, ¶ 2(a).

[86] Raubenheimer & McIlgorm, *supra* note 78, at 288.

[87] *Id.*; Stockholm Convention, *supra* note 84, art. 6, ¶ 1(d).

[88] *Everything You Need To Know About Plastic Pollution*, UNEP (Apr. 25, 2023), https://www.unep.org/news-and-stories/story/everything-you-need-know-about-plastic-pollution.

[89] HUNTER ET AL., *supra* note 1, at 730–31.

[90] U.N. Convention on the Law of the Sea, art. 1, ¶ 4, Dec. 10, 1982, 1833 U.N.T.S. 397 ("[T]he introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of sea, impairment of quality for use of sea water and reduction of amenities").

pollution to be directly placed under the UNCLOS's protection.[91] In accordance with the UNCLOS, states are obligated to take all measures that are necessary to prevent, reduce, and control marine plastic pollution from any sources, including land-based sources, sea-bed activities subject to national jurisdiction, activities in the Area,[92] dumping, vessels, and the atmosphere.[93] Due to the longstanding practice of plastic discharge into the ocean from vessels,[94] along with the leakage of plastic waste from the land, [95] the UNCLOS assumes a significant role in protecting and preserving marine habitats and species. Still, the absence of specific obligations and the reliance on domestic legislation raises concerns regarding the effectiveness of the UNCLOS in tackling marine plastic pollution.[96]

6. LONDON CONVENTION

In contrast to the MARPOL, which focuses on the regulation of the unintentional release of pollution, the London Convention and subsequent protocol control the intentional dumping of waste from ships.[97] The London Convention explicitly prohibits dumping "persistent plastics and other persistent synthetic materials, for example, netting and ropes, which may float or may remain in suspension the sea in such a manner as to interfere materially with fishing, navigation or other legitimate uses of the sea."[98] This provision can be replaced by the 1996 Protocol to the London Convention, which prohibits dumping any waste or other matter with the exception listed in Annex 1.[99] In a similar vein to the MARPOL, the London Convention serves to mitigate marine plastic pollution. However, its effectiveness is limited, as it deals with the dumping of plastics from ships, rather than the leakage of plastic waste from land.[100]

7. UNFCCC

The UNFCCC establishes a general framework but delineates few specific or substantive obligations to curb climate change.[101] Under the UNFCCC regime, parties to the Paris Agreement are encouraged to set their own nationally determined contributions (NDCs) to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial

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[91] *See* Goncalves & Faure, *supra* note 72, at 894 ("UNCLOS has approaches that cover all sources of plastic pollution.").

[92] U.N. Convention on the Law of the Sea, *supra* note 90, art. 1, ¶ 1 ("[T]he seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction").

[93] *See*, *e.g.*, U.N. Convention on the Law of the Sea, *supra* note 90, arts. 194(1).

[94] Jambeck et al., *supra* note 25, at 768.

[95] LI et al., *supra* note 39, at 335.

[96] Wang, *supra* note 81, at 2.

[97] HUNTER ET AL., *supra* note 1, at 810; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, art. III, ¶ 1, Dec. 12, 1972, 1046 U.N.T.S. 120 [hereinafter London Convention].

[98] London Convention, *supra* note 97, art. IV, ¶1(a), annex I(4).

[99] 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, art. 4, ¶ 1, Nov. 7, 1996, 36 I.L.M. 1.

[100] Goncalves & Faure, *supra* note 72, at 899.

[101] HUNTER ET AL., *supra* note 1, at 639.

levels.[102] Since plastics substantially contribute to climate change throughout their full life cycle, from production to disposal,[103] voluntary NDCs may incorporate measures to reduce the use of plastics and the resulting pollution.[104]

8. CBD

The CBD establishes a general framework for the conservation of biodiversity which encompasses species regardless of their migratory nature.[105] Recognizing the considerable threat posed by plastic pollution, particularly to marine habitats and species,[106] states can be encouraged to develop a national strategy, plan, or program for the conservation of marine biodiversity.[107] Moreover, parties to the CBD agreed to increase their efforts to avoid, minimize, and mitigate the impacts of plastic pollution on marine and coastal biodiversity and habitats.[108] However, similar to the UNCLOS, the CBD encounters a shared challenge as its effective implementation relies on domestic legislation.[109]

Among these existing treaties, only the MARPOL, the Basel Convention, and the London Convention explicitly regulate certain sources of plastic pollution. In addition, the Rotterdam Convention and the Stockholm Convention are expected to contribute to reducing plastic production. Lastly, the measures or strategies taken to regulate the full life cycle of plastics under the UNCLOS, the UNFCCC, and the CBD can vary across different countries.

B. NEGOTIATIONS OVER GLOBAL PLASTICS TREATY

None of the existing treaties focus primarily on plastic pollution with upstream phases of plastic production, and their governance is fragmented.[110] As the existing treaties are insufficient to combat plastic pollution, the idea of establishing a new international, legally-binding treaty on plastic pollution has been supported.[111] As per the UNEA Resolution 5/14, the UNEA requests the convening of an intergovernmental negotiating committee (INC) to

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[102] *The Paris Agreement*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement (last visited Dec. 28, 2023.

[103] ORG. FOR ECON. COOP. AND DEV., *supra* note 23, at 16.

[104] *See* Luísa Cortat Simonetti Gonçalves, *The Effects of Plastics on Climate Change: An Analysis of the Potential Responses within the Nationally Determined Contributions (NDCs)*, 30 Y.B. INT'L ENV'T L. 165, 192 (2021) (noting that only 3.7% of the NDCs explicitly mention plastics, typically in a very broad manner, as the linkages between plastics and climate change constitute a novel discourse in the scientific area).

[105] HUNTER ET AL., *supra* note 1, at 998.

[106] THOMAS ET AL., *supra* note 45.

[107] Convention on Biological Diversity art. 6, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993).

[108] Conference of the Parties to the Convention on Biological Diversity, ¶ 5(a), U.N. Doc. CBD/COP/14/14, (Nov. 29, 2018).

[109] Wang, *supra* note 81.

[110] *See* Giulia Carlini & Konstantin Kleine, *Advancing the International Regulation of Plastic Pollution Beyond the United Nations Environment Assembly Resolution on Marine Litter and Microplastics*, 27 REV. EUR. COMPAR. & INT'L ENV'T. L. 234, 235–36 (2018) ("When compared with other fields of environmental regulations, what is particularly notable is the complete lack of binding targets for plastic pollution reduction and compulsory timelines.").

[111] Wang, *supra* note 81.

develop an international legally binding treaty on plastic pollution, addressing the full life cycle of plastics by the end of 2024.[112] This treaty may include both binding and voluntary approaches, taking into account the principles of the Rio Declaration on Environment and Development (Rio Declaration) as well as national circumstances and capabilities.[113] Although the resolution does not specify which principles of the Rio Declaration are to be considered, it seems that the principle of common but differentiated responsibilities, particularly between developed and developing countries, is one of the considerations.[114]

At the recent second session of the INC, participating countries discussed potential options for elements toward the global plastics treaty as follows: objectives, core obligations, control measures and voluntary approaches, means of implementation, implementation measures, and additional matters.[115] The session concluded with the preparation of a Zero Draft – the first iteration of the treaty text – of the global plastics treaty for the upcoming session, guided by diverse perspectives revealed during the discussion.[116] Furthermore, the final decision called for addressing the principles and scope of the treaty that were not included in the options.[117] Meanwhile, the principle of extended producer responsibility has been proposed to strengthen the ambition of domestic public policies for reducing the use of plastics.[118]

IV. CIVIL LIABILITY ELEMENTS AND PLASTIC POLLUTION

In the process of developing Resolution 5/14, the open-ended, ad hoc expert group[119] had initially identified the lack of a global liability and compensation mechanism as a barrier to combating marine plastic litter and microplastics.[120] However, the expert group concluded that addressing the issue of liability was not a priority at its first meeting.[121] Although the issue of liability has not been intensively discussed since then, certain forms of liability are

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[112] U.N. Env't. Assembly Res. 5/14, *supra* note 8, ¶ 1.

[113] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992). *See id.* ¶ 3.

[114] *See* Wang, *supra* note 81 (arguing that the UNEA's decision to take into account national circumstances and capabilities leads to a complex debate on how and where to place the principle of common but differentiated responsibilities).

[115] *Summary of the Second Meeting of the Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution: 29 May – 2 June 2023*, 36 IISD EARTH NEGOT. BULL. 1, 4 (2023), https://enb.iisd.org/plastic-pollution-marine-environment-negotiating-committee-inc2-summary (list of 12 possible core obligations).

[116] *Id.*; *See* Intergov'l Negot. Comm. To Dev. An Int'l Legally Binding Instrument on Plastic Pollution, Including Marine Env't, *Zero Draft Text of the International Legally Binding Instrument on Plastic Pollution, Including in the Marine Environment*, U.N. Doc. UNEP/PP/INC.3/4 (Sept. 4, 2023) (The Zero Draft of the global plastics treaty was released on September 4, 2023).

[117] *See* IISD Earth Negot. Bull., *supra* note 115.

[118] ORG. FOR ECON. COOP. AND DEV., *supra* note 23, at 20.

[119] *See* U.N. Env't Assembly Res. 3/7, U.N. Doc. UNEP/EA.3/Res.7, ¶ 10 (Jan. 30, 2018) (stating that an open-ended ad hoc expert group has been established to examine the barriers to and options for combating marine plastic litter and microplastics from all sources, especially land-based sources).

[120] U.N. Env't Assembly, *Rep. of the First Meeting of the Ad Hoc Open-Ended Expert Group on Marine Litter and Microplastics,* ¶ 25, U.N. Doc. UNEP/AHEG/2018/1/6 (June 19, 2018).

[121] *Id.* ¶ 88.

possible and should be incorporated into the global plastics treaty.[122] Thus, Part IV explores the elements of civil liability derived from the Basel Liability Protocol which was adopted under Article 12 of the Basel Convention,[123] which is one of the existing treaties regulating plastic pollution. Next, it applies the civil liability elements to plastic pollution and provides the rationale for incorporating the civil liability elements into the plastics treaty.

A. CIVIL LIABILITY ELEMENTS DERIVED FROM THE BASEL LIABILITY PROTOCOL

The term "liability" refers to situations in which states are obligated to take reparatory and preventive measures vis-à-vis other states for damage caused, or likely to be caused, by hazardous activities carried out under their jurisdiction, irrespective of the unlawfulness of the conduct by the origin state.[124] This liability norm has evolved through the transition from inter-state liability to civil liability under the domestic law of the private operator whose activity caused damage.[125] Although the Basel Liability Protocol has not yet met the requirement for entry into force,[126] it serves as an instrument providing a model and shares several characteristics of civil liability that are in common with other civil liability treaties.[127]

Firstly, the Basel Liability Protocol imposes strict liability for damage resulting from the transboundary movement and disposal of hazardous waste and other waste to individuals.[128] The damage covers loss of life or personal injury, loss of or damage to property, loss of income deriving from an economic interest in any use of the impaired environment, the costs of measures of reinstatement of the impaired environment, and the costs of preventive measures to the extent that the damage arises out of or results from the waste's hazardous properties.[129] The individual can be the person who provides notice of the transboundary movement under Article 6 of the Basel Convention or the exporter if the state of export is the notifier or no notification has occurred, and ultimately the disposer who has taken possession of the hazardous waste and other waste.[130] Additionally, the importer is subject to liability until the disposer has taken possession of the waste if the state of import is the notifier or no notification has occurred.[131] In situations involving multiple individuals, joint and several liability applies.[132]

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[122] *See* Sandrine Maljean-Dubois & Benoît Mayer, *Liability and Compensation for Marine Plastic Pollution: Conceptual Issues and Possible Ways Forward*, 114 AM. J. INT'L L. UNBOUND 206, 210–11 (2020).

[123] Basel Convention, *supra* note 36, art. 12 ("The Parties shall co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.").

[124] Attila Tanzi, *Liability for Lawful Acts*, MAX PLANCK ENCYC. INT'L L., ¶ 1, Jan. 2021.

[125] *Id.* ¶ 19.

[126] *See* HUNTER ET AL., *supra* note 1, at 957–58 ("As of 2020, . . . only 11 of the 20 parties required for entry into force had ratified the Protocol, and it still had not gone into effect.").

[127] *See* LUCAS BERGKAMP, LIABILITY AND ENVIRONMENT: PRIVATE AND PUBLIC LAW ASPECTS OF CIVIL LIABILITY FOR ENVIRONMENTAL HARM IN AN INTERNATIONAL CONTEXT 35 (2001).

[128] *Id.* at 36.

[129] Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, art. 2, ¶ 2(c) *opened for signature* Mar. 6, 2000 [hereinafter Basel Liability Protocol].

[130] *Id.* art. 4, ¶ 1.

[131] *Id.* art. 4, ¶ 2.

[132] *Id.* art. 4, ¶ 6.

Secondly, the Basel Liability Protocol provides an exhaustive list of defenses against strict liability claims.[133] These defenses are situations where the damage resulted from an act of armed conflict, hostilities, civil war, or insurrection; a natural phenomenon of exceptional, inevitable, unforeseeable, and irresistible character; compliance with a compulsory measure of a public authority of the state where the damage occurred; or the wrongful intentional conduct of a third party or the victim.[134]

Thirdly, the Basel Liability Protocol limits strict liability in terms of amount and time.[135] The financial limits are determined by domestic law but are subject to the minimum amounts articulated in Annex B.[136] In addition, time limits for filing a claim are set to five years from the date the claimant knew or should have known of the damage or ten years from the date of the incident.[137]

Lastly, the Basel Liability Protocol requires liable individuals to establish and maintain insurance, bonds, or other financial guarantees covering their liabilities.[138] If compensation is not available because of the absence of liable individuals or their insolvency, alternative mechanisms, such as the Technical Cooperation Trust Fund, may be employed.[139]

B. APPLICABILITY OF THE CIVIL LIABILITY ELEMENTS TO PLASTIC POLLUTION

The number of plastic pollution cases filed against plastic manufacturers, distributors, or retailers has significantly risen at the national level, claiming to hold them accountable for plastic pollution.[140] In line with this shift, the civil liability elements can be applied to certain aspects of plastic pollution.

1. HAZARDOUS WASTE AND HAZARDOUS ACTIVITY

The Basel Liability Protocol adheres to the definition of hazardous waste or other waste as specified in the Basel Convention[141] Since parties to the Basel Convention decided to include mixed, unrecyclable, contaminated plastic waste within its regulatory scope,[142] an incident occurring during transboundary movement or disposal of such plastic waste can be subject to the Basel Liability Protocol. These transboundary movements and disposal of waste can be classified as hazardous activities. The International Law Commission (ILC), however, provides an extensive definition of a hazardous activity as "an activity which involves a risk of causing significant harm" in its draft, reflecting the modern development

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[133] BERGKAMP, *supra* note 127, at 36.
[134] Basel Liability Protocol, *supra* note 129, art. 4, ¶ 5.
[135] BERGKAMP, *supra* note 127, at 36.
[136] Basel Liability Protocol, *supra* note 129, art. 12, ¶ 1, Annex B.
[137] *Id.* art. 13, ¶¶ 1–2.
[138] *Id.* art. 14, ¶ 1.
[139] *Id.* art. 15, ¶ 1; BERGKAMP, *supra* note 127, at 37.
[140] *See, e.g.*, Connor Fraser, *Plastics in the Courtroom: The Evolution of Plastics Litigation*, N.Y.U: STATE ENERGY & ENV'T IMPACT CTR. (July 15, 2022), https://stateimpactcenter.org/insights/plastics-in-the-courtroom-the-evolution-of-plastics-litigation.
[141] Basel Liability Protocol, *supra* note 129, art. 2, ¶ 1.
[142] HUNTER ET AL., *supra* note 1, at 968.

of civil liability treaties.[143] Considering the definition, hazardous activities may encompass those related to hazardous chemicals, which can be additives for plastics, such as PCBs listed in Annex III of the Rotterdam Convention,[144] or PBDEs, HBCDD, HBB, and SCCPs listed in Annex A of the Stockholm Convention.[145] Furthermore, activities associated with non-hazardous chemicals, such as the improper disposal of plastic waste containing non-hazardous chemicals may also be considered hazardous.

2. DAMAGE

Given the definition of damage under the Basel Liability Protocol, plastic pollution damage can be loss of life or personal injury, loss of or damage to property, loss of income directly deriving from an economic interest in any use of the impaired environment, the costs of measures of reinstatement of the impaired environment, and the costs of preventive measures.[146] On the other hand, compensation for damage under most civil liability treaties does not cover non-economic components of the environment, such as fauna or flora not exploited by humans and incapable of complete restoration.[147] Beyond this, there exists a difficulty in quantifying such damage,[148] and it is imperative to conduct further research to gain a better understanding of how to evaluate and compensate for the irreparable environmental damage.[149] Meanwhile, the quantifiable costs from marine plastic pollution, as related to marine natural capital, are conservatively estimated to range from $3,300 to $33,000 per ton of marine plastics per year, based on the 2011 ecosystem services value and marine plastic stocks.[150]

Since the purpose of civil liability is to internalize environmental and other social costs into ones benefitting from the hazardous activities in line with the implementation of the polluter pays principle,[151] civil liability may require providing measures of reinstatement, by analogy with actions or support for finance, technology, and capacity-building, as well as compensation – i.e. financial indemnification.[152] Hence, legal remedies pursued by liable individuals other than compensation are expected to help in efforts to restore pure ecosystems destroyed by plastic pollution.

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[143] *Int'l L. Comm'n, Rep. on the Work of Its Fifty-Eighth Session*, U.N. Doc. A/61/10, at 58 (2006) [hereinafter ILC].

[144] Rotterdam Convention, *supra* note 80.

[145] Stockholm Convention, *supra* note 84.

[146] Basel Liability Protocol, *supra* note 129, art. 2, ¶ 2(c).

[147] Fitzmaurice, *supra* note 11, at 1031. *Contra* Jutta Brunnée, *Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection*, 53 INT'L & COMPAR. L.Q. 351, 364 (2004) ("[S]everal recent agreements allow for compensation of ecological damage to the extent that it is reflected in restoration or clean-up costs.").

[148] Malgosia Fitzmaurice, *A Few Reflections on State Responsibility or Liability for Environmental Harm*, EJIL: TALK! (Mar. 8, 2023), https://www.ejiltalk.org/a-few-reflections-on-state-responsibility-or-liability-for-environmental-harm/.

[149] Anne Daniel, *Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?*, 12 REV. EUR. COMPAR. & INT'L ENV'T L. 225, 237 (2003).

[150] Nicola J. Beaumont et al., *Global Ecological, Social and Economic Impacts of Marine Plastic*, 142 MARINE POLLUTION BULL. 189, 194 (2019).

[151] *See* PHILIPPE SANDS QC, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 869 (2d ed. 2003).

[152] Maljean-Dubois & Mayer, *supra* note 122, at 210.

3. STRICT LIABILITY

The Basel Liability Protocol differentiates between strict liability and fault-based liability through separate articles, namely Article 4 and Article 5. Under Article 5, fault-based liability is established when damage has occurred as a result of non-compliance with the requirements of the Basel Convention, or due to wrongful intentional, reckless, or negligent conduct.[153] In contrast, strict liability does not require proof of fault.[154] Consequently, any stakeholders involved in hazardous activities throughout the full life cycle of plastics can be held liable for the damage caused, even when they have exercised due care. However, their strict liability may be capped in the amount and be exempted when damage has occurred in certain extraordinary situations out of their control.

4. LIABLE INDIVIDUALS AND JOINT AND SEVERAL LIABILITY

When multiple actors are engaged in hazardous activities, the issue may arise as to whom liability should be channeled.[155] The liability claims for plastic pollution damage can be brought against companies that produce plastics, those who provide them to consumers, consumers themselves, or those who dispose of plastic waste in the environment.[156] In this situation, however, joint and several liability is allowed. Moreover, the exhaustive list of defenses and time limits for filing the liability claims serve to narrow down the scope of potential defendants.

5. FINANCIAL SECURITY

Compensation for plastic pollution damage can be ensured through liable individuals' insurance or bonds, or through supplemental funds. International compensation funds, in particular, play a significant role when civil liabilities at the national level are insufficient to cover the damage.[157] These funds appear to be accessible to diverse claimants, including individuals, partnerships, companies, private organizations, or public bodies such as states or local authorities.[158] Therefore, in cases where challenges arise due to the absence of liable individuals, their insolvency, or the involvement of multiple jurisdictions in pursuing the liability claim for plastic pollution damage in courts, claimants may alternatively seek

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[153] Basel Liability Protocol, *supra* note 129, art. 5 ("Without prejudice to Article 4, any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the Convention or by his wrongful intentional, reckless or negligent acts or omissions.").

[154] ILC, *supra* note 143, at 58.

[155] Daniel, *supra* note 149, at 237.

[156] Maljean-Dubois & Mayer, *supra* note 122, at 207.

[157] Chie Kojima, *Compensation Fund*, *in* MAX PLANCK ENCYC. PUB. INT'L L., 519 (2019) (discussing the importance of international compensation funds to cover insufficiencies).

[158] *See id.* at 521 (explaining that the International Oil Pollution Compensation Funds have provided compensation to any persons who have suffered pollution damage but are unable to obtain full and adequate compensation under the International Convention on Civil Liability for Oil Pollution Damage, and that claimants may include individuals, partnerships, companies, private organizations, or public bodies such as states or local authorities).

recourse through international compensation funds. It is worth noting that the Zero Draft of the global plastics treaty includes the option of establishing newly dedicated funds and a plastic pollution fee to be paid by plastic polymer producers,[159] which could potentially serve this function.

C. RATIONALE FOR INCORPORATING THE CIVIL LIABILITY ELEMENTS INTO THE PLASTICS TREATY

Generally, a liability norm serves multiple purposes, including providing an incentive to encourage compliance with environmental obligations, imposing sanctions for hazardous activities, requiring corrective measures to restore damaged environmental assets, and internalizing environmental and other social costs into production processes and other activities in line with the implementation of the polluter pays principle.[160] Incorporating the civil liability elements into the plastics treaty, in alignment with these purposes, will bolster efforts to mitigate plastic pollution while upholding international legal principles. Moreover, it will simplify, expedite, and ensure cost-efficiency in invoking liability claims.[161]

1. UPHOLDING INTERNATIONAL LEGAL PRINCIPLES AND STRATEGIES

Incorporating the civil liability elements into the plastics treaty will support international legal principles and strategies such as the polluter pays principle, extended producer responsibility, the right of access to justice, and the obligation not to cause transboundary environmental harm, thereby enhancing their effective implementation within the context of plastic pollution.

i. POLLUTER PAYS PRINCIPLE

The polluter pays principle originated as an economic policy for allocating the costs of pollution or environmental damage borne by public authorities, and gained international recognition as an environmental policy through the Rio Declaration.[162] The implementation of this principle entails consideration of civil liability and compensation.[163] In the case of plastic pollution, liability claims seeking compensation for damage may be increasingly brought against plastic manufacturing companies or plastic waste management companies

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[159] Intergovernmental Negotiating Comm. to Develop an Int'l Legally Binding Instrument on Plastic Pollution, Including Marine Env't, *supra* note 116, at 20–21.

[160] *See* SANDS, *supra* note 151.

[161] A.E. Boyle, *Globalising Environmental Liability: The Interplay of National and International Law*, 17 J. ENV'T L. 3, 8 (2005) (discussing more efficient ways to punish those who cause pollution or other forms of damage).

[162] PATRICIA BIRNIE ET AL., INTERNATIONAL LAW & THE ENVIRONMENT 322 (3d ed. 2009); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, princ. 16, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992) [hereinafter Rio Declaration] ("National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.").

[163] *See* Fitzmaurice, *supra* note 11, at 1034; *see also* BIRNIE ET AL., *supra* note 162, at 324.

that produce plastics containing harmful chemicals or transfer plastic waste to other countries where proper recycling is lacking.[164] Consistent with this, although most existing pollution liability insurances for businesses do not explicitly cover plastic pollution, there is potential for the development of insurance coverage specifically addressing plastic pollution.[165] These progressions accord with the polluter pays principle, which requires the costs ensured by insurance should be borne by companies liable for plastic pollution damage.

ii. EXTENDED PRODUCER RESPONSIBILITY

Extended Producer Responsibility (EPR) is an environmental protection strategy that aims to reduce the negative environmental impact of a product by making manufacturers responsible for the full life cycle of their product with a particular emphasis on take-back, recycling, and final disposal of the product.[166] EPR correlates with the polluter pays principle and can be operated in the form of liability for environmental damage caused by the usage or disposal of the product.[167] Therefore, following the same logic as the polluter pays principle above, plastic manufacturing companies liable for plastic pollution damage take the costs of managing their plastic waste and implement EPR.

iii. RIGHT OF ACCESS TO JUSTICE, REDRESS, AND REMEDY

The right of access to justice appears in the Rio Declaration stating, "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[168] The liability norm ensures the right of access to justice, redress, and remedy by shifting from the inter-state liability approach under international law to civil liability under the domestic law of the private operator whose activity caused damage, which is simpler, quicker, and more economically efficient.[169] In addition, compensation from liable individuals, insurance, bonds, and supplemental funds facilitates the remedy for damage caused.[170] Global petrochemical companies are expected to face liability claims for plastic pollution damage exceeding $20 billion by the end of the decade.[171] The civil liability elements in the plastics

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[164] *Unwrapping the Risks of Plastic Pollution to the Insurance Industry*, UNITED NATIONS ENVIRONMENT PROGRAM, 26–27 (November 2019), https://www.unepfi.org/wordpress/wp-content/uploads/2019/11/PSI-unwrapping-the-risks-of-plastic-pollution-to-the-insurance-industry.pdf.

[165] *Id.* at 28.

[166] Thomas Lindhqvist, Extended Producer Responsibility in Cleaner Production: Policy Principle to Promote Environmental Improvements of Product System 37 (May 5, 2000) (Doctoral Dissertation, Lund University).

[167] *Id.* at 38, 128. *Contra* Wang, *supra* note 81 ("The polluter pays principle is to blame the polluter for the cost of pollution whereas the producer of plastic products shall bear the cost of pollution under the EPR even if the products do not end up contributing to pollution.").

[168] Rio Declaration, *supra* note 162, princ. 10.

[169] *See* Fitzmaurice, *supra* note 11, at 1034 (explaining that civil liability regime can operate as a backup system in the event of the occurrence of environmental harm, notwithstanding the legal framework of the underlying protection regime); *see also* Tanzi, *Liability for Lawful Acts*, *supra* note 124, ¶ 19; Boyle, *supra* note 161, at 8.

[170] David Hunter, *Moving Beyond State-Centrism in International Environmental Law*, 52 ENV'T POL'Y & L. 201, 211 (2022).

[171] Jamie Hailstone, *Plastic Pollution Could Trigger Legal Claims Worth Billions of Dollars, Warns Report*, FORBES (Oct. 14, 2022, 4:00 AM), https://www.forbes.com/sites/jamiehailstone/2022/10/14/plastic-pollution-could-trigger-legal-claims-worth-billions-of-dollars-warns-report/?sh=6694e42b6481.

treaty will serve as a framework for these claims, and protect the right of access to justice, redress, and remedy.

iv. OBLIGATION NOT TO CAUSE TRANSBOUNDARY ENVIRONMENTAL HARM

The obligation not to cause transboundary environmental harm is elaborated in the Rio Declaration and is considered customary international law.[172] The obligation presumes that states have a duty to prevent, reduce, and control transboundary pollution and environmental harm resulting from activities within their jurisdiction or control.[173] This preventive approach may lead states to impose civil liability under domestic laws on manufacturers, disposers, and other stakeholders for plastic pollution and foster their efforts in preventing and mitigating plastic pollution. In this way of implementation, the civil liability elements in the plastics treaty will contribute to compliance with the obligation not to cause transboundary environmental harm.

2. ENHANCING EFFICIENCY IN INVOKING LIABILITY CLAIMS

Channeling liability to individuals relieves courts of the difficult task of setting standards of reasonable care and plaintiffs of the burden of proving breach of those standards in complex and technical industrial processes.[174] Furthermore, it simplifies the identification of defendants based on the assumption that they are in a position to exercise effective control of their activities.[175] As previously mentioned, petrochemical companies, plastic manufacturing companies, and plastic waste management companies are likely to be defendants in plastic pollution litigations. In contrast, attributing plastic pollution to specific states is practically impossible and time-consuming under the inter-state liability approach.[176] Furthermore, the polluter states may lack jurisdiction over the polluted territory and may not be in a position to undertake clean-up measures.[177]

3. BOLSTERING EFFORTS TO PREVENT OR MITIGATE PLASTIC POLLUTION

In addition to deterrence and fines, civil liability is an integral part of pollution control, as it prompts the adoption of corrective measures to change conduct and helps avoid rising costs of preventing contamination and fixing the damage.[178] For example, Neste Oyj and Ravago, an oil refining company and a polymers recycling company, respectively, have

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[172] *See* Rio Declaration, *supra* note 162, princ. 2 ("States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."); HUNTER ET AL., *supra* note 1, at 454.

[173] BIRNIE, ET AL., *supra* note 162, at 137.

[174] Boyle, *supra* note 161, at 13.

[175] *Id.* at 14.

[176] Goncalves & Faure, *supra* note 72, at 941.

[177] *Id.*

[178] Ananaya Khare, *Fundamental Principles Governing International Environmental Law*, 4 INT'L J.L. MGMT. & HUMAN. 1874, 1879 (2021). *See also* Fitzmaurice, *supra* note 11, at 1034. *Contra* BERGKAMP, *supra* note 127, at 151 ("[L]iability is an inefficient way to pursue deterrence, risk spreading and lowering activity levels.").

joined to build a chemical recycling facility and develop capabilities for managing plastic waste.[179] Coca-Cola has launched a fully recyclable polyethylene terephthalate (PET) bottle made with 100% plant-based material.[180] These efforts to prevent or mitigate plastic pollution will be further promoted if companies are at risk of being subject to civil liability.

V. CONCLUSION

The UNEA Resolution 5/14 is a historical achievement to forge an international legally binding treaty addressing the full life cycle of plastics from production to disposal.[181] The negotiations have just begun, and this paper suggests the incorporation of civil liability elements into the plastics treaty, or if that proves unfeasible, into a subsequent protocol, as an international legal mechanism. By adopting those elements, manufacturers, disposers, and other stakeholders involved in hazardous activities throughout the full life cycle of plastics can be held strictly liable for the damage caused. Their liability may be subject to legal defenses or limitations in terms of amount and time. However, compensation can be ensured through insurance or bonds of manufacturers or disposers, or supplemental funds.

Incorporating the civil liability elements into the plastics treaty upholds international legal principles and strategies, enhances efficiency in invoking liability claims, and bolsters efforts to prevent or mitigate plastic pollution. These advantages correlate with Resolution 5/14 in that UNEA calls for the INC to take into account the principles of the Rio Declaration and provisions to promote sustainable production and consumption of plastics through product design and environmentally sound waste management. This will also encourage action by all stakeholders, including the private sector, and to promote research into and development of sustainable, affordable, innovative and cost-efficient approaches.[182]

Given that development of civil liability under the already-existing international treaties is still largely an aspiration,[183] with certain aspects relying on scientific and socioeconomic research,[184] it is crucial to proceed in a manner that maximizes the effectiveness of the civil liability elements when incorporating them into the plastics treaty. In doing so, this incorporation will signify substantial progress not only in combating plastic pollution to save the environment and humans, but also in advancing civil liability itself.

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[179] Megan Smalley, *Neste, Ravago to Construct Chemical Recycling Facility in the Netherlands*, RECYCLING TODAY (Oct. 22, 2021), https://www.recyclingtoday.com/news/neste-ravago-construct-chemical-recycling-plant-alterra-netherlands/.

[180] *Coca-Cola Collaborates with Tech Partners to Create Bottle Prototype Made from 100% Plant-Based Sources*, COCA-COLA CO. (Oct. 22, 2021), https://www.coca-colacompany.com/media-center/100-percent-plant-based-plastic-bottle.

[181] *See UN To Take First Step Towards 'Historic' Plastic Treaty*, AFP (Mar. 2, 2022, 3:56 AM), https://www.france24.com/en/live-news/20220302-un-to-take-first-step-towards-historic-plastic-treaty ("Inger Andersen, the head of the UN Environment Programme, said a plastics treaty would be 'one for the history books' and the most important pact for the planet since the Paris climate agreement.").

[182] U.N. Env't Assembly, *supra* note 8, at 3.

[183] BIRNIE ET AL., *supra* note 162, at 334.

[184] *See* Daniel, *supra* note 149, at 236 ("The practical limitations of proving cause and effect due to long-range transport is a scientific and legal concern.").


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SOVEREIGNTY IN CRIMEA AND DONBAS AT THE EUROPEAN COURT OF HUMAN RIGHTS

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I. INTRODUCTION

Russia's conduct in Ukraine in 2014 is the subject of a number of applications that Ukraine in 2014 and 2015, and the Netherlands in 2020, lodged under the European Convention on Human Rights (the Convention) in the European Court of Human Rights (the Court or ECtHR).[1] The applications lodged by Ukraine address conduct in two geographic areas of Ukraine: Ukraine's eastern area customarily referred to as the 'Donbas,' which is comprised of the oblasts (provinces) of Donetsk and Luhansk, and Ukraine's Autonomous Republic of Crimea, which is comprised of the Crimean Peninsula.[2] In its applications, Ukraine alleges a range of heinous and unlawful acts, including abduction of children in eastern Ukraine,[3] and other violations of human rights in Crimea and in eastern Ukraine.[4] The Netherlands in its application alleges violations in Ukraine's eastern area, in particular the destruction of Malaysian Airlines flight MH17 on July 17, 2014. The incident occurred near Snizhne, a small city in Donetsk province, and resulted in the deaths of the 298 persons aboard, all of whom were civilians and 196 of whom were nationals of the Netherlands.[5]

Over several steps, the ECtHR partitioned and joined certain claims that the applicant States lodged,[6] thereby reorganizing the proceedings along geographic lines.[7] In the structure that the Court eventually placed on the applications, the Court now addresses the two applicant States' claims regarding eastern Ukraine as one case, and Ukraine's claims regarding the Crimean area of Ukraine as another. The claims regarding eastern Ukraine form *Ukraine and the Netherlands v. Russia* ('*MH17* case'), and the claims regarding the Crimean area form *Ukraine v. Russia (*re *Crimea)* ('*Crimea* case'). The ECtHR adopted a decision on admissibility in *Ukraine v. Russia (*re *Crimea)* on December 17, 2020.[8]

The proceedings continued following Russia's enlarged invasion of Ukraine, which began on February 24, 2022, expulsion from the Council of Europe on March 16, 2022, and

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[1] At the time this article went to press, four *Ukraine v. Russia* cases were pending before the Eur. Ct. H.R., including Ukraine v. Russia *(re Crimea)*, App. Nos. 20958/14 & 38334/18, (Dec. 16, 2020), https://hudoc.echr.coe.int/eng?i=001-207622 [hereinafter *Crimea* Case], Ukraine v. Russia, App. Nos. 8019/16, 43800/14, 28525/20 & 11055/22 (Jan. 3, 2023), https://hudoc.echr.coe.int/eng?i=001-222889 [hereinafter *MH17* Case], and several individual applications. *Id.* ¶ 388. *See also* overview periodically updated on the website of the Court: *Knowledge Sharing,* EURO. CT. OF HUM. RTS., https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c (last visited, Nov. 9, 2023).

[2] The peninsula has two administrative parts, the Autonomous Republic of Crimea and the city of Sevastopol. G.A. Res. 68/262, ¶¶ 5-6 (Mar. 27, 2014). For ease of reference, I refer to the peninsula as "Crimea."

[3] *Id.* ¶¶ 4, 374-375.

[4] *MH17* Case, App. Nos. 8019/16, 43800/14, 28525/20 & 11055/22, ¶¶ 11, 373. Human rights violations as alleged in Ukraine's applications are summarized in the dispositive paragraph dismissing Russia's time-bar objections: dispositive point 8, *id.* ¶¶ 226-227.

[5] *Id.* ¶¶ 6, 69, 376-382.

[6] *Id.* ¶¶ 11, 14, 22.

[7] The procedural history is complex. *See id.* ¶¶ 233.

[8] *Crimea* Case, App. Nos. 20958/14 & 38334/18.

the cessation of Russia's status as a High Contracting Party to the Convention on September 26, 2022.[9]

The ECtHR adopted a Decision on January 25, 2023, in the *MH17* case. In the January 25, 2023 Decision, the Court addressed, in fifteen dispositive points, a series of jurisdictional objections *ratione loci* and *ratione materiae,* and objections to admissibility.[10] Of interest here are the Court's holdings and reasoning with regard to Russia's effective presence in eastern Ukraine and Crimea. If a respondent State lacks jurisdiction *ratione loci* in the place where an applicant alleges that the respondent State's conduct constitutes a breach of one of the respondent State's obligations under the Convention, then the ECtHR lacks jurisdiction to adjudicate the matter.[11] The ECtHR held unanimously that events in eastern Ukraine, where Ukraine alleges that Russia's conduct breached Russia's Convention obligations, are within Russia's jurisdiction *ratione loci.*[12] The majority also ruled that the destruction of flight MH17–which the Netherlands' complaint addresses–is within Russia's jurisdiction *ratione loci*.[13] In arriving at these holdings, the Court was clear that there is no question as to sovereignty over eastern Ukraine, and the Court affirmed Ukraine's sovereignty over the locations concerned in the *MH17* case.[14] Also of interest is the Court's holding that the complaints concerning armed conflict fall within the Court's jurisdiction *ratione materiae*.[15]

The Court, in its January 25, 2023 decision in *MH17,* recalled certain holdings in its December 17, 2020 decision in *Ukraine v. Russia (*re *Crimea).* This article will consider both decisions with particular reference to what they have to say about Ukraine's sovereignty and the Court's reasoning behind them. In both decisions, the ECtHR was careful not to disturb the widespread recognition that, in Donbas and Crimea, Ukraine is the only sovereign. The decisions illustrate that a judge or other decision-maker, confronted with a radical challenge to legal order, nevertheless may use ordinary methods of fact-finding and legal reasoning to reach conclusions that both observe the formal limitations of the dispute settlement function and uphold legal order.

After considering *MH17* and *Crimea*, I will then turn to a case in which the decision-makers reached a radically different result. *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)* (hereinafter referred to as "*Coastal State Rights*") called on a United Nations Convention on the Law of the Sea (UNCLOS) Annex VII tribunal to determine whether certain claims of Ukraine against Russia regarding Russia's conduct in maritime areas appurtenant to Crimea are claims that fall within the dispute settlement procedures of UNCLOS. Unlike the ECtHR, the Annex VII Tribunal concluded that a legal dispute exists as to whether Ukraine is sovereign in Crimea. The reasons that the Tribunal stated for this conclusion are based on a particular interpretation that the Tribunal placed on UNCLOS but, moreover, from a particular approach that the

[9] *MH17* Case, App. Nos. 8019/16, 43800/14 & 28525/20, ¶¶ 35, 36, 389.
[10] *Id.* ¶ 226.
[11] *Id.* ¶¶ 505-506.
[12] *Id.* at dispositive point 2.
[13] *Id.* at dispositive point 4. The factors distinguishing the Court's analysis between the two applicant parties' jurisdiction arguments are not relevant for present purposes.
[14] *Id.* ¶ 552.
[15] *Id.* at dispositive point 5.

Tribunal took to fact-finding. The implications of that interpretation and of the approach to fact-finding are potentially far-reaching.[16]

II. UKRAINE AND THE NETHERLANDS V. RUSSIA (MH17 CASE) DECISION OF JANUARY 25, 2023

Russia's jurisdictional objections in *MH17* rested on factual assertions. Russia asserted that it had not invaded Donbas and that it did not exercise control over armed formations that were fighting to separate Donbas from Ukraine. By rejecting these factual assertions, the ECtHR rejected Russia's jurisdictional objections.

This section considers: (A) the ECtHR's holding with regard to Russia's jurisdiction *ratione loci* and the judicial method behind it; (B) the ECtHR's holding regarding jurisdiction *ratione materiae*; and (C) the conclusion that these holdings both state and imply that Ukraine's sovereignty in Donbas has not been disturbed.

A. JURISDICTION *RATIONE LOCI*: REJECTING THE FICTION OF INDEPENDENT 'SEPARATISTS' IN DONBAS

1. RUSSIA'S JURISDICTIONAL DEFENSE

Russia's jurisdictional defense to the claims of Ukraine and the Netherlands was straightforward. According to Russia, "Russian troops did not invade Ukraine;"[17] and Russia "was not involved in the conflict in eastern Ukraine" in any way.[18] In denying involvement, Russia gave an account of events that, if accepted, would have been a complete answer to the claims, as no claim would stand against a respondent who has nothing to do with the conduct that the claim alleges.[19] Also, in denying involvement in an armed conflict in eastern Ukraine, Russia sought to shift the matter to the general course of events in eastern Ukraine, over which no provision of the European Convention specifically empowers the Court to adjudicate. The European Convention empowers the Court to adjudicate claims that arise when a respondent has breached one of the human rights obligations under the Convention,[20]

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[16] Proceedings also had been afoot at the Eur. Ct. H.R. in which Russia alleged that Ukraine had engaged in a pattern of killings, abductions, forced displacement, interference with voting rights, discrimination against speakers of the Russian language, and diplomatic and consular violations. Russia failed to pursue its claims in earnest, eventually ceasing altogether to participate in the case that it had instituted. The ECtHR adopted a decision on July 18, 2023 by which it found "no grounds relating to respect for human rights as defined in the Convention and the Protocols thereto which . . . would require it to continue the examination of [Russia's] application," and in light of Russia's cessation of participation, struck the case from the List: Russia v. Ukraine, App. No. 36958/21, ¶¶ 26, 29 (July 4, 2023), https://hudoc.echr.coe.int/?i=001-226077.

[17] *MH17* Case, App. Nos. 8019/16, 43800/14 & 28525/20, ¶ 362.

[18] *Id.* ¶ 355.

[19] This observation reflects several elements of State responsibility, including the causal element: G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, at arts. 31(1) and 2(a) (Dec. 12, 2001).

[20] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 & 15, arts. 19 & 32, Nov. 4, 1950.

not claims that arise when a respondent has a general responsibility for a war.[21] Russia asserted that the applications of Ukraine and the Netherlands were "not a genuine application brought in good faith," because, in truth, according to Russia, they "concern[ed] the general situation in eastern Ukraine."[22] Thus, Russia's jurisdictional defense had two layers: first, the assertion of non-involvement which, if accepted, would entail that the applicants had stated no answerable claim; and, second, the centering of that assertion on the general course of events in Ukraine, a matrix of political and military matters that fall outside the Court's power to adjudicate.

Russia developed its defense by making factual allegations about the general course of events in Ukraine. According to Russia, "[t]he Nazi heritage of the thugs responsible for this violence [against the populace in Crimea and eastern Ukraine]" was "obvious;"[23] Ukraine's government "launched completely unlawful violence against its own people," instigating "waves of refugees to make their way to Russia;"[24] any armed activities in eastern Ukraine not carried out by Ukraine's government were "carried out by separatists" over whom Russia exercised no control;[25] and "separatist government figures or separatist commanders" were not Russian agents.[26] According to Russia, "[t]here was no plausible prima facie evidence of any Russian invasion during the relevant period."[27] Instead, Russia asserted, "this was a *civil* war with defined sides,"[28] a characterization which, if accepted, would mean that the war was between Ukraine's central government and indigenous rebels or separatists, not between Ukraine and Russia. According to Russia, political formations fighting against Ukraine's central government in Donbas—the 'Donetsk People's Republic' and the 'Luhansk People's Republic' (the 'DPR' and 'LPR')[29]— were not under Russia's control.[30]

2. ECtHR'S ANALYSIS OF *RATIONE LOCI* JURISDICTION

In considering Russia's jurisdictional defense, the ECtHR recalled its jurisprudence regarding *ratione loci* jurisdiction of respondent States. In particular, the Court recalled that, "[w]here there is effective control over an area, whether exercised directly by the Contracting State's own armed forces or via the local subordinate administration, there is *ratione loci* jurisdiction."[31] To determine whether Russia exercised *ratione loci* jurisdiction in Donbas,

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[21] I.e., responsibility for the legality of the war as such. See the colloquy between judges in Georgia v. Russia (II), App. No. 38263/08, ¶ 28 (Jan. 21, 2021), https://hudoc.echr.coe.int/fre?i=001-207757 (Keller, J., concurring). *See also id.*, ¶ 31 (Chanturia, J., partly dissenting); ¶ 87 (noting comments of the Human Rights Centre of the University of Essex, as third-party).

[22] *MH17* Case, App. Nos. 8019/16, 43800/14 & 28525/20, ¶ 483.

[23] *Id.* ¶ 360.

[24] *Id.* ¶ 359.

[25] *Id.* ¶ 364.

[26] *Id.* ¶ 365.

[27] *Id.* ¶ 510. To similar effect, *see id.* ¶ 579.

[28] *Id.* ¶ 517 (emphasis added).

[29] Org. for Sec. & Co-Operation in Eur. [OSCE]: Special Monitoring Mission to Ukr., *Findings on Formerly State-Financed Institutions in the Donetsk and Luhansk Regions*, at 3, SEC.FR/273/15 (Mar. 30, 2015), https://www.osce.org/files/f/documents/8/2/148326.pdf.

[30] *Id.* ¶ 518.

[31] *Id.* ¶ 561.

therefore, the Court had to consider an essentially factual contention: Russia's contention that Russia did *not* have effective control in the area.[32]

Some brief observations are in order as to the ECtHR's approach to fact-finding in *MH17* in general and in relation to one aspect of its fact-finding in particular: its regard for findings by other international institutions.

a. JUDICIAL FACT-FINDING IN GENERAL

According to the ECtHR:

> There are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment: the Court has complete freedom in assessing not only the admissibility and relevance but also the probative value of each item of evidence before it. The Court adopts those conclusions of fact which are, in its view, supported by the free evaluation of all material before it irrespective of its origin, including such inferences as may flow from the facts and the parties' submissions and conduct.[33]

The Court, in this affirmation of its power to consider evidence and to reach conclusions as to relevant facts, continues its long-standing approach to fact-finding. As the Court observed over fifty years before, "[o]nce a case is duly referred to it . . . the Court is endowed with full jurisdiction and may thus take cognisance of all questions of fact and of law which may arise in the course of the consideration of the case."[34]

The Court in *MH17* proceeded to examine the factual evidence with care. It noted that Russia could have supplied evidence, if such evidence existed, showing that a real separatist movement, and not Russian proxies, were the armed forces at work against Ukraine's government.[35] Russia did not supply such evidence, and the Court decided that it would "draw all the inferences that it deems relevant" from Russia's failure in that regard.[36]

Russia attacked Ukraine's factual evidence regarding jurisdiction *ratione loci*. According to Russia, Ukraine had "failed to provide any evidence at all for vast tracts of [its] allegations, including those concerning jurisdiction."[37] Foreign forensic sources came under particular attack. Russia asserted that such sources were inherently untrustworthy or outright

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[32] For thoughtful exploration, *see* Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 LEIDEN J. INT'L L. 857, 860 (2012); Cedric Ryngaert, *Clarifying the Extraterritorial Application of the European Convention on Human Rights*, 28 UTRECHT J. INT'L & EUR. L. 57 (2012).

[33] *MH17* Case, App. Nos. 8019/16, 43800/14 & 28525/20, ¶ 440.

[34] De Wilde v. Belgium, App. Nos. 2832/66, 2835/66, 2899/66, ¶ 49 (June 18, 1971).

[35] *MH17* Case, App. Nos. 8019/16, 43800/14 & 28525/20, ¶¶ 455-458.

[36] *Id.* ¶ 459. On Russia's failure to show that its forces were not in eastern Ukraine, *see id.* ¶¶ 580-585. On fact-finding in cases arising out of armed conflict, *see* Marko Milanovic, *The Russia-Ukraine War and the European Convention on Human Rights*, ARTICLES OF WAR (Mar. 1, 2022), https://lieber.westpoint.edu/russia-ukraine-war-european-convention-human-rights/.

[37] *MH17* Case, App. Nos. 8019/16, 43800/14 & 28525/20, ¶ 408.

fake.[38] The Court rejected Russia's contention that Ukraine and the Netherlands had submitted false evidence.[39]

b. FINDINGS BY OTHER INTERNATIONAL INSTITUTIONS

Ukraine, in its pleadings, referred to several international institutions as sources of evidence in support of Ukraine's factual contentions. The Court noted that "[t]he applicant Ukrainian Government relied in particular on published reports and other material from international organisations and bodies, most notably the OHCHR, the OSCE and the Parliamentary Assembly of the Council of Europe ('PACE')."[40] The Court found no fault in a party placing reliance on such "reports and other material." Indeed, the Court itself did the same. The Court stated that it draws upon "reports and statements by international observers, NGOs and the media as well as decisions of other international and national courts to shed light on the facts or to corroborate findings made by the Court."[41] The Court referred extensively to reports of the OHCHR and the OSCE.[42] For example, the Court drew attention to reports from the OSCE Border Mission as evidence of Russia's presence in eastern Ukraine.[43] Evidence from OSCE reports were particularly important in establishing that the "separatists" in Donbas were orchestrated by and included significant numbers of Russian military personnel acting on Russia's instruction.[44] Reports of the OHCHR's Human Rights Monitoring Mission in Ukraine provided evidence, which the Court credited, that regular Russian troops were engaged in fighting in Donbas.[45]

Noteworthy as well: a broad international practice rejected the assertion that the DPR and LPR had real independent existence or their actions legal validity. Russia had taken a number of steps purporting to validate the so-called "referendums" and "elections" that the DPR and LPR supposedly held in Donbas in May 2014 and November 2014. The Netherlands pointed out that Russia's "position was *out of step with the position of the rest of the international community*," and the Court agreed.[46]

c. PROVING THAT RUSSIA INVADED UKRAINE

In some situations, courts, including the ECtHR, have found it obvious that a State carried out an armed invasion. For example, in *Georgia v. Russia (II),* the ECtHR observed that "the Russian armed forces undeniably carried out military operations, including . . . in undisputed Georgian territory."[47] In contrast, a case where a court found that there had been

[38] *Id.* ¶¶ 409-417.
[39] *Id.* ¶ 496.
[40] *Id.* ¶ 398.
[41] *Id.* ¶ 442.
[42] *Id.* ¶ 462.
[43] *Id.* ¶¶ 596–597.
[44] *See id.* ¶¶ 596-599.
[45] *Id.* ¶ 603.
[46] *Id.* ¶ 674 (emphasis added).
[47] Georgia v. Russia (II), App. No. 38263/08, ¶ 109.

no invasion was *Military and Paramilitary Activities in and against Nicaragua.*[48] El Salvador, alleging that it was under armed attack by Nicaragua, sought to intervene in the case. The ICJ rejected El Salvador's application for intervention. Though the ICJ there invoked procedural grounds that have been criticized for their obscurity,[49] in substantive result the Court implied that there was no armed attack for which Nicaragua might have answered.[50]

In *MH17,* Russia denied that any Russian military personnel were in Donbas.[51] A "noteworthy" initial point to which the Court drew attention was that Russia's President stated in 2015 that "[w]e've never said there are no people there . . . who deal with certain matters, including in the military area."[52] The Court "note[d] the similarities in time, space and method between the events in Crimea in late February and early March 2014—which the Court has found were within the jurisdiction of the respondent State . . . —and events in eastern Ukraine during the early stages of unrest."[53] Section III below considers the Court's findings in *Ukraine v. Russia (*re *Crimea*). In Donbas, as in Crimea,

> protests began by what were apparently local volunteers who subsequently took up arms and took over Government buildings. These "local" separatists subsequently organized "referendums" on the status of the regions concerned which apparently showed a large majority in favour of separation from Ukraine.[54]

Considering the evidence, the Court discerned that the principal individuals who coordinated events in Donbas were long-time Russian operatives who had engaged in similar "separatist" activities in the Transdniestria region of Moldova years before and in the Crimea region of Ukraine months before.[55] The Court concluded that these individuals, who were key figures in the "separatist" cadres, were in fact "members of the Russian military acting under Russian instruction."[56] By August of 2014, "there was a large-scale deployment of regular Russian troops" to prevent Ukraine from re-establishing effective control in Donbas.[57] The Court did "not consider it credible that local separatists in eastern Ukraine, even with the support of some professional Russian soldiers on leave, could have succeeded in pushing back the Ukrainian offensive to the point of forcing a surrender . . . and recovering, in such a short space of time, significant areas of land."[58]

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[48] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), Order, 1984 I.C.J. Rep. 215, ¶ 2 (Oct. 4).

[49] See the trenchant critique in, Nicar. v. U.S., 1984 I.C.J. Rep. 223-244 (Schwebel, J., dissenting).

[50] For a case of intermediate forensic difficulty (as concerned the question whether one State had invaded another), *see* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 53 (Dec. 19), where the ICJ determined that, in any event past a certain date, Congo had not consented to the armed presence of Uganda.

[51] *MH17* Case, App. Nos. 8019/16, 43800/14, and 28525/20, ¶ 588.

[52] *Id.*

[53] *Id.* ¶ 589.

[54] *Id.* ¶ 589.

[55] *Id*. ¶ 593 (as to Transdniestria); ¶¶ 590-592 (as to Crimea).

[56] *Id.* ¶ 594.

[57] *Id.* ¶ 602.

[58] *Id.* ¶ 605.

The uncontroverted evidence that Russia's invasion was the critical factor in "separatists" gaining control over large parts of Donbas did not, however, support a finding "beyond a reasonable doubt" that Russia exercised effective control over the DPR and LPR "solely by virtue of the military presence of its own *de jure* soldiers."[59] The Court proceeded to consider, under a number of separate heads, the manner in which Russia did exercise effective control over the DPR and LPR. The Court examined Russia's contentions that Russia had little to do with the DPR and LPR.[60] The Court concluded that, as of May 11, 2014, when so-called "referendums" were held in Donbas, purporting to reflect a local desire to separate from Ukraine, "the separatist operation as a whole was being managed and coordinated by the Russian Federation."[61]

In its conclusion rejecting Russia's assertions that the DPR and LPR were independent political and military entities, the ECtHR stated as follows:

> The vast body of evidence… demonstrates beyond reasonable doubt that, as a result of Russia's military presence in eastern Ukraine and the decisive degree of influence and control it enjoyed over the areas under separatist control in eastern Ukraine as a result of its military, political and economic support to the separatist entities, these areas were, from 11 May 2014 and subsequently, under the effective control of the Russian Federation.[62]

On that basis, the Court concluded that Ukraine's complaints concerning events in Donbas from May 11, 2014 "accordingly fall within [Russia's] jurisdiction *ratione loci*."[63]

In an era in which "fragmentation" is widely lamented,[64] and writers and jurists assert that an even more profound break-up of international law is in progress,[65] signs of cohesion are welcome. At least a modest sign of cohesion is visible in the *MH17* decision. The ECtHR had regard to findings by other international institutions where such findings assisted in assessing factual matters that a party tried to place in contention. In so doing, and in exercising its own fact-finding function, both in *MH17* and *Crimea,* the Court scrutinized

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[59] *Id.* ¶ 611.

[60] For further evidentiary analysis, *see id.* ¶¶ 588-611 (finding "beyond reasonable doubt" that Russian troops were in Donbas "from the outset" and eventually on a "large-scale"); *id.* ¶¶ 618621 (finding that "the influence of the political hierarchy of [Russia]" on the DPR and LPR "was significant"); *id.* ¶¶ 628-639 (finding "beyond any reasonable doubt" that Russia provided weapons and other military equipment "on a significant scale"); *id.* ¶¶ 649654 (finding that Russia provided artillery cover to the "separatists"); *id.* ¶¶ 670-675 (finding "clear evidence" that Russia provided political support to the "separatist entities"); *id.* ¶¶ 684-689 (finding that Russia financed the "separatist entities").

[61] *Id.* ¶ 693.

[62] *Id.* ¶ 695.

[63] *Id.* ¶ 696.

[64] Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L. L. 553, 560 (2002).

[65] *See, e.g.*, Maurice Kamto, *Remarks by Maurice Kamto*, 111 AM. SOC'Y INT'L L. PROC. 325, 333 (2017) (addressing 'the rise of legal regionalisms'). *See also* Lauri Mälksoo, *Post-Soviet Eurasia,* Uti Possidetis *and the Clash Between Universal and Russian-led Regional Understandings of International Law*, 53 N.Y.U. J. INT'L. L. & POL. 787, 787-822 (2021); Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EURO. J. INT'L. L. 775, 755-795 (2013).

the factual assertions on which the respondent's jurisdictional objections rested, an approach that, as we will see, the Annex VII Tribunal in *Coastal State Rights* did not follow.

B. JURISDICTION *RATIONE MATERIA* IN REGARD TO RUSSIA'S USE OF FORCE

The Court in *MH17* also rejected Russia's objection against the Court addressing certain questions of international humanitarian law—*jus in bello*—that the applicant States' claims had raised.[66] The Court observed "that there is no apparent conflict between the provisions of the Convention and the relevant provisions of international humanitarian law in respect of the complaints made," the only possible exception being the prohibition of incidental killing of civilians under ECtHR Article 2.[67] The Court concluded that it has *ratione materiae* jurisdiction over the applicants' allegations concerning the destruction of flight MH17, artillery shelling, and "other events which occurred during combat, and the treatment of prisoners of war."[68]

The ECtHR was not determining whether Russia's use of force was lawful. The question of the lawfulness of use of force *per se*—the question of *jus ad bellum*—did not arise, and the Court probably would not have answered it if it had.[69] Instead, the Court answered the question whether Russia exercised extraterritorial jurisdiction in Ukraine "as a consequence of *lawful or unlawful* military action."[70] The limited scope of the question—did Russia exercise extraterritorial jurisdiction in Ukraine?—and the limited scope of jurisdiction to address the question nevertheless did not prevent the Court from reaching important conclusions regarding Russia's invasion of eastern Ukraine.

C. UKRAINE'S SOVEREIGNTY IN DONBAS

In particular, the ECtHR, in concluding that Russia exercised extraterritorial jurisdiction, by necessary implication concluded that Russia's invasion of eastern Ukraine did not displace Ukraine's sovereignty.

The Court, of course, was clear as to the limits of the dispute that the applicant States brought before it. Ukraine's sovereignty was not the subject matter that the parties had called on the Court to address. According to the Court:

> the present case concerns only the alleged responsibility of the Russian Federation in respect of alleged Convention violations in the relevant parts of Donbass. Only the potential extra-territorial jurisdiction of the Russian Federation over these areas at the relevant time is before the Court in this case: the Article 1 jurisdiction of

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[66] *MH17* Case, App. Nos. 8019/16, 43800/14, & 28525/20, ¶¶ 718-721.

[67] *Id.* ¶ 720. Further to which, see *infra* pp. 54-55.

[68] *Id.* ¶ 721.

[69] Though for criticism of the Eur. Ct. H.R. for going too far in that direction in the past, *see* Daniel Bethlehem, *When is an Act of War Lawful?*, *in* THE RIGHT TO LIFE UNDER ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: TWENTY YEARS OF LEGAL DEVELOPMENTS SINCE MCCANN V. THE UNITED KINGDOM: *IN HONOUR OF MICHAEL O'BOYLE* 237 (Lawrence Early, et al. eds. 2016).

[70] *MH17* Case, App. Nos. 8019/16, 43800/14, & 28525/20, ¶ 560 (emphasis added).

> Ukraine over these areas, *which fall within its own sovereign territory*, is not under examination.[71]

Reading the passage above, one might say that the Court had no business including the subordinate clause, "which fall within its own sovereign territory."[72] The sovereignty of Ukraine—Ukraine's "jurisdiction . . . over these areas"—in a formal sense is irrelevant in a case that concerns "*[o]nly* the potential extra-territorial jurisdiction of the Russian Federation over these areas."[73] Yet the Court included the subordinate clause. Having done so, the Court expressly stated that Ukraine is sovereign in the "relevant parts of Donbass."

Even if it had not stated that Ukraine is sovereign, the Court still would have affirmed Ukraine's sovereignty by necessary implication. By having concluded that Russia had *extra*-territorial jurisdiction in the areas concerned,[74] the Court necessarily implied that the *other* State has jurisdiction there—not extra-territorial jurisdiction, but full title to the territory as the sovereign. Ukraine being the other State, the Court necessarily implied that Ukraine is the sovereign.

The care that the Court took not to disturb the settled position that Ukraine is the sovereign in Donbas is a notable part of the *MH17* judgment. A comparison with the Court's formulation regarding Russia's August 2008 invasion of Georgia is illuminating. There, the Court said as follows:

> [I]n the context of the international armed conflict between Georgia and the Russian Federation in August 2008, the Russian armed forces undeniably carried out military operations, *including in South Ossetia and in undisputed Georgian territory*.[75]

The Court's choice of words in the last clause acknowledges a putative difference between South Ossetia and territory that is "undisputed Georgian territory." The clause suggests that a dispute exists as to sovereignty over South Ossetia. The Court avoided any such suggestion in regard to Donbas, thereby affirming Ukraine's sovereignty.

Any assertion that two new States had emerged in Donbas—a "Donetsk Republic" and a "Luhansk Republic"—needed no analysis by the Court. Even Russia did not recognize them as States at the time. Russia recognized Donetsk and Luhansk as independent on February 21, 2022, three days before Russia enlarged its aggression against Ukraine. Even so, the matter has remained clear: practically no other State, and no intergovernmental

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[71] *Id.* ¶ 552 (emphasis added).

[72] Presaging the formalist objection, *see* Lawrence Hill-Cawthorne, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, 68 INT'L COMPAR. L.Q. 779, 787 (2019), who says that the readiness of the ECtHR to apply the Convention to the extraterritorial conduct of States Parties "would suggest that there is no need to consider the sovereignty question in order to determine the applicability of the Convention to Russia's actions in Crimea."

[73] *MH17* Case, App. Nos. 8019/16, 43800/14, & 28525/20, ¶ 552 (emphasis added).

[74] *Id.* ¶ 696.

[75] Georgia v. Russia (II), App. No. 38263/08, ¶ 109 (emphasis added). Further to South Ossetia, *see* Thomas D. Grant, *Frozen Conflicts and International Law*, 50 CORNELL INT'L L.J. 361, 383-386 (2017).

organization, has accepted these Russian proxies to be "States."[76] Moreover, the Court did not hesitate to entertain further evidence that the state of affairs in Donbas was not as Russia described it. The Court's fact-finding, which I considered above, laid bare the falsity of Russia's assertion that the DPR and LPR had resulted from indigenous political action. The DPR and the LPR were mere extensions of Russia's machinery of armed coercion; as a matter of general international law, they were non-entities.[77] The Court rightly entertained no plea that Donbas or any part of it was extra-territorial to Ukraine.

What if, instead of restricting itself to saying that Russia had exercised extra-territorial jurisdiction and acknowledging that Ukraine is sovereign, the ECtHR had said that a "dispute" existed as to the continued sovereignty of Ukraine, the "dispute" having arisen from the objective fact that the central government had ceased for the time being from exercising control in parts of Donbas? Ukraine itself did not deny that a DPR and a LPR existed in the sense that personnel bearing DPR and LPR insignia functioned in eastern Ukraine, even if they were, as Ukraine noted, proxies of Russia. The purpose of those political-military formations, whether on their own account or as proxies, was to remove Ukraine's effective control from Donetsk and Luhansk, and eventually to remove Ukraine's sovereignty whole cloth. Formalistically, it would have been plausible for the Court to draw the conclusion that sovereignty was disputed. The Court even might have said that an "objective dispute" existed.[78] However, the Court did not say that. Nor did it restrict itself to determining that Russia had extra-territorial jurisdiction. Instead, it expressly affirmed that the areas "fall within [Ukraine's] own sovereign territory" and, by having done so, removed any ambiguity that otherwise might have arisen on the point.

I will argue below that the Court's affirmation that there is no sovereignty dispute in Donbas is not only the *desirable* result in view of considerations of international public order, but also the *correct* result in view of the formal requirements of the judicial function.

III. *UKRAINE V. RUSSIA (*RE *CRIMEA)* DECISION OF DECEMBER 17, 2020

The Court also addressed sovereignty in *Ukraine v. Russia (*re *Crimea)*, the other case under which the Court had organized Ukraine's applications. In that case, Ukraine advanced

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[76] Kristen E. Eichensehr, *Contemporary Practice of the United States Relating to International Law: State Diplomatic and Consular Relations: Russian Invasion of Ukraine Draws Widespread—but Not Universal—Condemnation,* 116 AM. J. INT'L L. 605 (2022); G.A. Res. ES-11/4, ¶ 5 (Oct. 12, 2022) (Russia on Sept. 29, 2022 purported to annex them by domestic law decisions that the General Assembly demanded Russia "immediately and unconditionally reverse."); as to independence as "the central criterion for statehood," *see* James Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW 62, 74-76, 78-83 (2d ed. 2006).

[77] The Minsk Agreements did nothing to impart juridical reality to either. The Security Council endorsed a Package of Measures, in which was noted "local self-government . . . in certain areas of the Donetsk and Luhansk regions." S.C. Res. 2202, annex I, ¶ 4, Package of Measures for Implementation of the Minsk Agreements (Feb. 17, 2015). Such a reserved statement, made for limited purposes, does not evince a general international law status, and, even if it did, the Security Council in the particular statement did not say that Donetsk and Luhansk had separated from Ukraine.

[78] Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. Rep. 432, ¶ 31 (Dec. 4); Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 29 (Dec. 20); Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 114, 126 (Dec. 18); Minquiers and Ecrehos (Fr. v. U.K.), Judgment, 1953 I.C.J. Rep. 47, 52 (Nov. 17); Nottebohm (Liech. v. Guat.), Second Phase, Judgment, 1955 I.C.J. Rep. 4, 16 (Apr. 6).

several claims that the Court could not have addressed, unless it characterized Russia's presence in Crimea.

First, under Article 6(1) of the Convention, Ukraine alleges that Russia has breached the obligation to provide a "tribunal established by law."[79] The Court understands the obligation to be to provide a tribunal under "relevant '*domestic* law.'"[80] The Court concluded that examining whether a tribunal exists in Crimea under relevant domestic law would be "impossible for the Court" unless the Court first determined which country's law applies in the territory concerned.[81]

Second, under Article 2 of Protocol No. 4 of the Convention, Ukraine alleges that Russia has breached the obligation to respect the right to liberty of every person "lawfully within the territory of a State, within that territory" to move and freely choose her residence.[82] Ukraine contends that Russia prevents people from moving freely between Crimea (which is part of Ukraine) and other areas of Ukraine, and from choosing their residences in Crimea.[83] If, instead, Crimea were under Russia's sovereignty, then the restrictions on movement and residency that Russia imposes would be restrictions *between States,* not "*within* . . . a State," and so would not constitute breaches of Article 2 of Protocol No 4.

And, third, under Article 14 of the Convention, Ukraine alleges that Russia has breached the obligation to secure every person's "enjoyment of the rights and freedoms set forth in this Convention . . . without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[84] According to Ukraine, Russia's maltreatment of Ukrainian citizens of Ukrainian language background and of Tatar ethnic background and Muslim religion, including Russia's alleged breaches of Article 2 of Protocol No. 4, constitutes further distinct Convention breaches. The Court understood that Ukraine's Article 14 claims, similarly, could not be adjudicated unless the Court characterized Russia's presence in Crimea as one of extra-territorial jurisdiction, not of sovereignty.[85]

Russia objected by arguing that the Court had no jurisdiction to characterize Russia's presence in Crimea. According to Russia, characterizing Russia's presence "would take the Court into questions concerning sovereignty between States that are outside its jurisdiction."[86] It is common ground that the ECtHR indeed does not have jurisdiction to settle a dispute on the merits between States as to which has sovereignty over a territory.[87]

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[79] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 346.

[80] *Id.* ¶ 342 (emphasis added).

[81] *Id.*

[82] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Sept. 16, 1963, C.E.T.S. No. 46 (emphasis added).

[83] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 343.

[84] As to Art. 14 of the ECHR, *see Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 of the Convention*, EUR. CT. H.R. (Aug. 31, 2022)), https://www.echr.coe.int/documents/d/echr/Guide_Art_14_Art_1_Protocol_12_ENG.

[85] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 343.

[86] *Id.* ¶ 338.

[87] No provision of the Convention supplies jurisdiction to any court or tribunal to adjudicate a sovereignty dispute on the merits. As adversaries in the proceedings, Russia and Ukraine unsurprisingly did not highlight their concordance on this (or any) point. However, both acknowledged that jurisdiction under the Convention does not embrace general situations of armed conflict. For example, Ukraine emphasized that its application, though "concerning the general situation in eastern Ukraine," was for the purpose of "vindicat[ing] the human rights of

The legal theory behind Russia's objection was that this clear limitation on the merits jurisdiction of the Court would prevent the Court from characterizing Russia's presence in Crimea and, if prevented from characterizing Russia's presence, the Court would have no choice but to decline to exercise jurisdiction over the merits of Ukraine's claims.

The Court rejected Russia's objection.[88] The considerations and reasons that led the Court to reject Russia's objection in the *Crimea* branch of Ukraine's claims, in retrospect, may be seen as having set the groundwork, juristic and factual, for the Court to reject Russia's objections in the Donbas branch. The two territorial situations differed at the relevant time, to a degree.[89] Russia on March 18, 2014, declared as a matter of Russian law that Crimea was part of Russia from that date forward,[90] whereas Russia had declared no formal annexation of any part of Donbas until much later. However, similarities were visible from the start.

One similarity was in the Court's acknowledgment that adjudicating a matter on the merits and reaching conclusions in order to perform some other necessary part of the judicial function are distinct legal operations.[91] The Court made clear that its conclusions in regard to Russia's territorial presence were for purposes of determining the scope of the Court's merits jurisdiction. The Court observed that "it is not called upon to decide whether Crimea's admission, as a matter of Russian law, into the Russian Federation was lawful from the standpoint of international law."[92] The Court recalled, with an extended extract from Ukraine's written submissions,[93] that Ukraine explicitly excluded from its application any request for a determination as to the legality of Russia's "purported 'invasion' and 'occupation' of Crimea" or of "the legality *per se* under international law of the 'annexation of Crimea' and, accordingly of its consequent legal status thereafter."[94]

With the question of sovereignty excluded in that way from the Court's merits jurisdiction, the Court then observed that its power to determine the scope of its jurisdiction nevertheless embraces making certain determinations regarding the "nature" of Russia's presence in Crimea. The Court explained that it "is empowered . . . to determine the nature of the jurisdiction exercised by a respondent State over a given territory," even as its power in that regard is limited to what is necessary for exercising its competence under Article 19 of the Convention to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto."[95] The Court thus drew

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certain sections of its population" as those rights are specifically enshrined in the Convention. *MH17* Case, App. Nos. 8019/16, 43800/14, & 28525/20, ¶ 489. Russia argued that Ukraine's application *only* concerned "the general situation in eastern Ukraine" and thus "was not a genuine application." *Id.* ¶ 483. And, in the *Crimea* case, see the Eur. Ct. H.R.'s characterization of the parties' claims and defenses: according to the Eur. Ct. H.R., neither Russia nor Ukraine was seeking to adjudicate the question of which State is sovereign over Crimea. *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 244.

[88] *See Crimea* Case, App. Nos. 20958/14 & 38334/18, dispositive ¶ 3 (dismissing Russia's preliminary objection that Ukraine's application "lacks the requirements of a genuine application").

[89] As to the differences, *see supra* pp. 46-51

[90] As to the domestic Russian acts, *see* THOMAS D. GRANT, AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW 18-21 (2015).

[91] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 339.

[92] *Id.*

[93] *Id.* ¶ 241.

[94] *Id.* ¶ 244.

[95] *Id.* ¶ 341.

attention to the particular approach it takes to the exercise of *compétence-de-compétence*.[96] The Court referred to the ICJ's approach in this connection in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia)*,[97] and the approach taken by "a number of international arbitral tribunals" which have adopted jurisdictional rulings since 2014 in cases under the Ukraine-Russia BIT.[98]

The Court mentioned the contrary approach followed by the *Coastal State Rights* Annex VII Tribunal in the Award of February 21, 2020.[99] The Court offered no assessment of the award or the Tribunal's methodology.[100]

The Court concluded that "for the purposes of this admissibility decision, the Court will proceed on the basis of the assumption that the jurisdiction of the respondent State over Crimea is in the form or nature of 'effective control over an area' rather than in the form or nature of territorial jurisdiction."[101] This was a cautious way of expressing the matter, but the distinction was clear: Russia exercised effective control in Crimea, but it was not the sovereign in Crimea.

In reaching the conclusion that Russia has only effective control, and not sovereignty over Crimea, the Court also made a number of factual determinations in regard to Russia's effective presence in Crimea that resemble those that it would make in the January 25, 2023 decision regarding Donbas. The Court noted that Russia failed to advert to any evidence that a "change to the territorial integrity of Ukraine in respect of Crimea within the meaning of international law" had taken place.[102] Russia's failure in that regard was unsurprising, as nobody, not even Russia, had made any statement or engaged in any other conduct up to the eve of Russia's purported annexation that would have placed Ukraine's sovereignty in Crimea in doubt. Moreover, the Court noted that, after Russia's purported annexation, "a number of States and international bodies have refused to accept any change to the territorial integrity of Ukraine in respect of Crimea within the meaning of international law."[103] The Court specifically considered that United Nations General Assembly (UNGA) Resolutions

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[96] *See id.* ¶ 264.

[97] Written Statement of Ukraine, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), 2019 I.C.J., ¶ 29 (Jan. 14, 2019), https://www.icj-cij.org/sites/default/files/case-related/166/166-20190114-WRI-01-00-EN.pdf.

[98] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 341. Awards in a number of the BIT cases concerning investments in Crimea have entered the public domain. A survey of the awards is beyond the scope of this article. For recent comment, see Tobias Ackermann & Sebastian Wuschka, *The Applicability of Investment Treaties in the Context of Russia's Aggression Against Ukraine,* ICSID REVIEW (2023).

[99] Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strati (Ukr. v. Russ.), Case No. 2017-06, Preliminary Objections Award of Feb. 21, 2020 (Perm. Ct. Arb. 2020), https://pcacases.com/web/sendAttach/9272 [hereinafter '*Coastal State Rights* (Prelim Obj.)'].

[100] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 244; Press Release, Eur. Ct. of Human Rts., Eastern Ukraine and Flight MH17 Case Declared Partly Admissible (Jan. 1, 2023) (on file with author).

[101] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 349.

[102] *Id.* ¶ 348.

[103] *See also id.* ¶¶ 211, 214, 216-217.

68/262, 71/205, 72/190, and 73/263[104] "cannot be disregarded" for purposes of the case.[105] I have already noted the Court's reliance on international institutional determinations in the Donbas branch of Ukraine's claims.[106]

Further in support of its conclusion that Russia has no territorial jurisdiction in Crimea, the Court drew attention to Russia's ratification of the European Convention.[107] The Court observed that "neither [Russia] nor any other State asserted or accepted that Crimea formed part of the territory of the Russian Federation" at that time.[108]

The Annex VII Tribunal in *Coastal State Rights* reached a very different conclusion, to which section V below will turn. It concluded that a "dispute" exists as to which State is sovereign in Crimea. How the putative "dispute" had arisen needed explanation: nobody, not even Russia, had asserted there to have been a dispute before March 2014, a point that the Tribunal acknowledged. However, the Tribunal offered no explanation. It merely alluded to "developments" in March 2014 in Crimea and left it at that.[109] The ECtHR, in distinction, inquired into what actually happened in Crimea. The Court observed that Russia offered no evidence to support its contention that Ukraine's forces in Crimea in late 2013 and early 2014 had placed Russia's forces under threat. According to the ECtHR, Russia "did not refer to any evidence or any objective assessment, contemporaneous or otherwise, based on relevant material, that there had been any, let alone any real, threat to the Russian military forces stationed in Crimea at the time."[110] Russia had been under an international obligation to cooperate with Ukraine in regard to troop movements in Crimea. There was no evidence that Russia made any effort to cooperate in accordance with that obligation,[111] and the Court found that Russia had no right under applicable international agreements to carry out any policing or public-order functions in Crimea.[112] The Court found it even more important that the President of Russia on the night of February 22 to 23, 2014, told his security agencies that he had decided to "start working on the return of Crimea to the Russian Federation."[113]

It was clear to the ECtHR that Russia's armed forces orchestrated the takeover of government buildings in Crimea and the installation of new local authorities and that the role of Russia's armed forces extended to the organization of the so-called "referendum," declaration of independence of Crimea, and "steps towards [Crimea's] integration into the Russian Federation,"[114] these steps all taking place in a short series of days.[115] As noted, a similar pattern emerged in Donbas in the months that followed, though over a longer timeline. Also in marked similarity, much of the evidentiary record regarding events in

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[104] *See* G.A. Res. 68/262 (Mar. 27, 2014); G.A. Res. 71/205 (Dec. 19, 2016); G.A. Res. 72/190 (Dec. 19, 2017); G.A. Res. 73/263 (Dec. 22, 2018).

[105] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 348.

[106] *See supra* pp. 51-52.

[107] Russia ratified the European Convention on May 5, 1998.

[108] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 347.

[109] *Coastal State Rights* (Prelim Obj.), PCA Case No. 2017-06, ¶ 181.

[110] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 324.

[111] *Id.* ¶ 326.

[112] *Id.* ¶ 327.

[113] *Id.* ¶ 331 (internal quotation marks omitted).

[114] *Id.* ¶ 329.

[115] *See* Thomas D. Grant, *Of Frozen Conflicts and How to Characterize Crimea*, 59 GERMAN Y.B. INT'L L. 49, 51-55 (2016).

Crimea and in Donbas found confirmation in statements by Russia's own officials. As to Crimea, the ECtHR recalled, referring to its own past reliance on *Military and Paramilitary Activities in and against Nicaragua,* that "statements from high-ranking officials . . . who have played a central role in the dispute in question are of particular evidentiary value when they acknowledge facts or conduct that place the authorities in an unfavourable light."[116]

IV. THE ECTHR'S APPROACH TO SOVEREIGNTY AND TERRITORY

In determining that it has jurisdiction to settle Ukraine's and the Netherlands' human rights claims on their merits, the ECtHR had to address subject matter over which the ECtHR does not have merits jurisdiction, namely the wider state of affairs affected by Russia's invasion.[117] An application asking the ECtHR to adjudge and declare that Russia had violated the prohibition of use of force or that Russia had violated Ukraine's sovereignty and territorial integrity, or to reject Russia's assertions that parts of Donbas are under the control of independent separatists, would strain against the limits of the Court's jurisdiction to adjudicate.

Nevertheless, the Court concluded that Ukraine is sovereign in Donbas, and the DPR and LPR have no independent existence as far as the jurisdictional question in the case is concerned. The approach that the Court took to reach those conclusions merits comment for the implications that it has for Ukraine, as well as for comparison to the approach that the Annex VII Tribunal in *Coastal State Rights* took to sovereignty in Crimea.

A. EXPANDING JURISDICTION OR SEPARATING THE ISSUES?

Lawrence Hill-Cawthorne, writing several years ago in the *International and Comparative Law Quarterly*, referred to the ECtHR as following an "expansive approach" to ancillary matters and contrasted this to other courts and tribunals that have found such matters, when raised in a case, to prevent the exercise of jurisdiction.[118] Under the "expansive approach," as Hill-Cawthorne described it, the court, "faced with a claim that implicates other aspects of a broader dispute over which it would not otherwise have jurisdiction, nevertheless exercises jurisdiction over the specific claim and . . . does not shy away from making other determinations regarding that broader dispute."[119]

Hill-Cawthorne proposed a taxonomy under which the "expansive approach" is one among three possible approaches. The other approaches in that taxonomy are a "severability" approach, under which the adjudicator separates the specific claim from the broader dispute;[120] and a "restrictive" approach, under which the adjudicator declines to exercise jurisdiction altogether.[121]

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[116] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 334 (quoting El-Masri v. Macedonia, App. No 39630/09 (Dec. 13, 2012), https://hudoc.echr.coe.int/eng?i=001-115621) (referring to Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 64 (Jun. 27)).

[117] *See supra*, n. 87.

[118] *See* Hill-Cawthorne, *supra* note 72, at 779-815.

[119] *Id.* at 805.

[120] *Id.* at 793-800.

[121] *Id.* at 800-04.

Hill-Cawthorne ascribes the "expansive" approach particularly to the ECtHR.[122] Yet, the ECtHR's jurisdiction decisions in *MH17* and *Crimea* exhibit the "severability" approach. For example, in *MH17* the Court said that it would have to consider the unintentional killing of civilians in an armed conflict separately from other issues.[123] In *Crimea,* as noted, the Court made clear that it would not adjudicate whether Russia's presence in Crimea, or how Russia came to be present, was lawful.[124] In both cases, the Court nevertheless rigorously assessed evidence regarding the situations concerned and adopted relevant conclusions as far as was necessary to determine the scope of its jurisdiction. The Court's emphasis on its power, and duty, to exercise *compétence-de-compétence,* which this article noted above,[125] hardly expanded the Court's jurisdiction; it, instead, recalled that determining the scope of jurisdiction and deciding the merits of a dispute are juridically distinct parts of the judicial function.

B. THE ECTHR'S FACT-FINDING AND CRIMEA AS THE EASIER CASE

The fact-finding that the ECtHR carried out in *Crimea* and *Donbas* was necessitated by Russia's jurisdictional objections. In support of its objections in both cases, Russia contended that certain events took place in Ukraine independently of intervention or support by Russia. In Crimea, Russia alleged a series of local actions, including supposed referendums, followed by an "international" act of absorption into Russia, all taking place in the span of a few weeks.[126] In Donbas, Russia alleged local actions supposedly removing parts of Donetsk and Luhansk from Ukraine's effective control.[127] The timelines in the two parts of Ukraine were somewhat different as well. In Crimea, Russia portrayed a local separatist movement coming rapidly into existence, organizing referendums a few weeks later, and then, after an almost contemporaneous declaration of independence, acceding to absorption into Russia.[128] In Donbas, Russia portrayed a local separatist movement escalating over a period of months in 2014, until the putative separatists supposedly organized referendums declaring the

[122] *Id.* at 786-88, 805.

[123] *MH17* Case, App. Nos. 8019/16, 43800/14, & 28525/20, ¶ 720.

[124] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶ 2.

[125] *Supra,* pp. 56-57.

[126] *Crimea* Case, App. Nos. 20958/14 & 38334/18, ¶¶ 149-184 (reciting Russia's factual contentions in regard to the annexation of Crimea).

[127] *MH17* Case, App. Nos. 8019/16, 43800/14, & 28525/20, ¶¶ 355-369 (reciting Russia's factual contentions in regard to events in Donbas).

[128] In Crimea, Russia's armed action started on Feb. 27, 2014. *See id.* ¶¶ 329, 331. A putative 'referendum' was held on Mar. 16, 2014. Absorption of Crimea into Russia was declared complete on Mar. 18, 2014. *Id.* ¶ 338. *See also id.* ¶¶ 46, 50 (acknowledging the role of "unidentified armed men in green military uniforms without insignia" in the takeover of key infrastructure and buildings in Crimea and the installation of a "separatist[]" government in Crimea "at gunpoint").

separation of parts of the region from Ukraine.[129] In neither territory did a movement for independence have any visible precursor before 2014.[130]

A point is to be made here about the likelihood of Russia's factual assertions. Judges and arbitrators are called on to make careful assessments of likelihood, which is to say that they must discern the probability that a given assertion of fact reflects the true state of affairs at issue. To have accepted Russia's principal assertion in regard to Crimea—i.e., that the events leading to Crimea's putative absorption into Russia were led by Crimean "separatists" and *not* orchestrated by Russia through armed invasion—would have required accepting two assertions: first, that the inhabitants of Crimea, in a lawful, or at least legitimate, act of self-determination to which they resorted in order to remedy extreme violations of basic human rights, freely chose to separate from Ukraine; and, second, that they then freely chose to join Russia. The likelihood of the evidence establishing *both* those necessary assertions is lower than the likelihood of the evidence establishing either one of them.[131] In Donbas, the judges had to accept only one analogous assertion to sustain Russia's objection to the ECtHR exercising jurisdiction: Russia's assertion that there were Donbas "separatists" exercising independent control over the relevant area. There was no assertion (at the relevant time) that a Donbas entity had chosen to join Russia. In short, it may be suggested that Russia had an easier path to sustaining its objection in Donbas than in Crimea.

Be that as it may, the ECtHR rejected Russia's factual assertions, and thus, its jurisdictional objections in *MH17* and *Crimea* alike. The Court reached the conclusion that Donbas and Crimea, though invaded by Russia, are under the sovereignty of Ukraine and, in Donbas, no independent entity acted in the relevant sense. The Court reached that conclusion by performing the fact-finding and legal reasoning that a dispute settlement organ must perform if it is to discharge its adjudicative function.

By contrast, the Annex VII Tribunal in *Coastal State Rights*, refusing to consider the facts of Russia's conduct in Crimea, concluded that Ukraine's sovereignty, though practically up to the day that Russia's forces intervened subject to no dispute, now is subject to dispute. Let us turn to consider the *Coastal State Rights* award of February 21, 2020.

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[129] In Donbas, the train of events began in early March 2014 with a putative separatist declaring himself "'People's Governor' of the Donetsk region." *MH17* Case, App. Nos. 8019/16, 43800/14 & 28525/20, ¶ 141. Armed take-overs of Donetsk public buildings were orchestrated on Apr. 7, 2014. *Id.* ¶ 142. Putative 'referendums' in Donbas were held on May 11, 2014. *Id.* ¶ 142. Through August 2014, putative separatists engaged in various machinations concerning the composition of the 'separatist' administrations in Donbas. *Id.* ¶¶ 147-149. 'Elections' in November 2014 purported to elect deputies to a 'People's Council.' *Id.* ¶ 150 (internal quotation marks omitted).

[130] Contrast the nearly decade-long process, which had a still longer antecedent history, and involved multiple modalities of international engagement, leading to the independence declaration in Kosovo. GRANT, *supra* note 90, at 171-83.

[131] Acts of secession and acts of absorption are not synonymous, and the factors contributing to each are not entirely the same. Thus, it is justifiable to treat them as independent of one another at least to an extent. *See* Rafal Urbaniak & Marcello Di Bello, *Legal Probabilism*, STAN. ENCYCLOPEDIA PHIL. (Jun. 8, 2021), https://plato.stanford.edu/entries/legal-probabilism/. It is observed that, to the extent that they are independent, "the probability of the conjunction of two events, $A \wedge B$, equals the product of the probabilities of the conjuncts, *A* and *B,* that is, $\Pr(A \wedge B) = \Pr(A) \times \Pr(B)$." *Id.* The probability that either secession or absorption was a *bona fide* event being less than 1.0, the product of the probabilities is lower than the probability of either one alone. The proposition that Crimea seceded from Ukraine and then joined Russia is less probable than the proposition that Donbas seceded.

V. *COASTAL STATE RIGHTS* AWARD OF 21 FEBRUARY 2020

Ukraine instituted proceedings against Russia under UNCLOS on September 16, 2016, and sought relief in respect to Russia's activities in the waters appurtenant to Crimea,[132] a territory recognized internationally to be under Ukraine's sovereignty. As noted, Russia itself acknowledged that it had not disputed Ukraine's sovereignty until March of 2014.[133] The Annex VII Tribunal constituted to address the case that addressed Russia's preliminary objections and concluded in an award on February 21, 2020, that a legal dispute now exists, however, in respect of sovereignty over Crimea. Reasoning that a procedure identified in UNCLOS Part XV, section 2, cannot address such a dispute, the Tribunal declared that it "lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea."[134]

A. LEGAL SHALLOW WATERS

In rejecting jurisdiction over an evidently large part of Ukraine's claims,[135] the Annex VII Tribunal in *Coastal State Rights* emphasizes UNCLOS Article 288(1), which provides that "[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."[136] However, the Tribunal also, in a surprisingly uncritical way, seemed to accept the conclusion, which occasioned a three-to-two split in the *Chagos Marine Protected Area Arbitration,*[137] that UNCLOS Article 298(1)(a)(i) entails a general limitation on jurisdiction in respect of sovereignty disputes.[138] Moreover, in sharp contrast to the ECtHR, the Tribunal directed no scrutiny toward the factual assertions that underlay Russia's jurisdictional objection.

If the *Coastal State Rights* Tribunal had considered Russia's assertions about Crimea with due care, then it would have recognized that use of force was Russia's central

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[132] *Coastal State Rights* (Prelim Obj), ¶ 8.

[133] *Id.* ¶ 181. As to the nullity of Russia's assertion of claim, *see supra* note 90, at 127-28.

[134] Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strati (Ukr. v. Russ.), PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation of Feb. 21, 2020, ¶ 197 (Perm. Ct. Arb. 2020), https://pcacases.com/web/sendAttach/9272 [hereinafter *Coastal State Rights* Case, (Prelim Obj, Award)].

[135] The qualifier ('evidently') is in order here, because it remains unclear precisely how extensive the Annex VII Tribunal's jurisdictional strike-out is, though it would appear to affect practically all of Ukraine's maritime claims. *See id.* By a procedural order dated the same day as the decision (February 21, 2020), the Tribunal set new time limits for written submissions in implementation of a direction in the award that Ukraine submit a revised Memorial "tak[ing] full account of the scope of, and limits to, the Arbitral Tribunal's jurisdiction as determined in the present Award." *Id.* at ¶ 198. At the time the present article went to press, the *Coastal State Rights* proceedings evidently continued, notwithstanding the massive enlargement of Russia's aggression (from February, 24 2022); the procedural order of February 21, 2020 was the most recent document publicly available in the case.

[136] *Id.* ¶ 155. *See also* U.N. Convention on the Law of the Sea art. 287, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (indicating that in dispute settlement procedures, a State "shall be free to choose.").

[137] Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), 31 R.I.A.A. 359, 590-91 (Perm. Ct. Arb. 2015) (Kateka & Wolfrum, JJ., dissenting in part).

[138] *Coastal State Rights* (Prelim Obj), ¶¶ 158-159.

strut. There was nothing to stop the Tribunal from doing so. UNCLOS tribunals have reached determinations about use of force before.[139] As to the land territory question, on the better view, this was parasitic upon a use of force question. International law admits no change of settled boundaries between States where use or threat of force is the modality by which a State purports to bring the change about. I will further address the prohibition of forcible territorial change below.[140]

It is a truism to say that the Law of the Sea Convention is not a Law of the Land Convention,[141] but to say that land has nothing to do with it strains the law that UNCLOS expounds. It is beyond the scope of the present article to set out a complete argument as to land sovereignty issues under Part XV, section 2, procedures. Suffice it to observe that the *Coastal State Rights* Tribunal interpreted limitations into the Convention that are far from obvious in the text.[142] The limitations that the Tribunal said prevented it from treating sovereignty over Crimea as settled were limitations both on the Tribunal's power to adjudicate a party's claims and on its power to engage in fact-finding in fulfilment of its duty to determine the extent of its jurisdiction. As to the latter, the limitations that the Tribunal insisted constrained its approach had far-reaching effects.

B. INSTITUTIONAL VACUUM

The *Coastal State Rights* Tribunal did not find persuasive the argument that the settled character of Ukraine's sovereignty was reflected in the multiple resolutions of the General Assembly affirming the territorial integrity of Ukraine within the borders that, up until the eve of Russia's invasion, States had universally recognized. It is commonplace that General Assembly resolutions, in most instances, do not promulgate legally binding rules. That is not to say that a given resolution is of no consequence in a legal setting. Moreover, from the voting pattern of States in the General Assembly, certain legal conclusions sometimes can be inferred. Some brief observations on these points are in order.

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[139] M/V Saiga (No. 2) Case (St. Vincent v. Guinea), Judgment of July 1, 1999, ITLOS Rep. 1999, 10, 61-62, ¶ 155; Rep. 9 at 72 ¶ 183; M/V Virginia G Case, (Pan./Guinea-Bissau), Judgement of Apr. 14, 2014, ITLOS Rep 2014, 100-103, ¶¶ 350-362; 125 at ¶ 452 (13); Guyana v. Suriname, Award of Sept. 17, 2007, Case No 2004-4, PCA/UNCLOS Annex VII, ¶ 487(ii);). *See also* The ARA Libertad Case (Arg. v. Ghana), Order of Dec. 15, 2012, ITLOS Rep 2012 at 343 ¶ 58, 349 ¶ 98 (addressing "general international law"); Arctic Sunrise Case (Neth. v. Russ.), Provisional Measures, Order of Nov. 22 2013, ITLOS Rep 2013 at 230 ¶ 33 (addressing human rights). *See* Callista Harris, *Incidental Determinations in Proceedings Under Compromissory Clauses*, 70 INT'L COMPAR. L.Q. 417, 434 (2021) (tracing the jural basis of the adjudicator's authority to reach these determinations to Certain German Interests in Polish Upper Silesia (Preliminary Objections), Judgement, 1925 P.C.I.J. ser. A No. 6, at 18 (Aug. 25)). *But see* Peter Tzeng, *Jurisdiction and Applicable Law Under UNCLOS*, 126 YALE L.J. 242 (2016).

[140] *See infra* Part VI, pp. 27-30.

[141] For which reason observations such as Robert Smith's statement that "[t]o have attempted to place [land] sovereignty issues in a law of the sea treaty most likely would have failed" are to no point. Robert W. Smith, *The Effect of Extended Maritime Jurisdictions on Land Sovereignty Disputes*, *in* THE 1982 CONVENTION ON THE LAW OF THE SEA: PROCEEDINGS, LAW OF THE SEA INSTITUTE SEVENTEENTH ANNUAL CONFERENCE 336, 343 (Albert W. Koers & Bernard H. Oxman eds., Willy Ostreng General Conference Chairman).

[142] *See* Thomas D. Grant, Sovereignty, Use of Force, and UNCLOS Jurisdiction (Nov. 7, 2023) (unpublished manuscript) (on file with author).

The first of the resolutions addressing Russia's illegal invasion and territorial assertions against Ukraine, GAR 68/262 of 27 March 2014, attracted the votes of 100 Member States and the negative votes of 11,[143] most of those casting negative votes saying nothing to suggest that they accepted Russia's putative annexation. Such practice might be ambivalent, if the formation of a rule of customary international law were in issue. However, at issue here was the recognition of territorial status–a status which in modern practice, once settled, displays almost absolute stability, with only the sovereign's consent allowing a change.[144] A powerful majority of States stated that no change in sovereign had occurred in Crimea; and *nobody* said that Ukraine had consented to a change.

The Tribunal sought to justify its resolve in ignoring the General Assembly practice by referring to the ICJ's *East Timor* judgment of 1995.[145] The Tribunal might have noted, but did not, that events after that judgment roundly impugned it. This is not to refer to the writers who found *East Timor* wanting[146] or to the powerful dissents of Judge Skubiszewski[147] and Judge Weeramantry[148] or later UNCLOS practice, in particular *Mauritius/Maldives* where, invited to draw conclusions from *East Timor,* an International Tribunal for the Law of the Sea (ITLOS) Special Chamber ignored it.[149] It is to refer instead to the atrocities committed by Indonesia, the occupying power, after 1995, and Indonesia's eventual, even if tacit, admission that Portugal indeed was the Administering Power for purposes of UN Charter Chapter XI. Furthermore, under UN Charter law, Indonesia was obliged to permit the people of East Timor to implement self-determination.[150] If the experience of East Timor prefigures the future of Crimea, then Russia will quit the province, and the award in which Russia was treated as a legal claimant to sovereignty will be ushered off the stage in deserved embarrassment. The 1995 *East Timor* judgment is not a convincing basis for the result that the Annex VII tribunal reached in 2020.

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[143] U.N. GAOR, 68th Sess., 80th plen.mtg. at 17, U.N. Doc. A/68/PV.80 (Mar. 27, 2014).

[144] The *Coastal State Rights* Tribunal treated the matter as one of the identifications of a new rule of customary international law. *Coastal State Rights* (Prelim Obj., Award), ¶ 173. Boundaries, however, do not change that way, and the response of the international community to putative claims to territory does not take form that way either.

[145] *Id.* ¶¶ 174, 178.

[146] *See*, *e.g.,* Iain G.M. Scobbie & Catriona J. Drew, *Self-Determination Undetermined: The Case of East Timor*, 9 LEIDEN J. INT'L. L. 185, 192 (1996); Richard Burchill, *The ICJ Decision in the Case Concerning East Timor: The Illegal Use of Force Validated*?, 2 J. ARMED CONFLICT L. 1 (1997); Bingbin Lu, *The Case Concerning East Timor and Self-determination*, 11 MURDOCH UNIV. ELEC. J.L., § 20 (2004), https://www.murdoch.edu.au/elaw/issues/v11n2/lu112nf.html. *Cf* Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L COMPAR. L. REV. 323 (1994); Thomas D. Grant, *East Timor, the U.N. System, and Enforcing Non-Recognition in International Law,* 33 VAND. J. TRANSNAT'L L. 273, 307-09 (2000).

[147] Case Concerning East Timor (Port. v. Austrl.), 1995 I.C.J. 90, 224, ¶ 77 (June 30) (Skubiszewski, J., dissenting) (emphasis added).

[148] Case Concerning East Timor (Port. v. Austrl.), 1995 I.C.J. 90, 183-203 (June 30) (Weeramantry, J., dissenting).

[149] Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives*)*, Case No. 28, Preliminary Objections Judgement of Jan. 28, 2021, ¶¶ 84, 88, https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf [hereinafter *Mauritius v. Maldives* Case].

[150] JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW 43-45 (2014).

The *Coastal State Rights* Tribunal also ignored events *before* the ICJ judgment. The General Assembly had fallen silent on East Timor over a decade before,[151] and key States with an interest in the matter had *de facto* recognized Indonesia's claim to sovereignty.[152] In contrast, the General Assembly continued to address Crimea up to and through the Annex VII proceedings;[153] and no State (save, possibly, two or three client States of Russia) has recognized Russia's claim *de jure* or *de facto*.

Other international institutions, including the Council of Europe, of which the ECtHR is the international court, also had made definitive determinations that Russia's aggression against Ukraine raises no question of territorial title.[154] The *Coastal State Rights* award of February 21, 2020, does not mention the Council of Europe at all. In fact, it does not mention *any* of the other multilateral bodies that affirmed Ukraine's title to Crimea.[155] Nor did the Tribunal draw attention to any multilateral body that said the opposite. It could not have, because none did. In contrast to the General Assembly and Council of Europe practice (and the practice of other intergovernmental institutions), there was no evidence of collective judgment that, after years of settled boundary relations, a legal dispute had erupted over which State is sovereign in Crimea.

The February 21, 2020 award was an act of adjudicative self-isolation.

C. FACT-FINDING REFUSAL

Even if a tribunal decides, for whatever reason, that it must ignore the landscape of institutional decisions and findings that surround the case that it is adjudicating, the tribunal has its own forensic tools. It uses these tools to answer factual questions necessary for addressing the parties' claims on the merits. It also uses them to answer factual questions that are necessary to determining the scope of the Tribunal's jurisdiction. The *Coastal State Rights* Tribunal, however, denied that it could answer factual questions, even though Russia had put the questions directly in issue when it denied that Ukraine's sovereignty in Crimea

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[151] A point that the ICJ had noted in its judgment: Case Concerning East Timor (Port. v. Austr.), Judgement, 1995 I.C.J. 90, 97, ¶ 16 (June 30).

[152] *See, e.g.*, HC Deb (18 Sept. 1991), at 2310, in *Canadian Practice in International Law/Parliamentary Decisions in 1991-1992*, 30 CAN. Y.B. INT'L L. 366 (1992), quoted in C. Antonopoulos, *Effectiveness v. The Rule of Law Following the East Timor Case* 27 NETH. Y.B. INT'L L. 75, 98 (1996).

[153] *See* G.A. Res. 77/229, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, ¶ 9 (Dec. 15, 2022); G.A. Res. ES-11/4, Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations (Oct. 12, 2022).

[154] Eur. Parl. Ass., *Committee of Ministers, Decision,* Situation in Ukraine, 1196th Mtg., ¶ 1 (Apr. 2-3, 2014); Eur. Consult. Ass., *Recent developments in Ukraine: threats to the functioning of democratic institutions*, ¶ 16 (2014); Eur. Consult. Ass., *Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation*, ¶ 15 (2014).

[155] Practice that it might have mentioned includes the Baku declaration and resolutions adopted by the OSCE parliamentary assembly at the twenty-third annual session ¶ 12, June 28 - July 2, 2014; the G7 Hague Declaration, ¶ 2, Mar. 24, 2014; the widespread policy of treating Ukraine's sovereignty as undisturbed, policy followed, e.g., by the U.N. OHCHR and the IAEA. *See also* Grant, *supra* note 91 at 71-83.

is settled and even though Russia's denial, left unchallenged, potentially removes most of Ukraine's claims from the Tribunal's jurisdiction.[156]

The explanation that the *Coastal State Rights* Tribunal gave for how it was that Ukraine's settled sovereign title to Crimea came to be disturbed by a "dispute" reduces to a single short paragraph in the February 21, 2020, Award. Reciting Russia's plea, the Tribunal said that sometime in early March of 2014, "there was a change in the situation of Crimea and . . . [Russia's] claim of sovereignty was a response to that change."[157] In the same paragraph, the Tribunal acknowledges that Russia "does not contest that before March 2014 it had recognized Ukraine's sovereignty over Crimea."[158] According to the Tribunal, however, nothing barred Russia now from maintaining that a dispute exists as to which State is sovereign over Crimea, because Russia's "earlier statements had been substantially and materially *changed by developments* upon which the Arbitral Tribunal has no jurisdiction to adjudicate."[159] That is all that the Tribunal had to say about the matter. The Tribunal declared, in effect, that it was abstaining from inquiry into facts. The difficulty with the Tribunal's abstention is encapsulated in the phrase "changed by developments." It is a phrase of Orwellian abstraction. It is an attempt at avoidance through the use of anodyne terms, passive in form and empty of content. The "developments" to which the Tribunal referred were an armed invasion and the pretension that a State can shift territorial title, or create a dispute over territorial title, by dint of arms. It is a fundamental element of modern international law that no such change to territory, even a claim to territory, arises in that way.[160]

If seeking to explain the Tribunal's refusal to inquire into the "developments" that changed the situation in Crimea, one may look to the Tribunal's declaration that it "has no jurisdiction to adjudicate" those "developments," then one stares even deeper into a dispute settlement failure. For one thing, nobody asked the Tribunal to "adjudicate" in regard to Ukraine's sovereignty.[161] *That* was a matter that was already settled.

Even if a question regarding sovereignty somehow had arisen and it had thus become necessary to clear the air, the Tribunal readily could have done so without pronouncing a dispositive result on the matter. Arbitrators know full well how to indicate what parts of an award they adopt are reasoning and what parts are dispositive. The "severability" approach, noted above, whatever name one gives it, has a long pedigree.[162] It is an approach familiar to arbitrators applying UNCLOS.[163] There is also the competence of adjudicators to determine the scope of their jurisdiction. It was in the exercise of that competence that the ITLOS Special Chamber in *Mauritius/Maldives* later would examine in considerable detail

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[156] The tribunal declared that a "sovereignty dispute" had arisen in respect of Crimea as a result of "developments *upon which the Arbitral Tribunal has no jurisdiction to adjudicate*" (emphasis added) *Coastal State Rights* (Prelim Obj., Award) ¶ 181.

[157] *Id.*

[158] *Id*.

[159] *Id.* (emphasis added).

[160] Ingrid (Wuerth) Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 AM. J. INT'L L. 687 (2022).

[161] Ukraine was clear about this. *Id.* ¶¶ 50, 144.

[162] *See supra* note 111.

[163] In the *South China Sea Arbitration,* an Annex VII tribunal in effect applied the 'severability' approach in order to make clear that it was not deciding certain sovereignty questions. S. China Sea (Phil. v. China), 33 R.I.A.A. 1, ¶ 152 (Perm. Ct. Arb. 2015).

(and reject) the Maldives' objection that a territorial dispute precluded the exercise of merits jurisdiction.[164] UNCLOS tribunals have also addressed questions of use of force in connection with maritime disputes.[165] As for the ECtHR, in the *MH17* and *Crimea* cases the Court faced Russia's use of force head on. The *Coastal State Rights* Tribunal, by contrast, denied that it could deal in any way with Russia's assertion of a sovereignty claim, and it did not so much as take notice that it was by use of force that Russia asserted the claim. True, the *Coastal State Rights* Tribunal was under no formal compulsion to say why it did not take an approach that the ECtHR takes, but it gave no reasoned explanation for the stark variance between its approach and that of *other UNCLOS tribunals,* which had had no difficulty in addressing use of force. The *Coastal State Rights* award thus stands in isolation not only from the wider legal landscape but from the particular dispute settlement procedure under which it was promulgated.

D. *APOLOGIA* FOR *COASTAL STATE RIGHTS*?

Russia in the *MH17* case argued that Ukraine and the Netherlands were seeking to adjudicate matters in a region where Russia was not involved, Donbas, and, thus, the ECtHR had no jurisdiction to adjudicate those matters; and, in any event, the ECtHR had no jurisdiction to say *whether* Russia was involved in that region.[166] Russia in the *Coastal State Rights* case argued that Ukraine was seeking to adjudicate matters in a region where an Annex VII tribunal had no jurisdiction, the waters of Ukraine's Crimea, because a territorial dispute supposedly had arisen; and, in any event, the Tribunal had no jurisdiction but to accept on an "objective" basis that such a dispute existed.[167] The ECtHR rejected Russia's argument.[168] The *Coastal State Rights* Annex VII Tribunal accepted it.[169]

An apologist for *Coastal State Rights* likely would start by observing that adjudicators reached these decisions under different jurisdictional instruments. The apologist might further posit that it is the ECtHR that one should critique, on grounds that the Court went further than needed when it addressed sovereignty, and, perhaps, further than it had gone when addressing Georgia's region of South Ossetia.[170] On that line of thinking, the ECtHR's pronouncement as to Ukraine's sovereignty was pure *dictum,* unnecessary to deciding the case and, thus, the ECtHR should have remained silent on the point.

Both the putative defense of *Coastal State Rights* and critique of *MH17* and *Crimea,* however, collide with one of the adjudicator's most basic precepts: it is not the function of a judge or arbitrator to find disputes where none exist.[171] Judges and arbitrators must take care as well not to imply the existence of disputes. This duty is not limited to tribunals under any

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[164] *Mauritius v. Maldives* Case, ¶¶ 115, 190. The Special Chamber offered little analysis of this exercise of *compétence-de-compétence,* likely because its validity is self-evident.

[165] See *supra,* note 132. The *Coastal State Rights* (Prelim Obj) does not mention this practice.

[166] *MH17* Case, 8019/16, 43800/14 & 28525/20, ¶¶ 335, 483.

[167] *Coastal State Rights* (Prelim Obj., Award), ¶ 181.

[168] *Crimea* Case, App. Nos. 20958/14 &38334/18, ¶88, dispositive ¶ 3.

[169] *Coastal State Rights* (Prelim Obj., Award), ¶ 181.

[170] *See Georgia v. Russia (II),* App. No. 38263/08.

[171] Armed Activities on the Territory the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 26 (Dec. 19).

one jurisdictional instrument. If the ECtHR had remained silent as to Ukraine's sovereignty, then the party that seeks to demonstrate that a sovereignty dispute exists would have pointed to the *MH17* and *Crimea* decisions as its demonstration. Russia has made putative sovereignty disputes a centerpiece of its rhetoric and information strategy; the putative dispute with Ukraine is Russia's *casus belli*. When a judge or arbitrator unnecessarily suggests that a sovereignty dispute exists, this transgresses the formal limits of the adjudicative function. It also has potentially far-reaching effects on public order. The *Coastal State Rights* decision was not a neutral act.[172]

The apologist, in pleading that the Annex VII Tribunal simply was following an established UNCLOS jurisprudence, would be resting his case, in truth, on a single Annex VII award, and a three-to-two divided award at that. *Chagos Marine Protected Area* is the prior case in which jurisdiction to address sovereignty issues was tested. The *South China Sea Arbitration,* though the *Coastal State Rights* Tribunal alluded to it as putative support for a general exclusion of sovereignty issues from jurisdiction,[173] was careful to observe that the applicant State, the Philippines, had not asked for a determination of sovereignty, and, therefore, the Tribunal did not give one.[174] Notably, that Tribunal also did not give an interpretation of the scope of the putative sovereignty exclusion.[175]

In the interstices of judgments and awards addressing complex factual and legal disputes, alert legal counsel in future cases may find material that they plausibly may argue identifies a dispute. Judges and arbitrators, in the proper exercise of their dispute settlement function, do their best to avoid furnishing such material except when the dispute of which they are seized requires it. In *MH17* and in *Crimea,* the ECtHR was right on the substance to have concluded that there was no dispute as to sovereignty. Within the setting of the disputes that the parties did present and over which the Court exercised jurisdiction, it was right to have addressed the evidence and thus to have removed any doubt that its decisions otherwise might have engendered.[176] By having addressed the substance the way it did, the ECtHR tacitly recognized that the job of judges is to settle disputes, not to make them.

The Annex VII Tribunal in *Coastal State Rights* did the opposite of what the adjudicator's job requires. It found one dispute over sovereignty to exist to which almost nobody else attributes jural reality; and it resiled from settling a series of disputes that the applicant State plausibly had pleaded in fact and law. The Annex VII Tribunal declared that

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[172] Across many, perhaps most, legal régimes, formal cognizance under a dispute settlement procedure that a dispute of any kind exists has definite jural effects. There is also the matter of the principle of non-aggravation of disputes. Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), Interim Measures of Protection, 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (Dec. 5). Ordinarily opposed against parties in a dispute, the principle may have a correlate in the duties of judges and arbitrators. *Non ultra petita* has a definite application to the adjudicator: the adjudicator who interprets a party's claims past their formal limits has exceeded the scope of jurisdiction.

[173] *Coastal State Rights* (Prelim. Obj.), ¶ 160. The Special Chamber in *Mauritius v. Maldives* also (and also unconvincingly) suggested that *Philippines v. China* declared that procedures under UNCLOS Part XV, section 2, have no authority to address sovereignty disputes yet proceeded itself to address the Mauritius-UK sovereignty dispute and to declare it settled in Mauritius' favor. *See Mauritius v. Maldives* Case, ¶¶ 110.

[174] S. China Sea (Phil. v. China), 33 R.I.A.A. 1, ¶8 (Perm. Ct. Arb. 2015).

[175] *See id*., e.g., the careful wording in. S. China Sea (Phil. v. China), 33 R.I.A.A. 153, ¶¶ 403-04, (Perm. Ct. Arb. 2015).

[176] And, as Harris persuasively argues, doubt is unfounded that incidental determinations might be "invoked as final and binding determinations 'in any and all fora.'" Harris, s*upra* note 138, at 447.

a dispute exists in regard to sovereignty over Crimea, notwithstanding the absence of any multilateral or binding determination that such a dispute exists in a legal sense; and the plain evidence that use of force was the basis of the putative territorial claim. And, in finding that *that* dispute exists, it failed to settle a series of disputes that were plainly justiciable under the applicable treaty. In this double failure, the Tribunal stands in stark contrast to the ECtHR.

Pivotal in *MH17* and *Crimea* was the readiness of the ECtHR to make a determination as to the facts of Russia's armed invasion. The Court did not abstain from the fact-finding necessary to address sovereignty over territory. On the one hand, there is a self-evident character to the Court having not abstained: it is the duty of every judge and arbitrator to make those determinations necessary to ascertain whether or not her court or tribunal has jurisdiction over the matter that the parties have presented.[177] On the other hand, however, with Russia having confronted it with a similar jurisdictional strategy, the Annex VII Tribunal in *Coastal State Rights* proved unready to carry out the arbitral function in an analogous way.

Taking a page from the *Chagos* case, the *Coastal State Rights* Tribunal said that the existence of a sovereignty dispute in regard to a land area prevents an UNCLOS tribunal from considering disputes in appurtenant maritime areas. Jurisprudence *in abstracto,* however, does not decide cases. It is law *applied to fact* that decides a case. The factual situation in Crimea was readily distinguishable from that in the Chagos Archipelago. Two brief observations serve to distinguish them. First, *Chagos* concerned the disposition of a Chapter XI territory recognized as such under the UN Charter, which is to say, the disposition of the territory, at the time the relevant transactions took place, had yet to be settled; *Coastal State Rights* concerned a boundary between States that nobody had doubted was settled. Second, *Chagos* concerned a well-known land territory dispute that had subsisted for decades.[178] Nobody, not even Russia, said that a dispute existed in regard to sovereignty over Crimea until Russia suddenly asserted one in March 2014, and, even then, the putative dispute was the result of "developments" which the Tribunal left unnamed and unexamined.[179] This leads to a third observation, this about fact-finding: the *Chagos* Tribunal scrutinized the putative self-determination act—the Lancaster House undertakings—while the *Coastal State Rights* Tribunal threw up its hands and declared that it had no competence to look behind Russia's assertions that Crimea had engaged in a self-determination act. If the ECtHR had taken a similar approach to the *Coastal State Rights* Tribunal, then we would be burdened with three decisions, not just one,[180] implying that claims by Russia and its proxies

[177] *See, e.g.*, S. China Sea (Phil. v. China), 33 R.I.A.A. 1, ¶¶ 15, 123 (Perm. Ct. Arb. 2015).

[178] Chagos Marine Prot. Area (Mauritius v U.K.), 31 R.I.A.A. 359, ¶ 209 (Perm. Ct. Arb 2015).

[179] *Coastal State Rights* (Prelim Obj., Award), ¶ 181.

[180] Regrettably, the Annex VII tribunal in *Detention of Ukrainian Naval Vessels and Servicemen,* where it suggests that "the present dispute arises in the context of competing claims to sovereignty," echoes the *Coastal State Rights* tribunal. At least it tempers the impact by noting that these are "matters . . . outside [its] jurisdiction." Detention of Ukrainian Naval Vessels and Servicemen (Ukr. v Russ.), Case No. 2019-28, ¶ 42 (Perm. Ct. Arb. 2022). As to *Coastal State Rights* in *Mauritius v. Maldives, see Mauritius v. Maldives* Case, ¶ 28.

to territory in Ukraine are potentially valid. It is just as well that the ECtHR ignored *Coastal State Rights*.[181]

IV. WHY IT MATTERS: THE TERRITORIAL SETTLEMENT AND PUBLIC INTERNATIONAL ORDER

The prohibition of use of force is commonly identified as the fundament of modern international law. Yet, international law admits use of force in a range of situations, and the limiting principles are sufficiently flexible (or vague) that considerable differences arise in particular incidents of force.[182] If one searches for an absolute prohibition, then it is not of the use or threat of force *per se*. A prohibition as close to absolute as any, however, exists *in connection* with use or threat of force: to attempt to change a settled boundary between States by threat or use of force is absolutely prohibited. "The same consideration" no doubt "applies to maritime boundaries."[183] Underlying the observations in the sections above about *MH17*, *Crimea*, and *Coastal State Rights* is this premise regarding the boundaries between States, which goes hand in hand with the premise of predictability and finality in questions of sovereignty.

The prohibition of attempted change to international boundaries is no mere formality. It grounds a geopolitical settlement that has entailed unprecedented peace among States since 1945. Pacific relations among States in the period have been a boon to humanity. The pacification correlates to the territorial stability embodied in the prohibition of forced boundary changes.

It was not fashionable to say that modern international law starts with territorial stability, but writers now are saying it. The co-editors-in-chief of the *American Journal of International Law* in October 2022 said that Russia's aggression "rejects *the* foundational principle of the post-World War II order—namely, that international boundaries may not be changed with force alone."[184] In the co-editors' understanding, "the prohibition of forcible

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[181] *Crimea case*, App. Nos. 20958/14 & 38334/18, ¶ 244 *(*quoting *Coastal State Rights,* ¶¶ 195, 197) but otherwise ignoring it. In Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean, the ITLOS Special Chamber, which seemed at pains to avoid discordance with *Coastal State Rights,* referred to the February 21, 2020 award in muted tones. *Mauritius v. Maldives*, Judgment, ITLOS Rep. 2021, 28. Where it referred to the *Coastal State Rights* Tribunal's observation about UNGA resolutions, this was to emphasize that their effect depends on "their content and the conditions and context of their adoption." *Id.* ¶ 225. The ITLOS Special Chamber proceeded to conclude the opposite of *Coastal State Rights* in regard to the effect of the GAR relevant to Mauritius and the Maldives (*Id.* ¶ 226) except in a trivial passage saying that the resolution does not address the Special Chamber. *Id.* ¶ 230. The Special Chamber said that the *Coastal State Rights* Tribunal "did not have the benefit of prior authoritative determination of the main issues relating to sovereignty." *Id.* ¶ 244. However, this was a *non sequitur*. The Special Chamber invoked the ICJ's *Chagos* Advisory Opinion, but not as a free-standing and self-evident "determination": it relied on the Advisory Opinion to support the determination that no sovereignty dispute existed only after thorough analysis and parsing. *Id.* ¶ 245.

[182] *See* GRANT, *supra* note 90, at 183-93 (relating the grounding for, and objections to, Coalition intervention in Iraq in 2003).

[183] Bay of Bengal Maritime Boundary (Bangl. v. India), Case Repository No. 2010-16, Award, ¶ 216 (Perm. Ct. Arb. 2014), https://www.pcacases.com/web/sendAttach/383.

[184] Brunk, *supra* note 160 at 688 (emphasis added). As early as 2017, Professor Brunk had rightly placed emphasis on the prohibition of forcible seizure of territory as the core principle of international law. Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 201-06 (2017). *See also* Juergen Bering,

annexation of foreign territory" is "*the* norm at the core of the UN Charter system on the use of force."[185] They further observe that ignoring the "norm" removes any "limiting condition" on the use of force, because it invites the use of force anywhere "people continue to harbor historical grievances about the internationally recognized borders that they have inherited."[186] The co-editors might have added that such grievances are legion and that, in any case, opportunists can awaken them where they are latent, or manufacture them where they are absent.[187] Territorial stability—"the holy grail of the post-World II order"[188]—took centuries of searching, and the two world wars, to find. It might take considerably less time to lose.[189]

In light of what is at stake, the ECtHR decision of January 25, 2023, in the *MH17* case is to be commended.

The ECtHR performed its role as part of the regional integration that its treaty is meant to foster.[190] Our imagined apologist for *Coastal State Rights* might observe that dispute settlement procedures under Part XV, Section 2, do not share that role and, so, the apologist would say, it was not for an Annex VII Tribunal to concern itself with Council of Europe determinations. Yet, every party exists in a geographic region. Ukraine and Russia were part of the region with which the Council of Europe is concerned. Those geographic and institutional facts were part of the setting in which the Annex VII Tribunal was called on to render a decision. Moreover, UNCLOS has its own systemic aspect. It is hard to see how the Convention will continue to function, if its dispute settlement procedures ignore the systemic aspect as totally as did the *Coastal State Rights* Tribunal. In East Asia, where arguably the most important yet-unsettled maritime disputes exist, regional integration remains anemic. East Asia is widely understood to be the least integrated major region, and, for a number of reasons, the one that might benefit the most from integration increasing. The Annex VII Tribunal's disregard for Council of Europe determinations hardly enhances the prestige of regional integration in other parts of the world. It is to be submitted that it would serve UNCLOS better to encourage, rather than disparage, that kind of institutional and legal development. Rejecting General Assembly practice and the practice of the overwhelming majority of States, the Tribunal deepened its isolation and effectively renounced a

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The Prohibition on Annexation: Lessons from Crimea, 49 N.Y.U. J. INT'L L. & POL. 747, 758-62 (2017). The centrality of the prohibition is the main thesis of earlier work of the present author, *e.g.* Grant, "The State, Territory, and International Law: The Annexation of 2014 as a Fundamental Challenge," 9, 103-107, 116-127 (2015).

[185] Brunk & Hakimi, *supra* note 160, at 689 (emphasis added).

[186] *Id*.

[187] Grant, *supra* note 184, at 160. Lauri Mälksoo, in the welcome second edition of his *Illegal Annexation and State Continuity,* draws attention to the general threat to peace and security that opening historical territorial issues would create a "Pandora's box of mutual claims." Lauri Mälksoo*, Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR*, 20 ERIK CASTRÉN INST. MONOGRAPHS ON INT'L L. & HUM. RTS. 223-4 (2nd ed. 2022).

[188] Brunk & Hakimi, *supra* note 160, at 689.

[189] *See also* Bjorge's salient observation that boundaries between states are "essentially objective as opposed to relative," with citations to classic authorities. Eirik Bjorge, *Opposability and Non-Opposability in International Law,* BRIT. Y.B. INT'L L. 12-14 (2021).

[190] In the *MH17* Case, the Eur. Ct. H.R. was explicit about the role of claims in "establish[ing] a common public order of the free democracies" of Europe." *MH17* Case, ¶ 385 (quoting Austria v. It., 4 Y.B. 116, 138 Y (1961)).

constitutional role for the treaty that empowered it. The Tribunal's approach, as much as its result, is irreconcilable with the "due regard for the sovereignty of all States" that UNCLOS parties recognize.[191]

The ECtHR, by exercising its fact-finding powers, demonstrated that international dispute settlement procedures are perfectly capable of looking behind fictive claims. A State might say that it has claims that it heretofore had not articulated in any way and then portray those newly-articulated claims as the basis of a putative legal dispute with another State. New legal disputes do arise, but the *form* of a dispute does not change the reality of armed aggression. The ECtHR kept the distinction between the form and the facts in view. The Annex VII Tribunal let form eclipse the facts.

In the conclusion that it reached, the Annex VII Tribunal did not maintain legal neutrality. Instead, it imparted gravity to Russia's assertions as has no other authoritative decision by a multilateral body of any significance. In *MH17* and *Crimea*, the ECtHR deferred to the preponderance of international opinion and thereby did the least to weigh the scales on issues not subject to its jurisdiction. In this last respect, the Annex VII Tribunal's award of February 21, 2020, is at its most pernicious, and the ECtHR judgments perhaps at their most commendable. Recognition is the decentralized institution that international law—a decentralized system[192]—relies upon to reach community decisions as to matters such as the existence of cognizable claims. A striking deficiency in Russia's assertion that a "legal dispute" existed regarding sovereignty over Crimea was that practically no multilateral institution, and only a few States, agreed that such a dispute existed. The February 21, 2020, award, albeit only incrementally, might have shifted the community view toward acceptance of Russia's claims—a baleful result, and one which is not entirely hypothetical. It is to be hoped that future events, plus isolation, deprive the award of much influence. However, the award already, perhaps, has exercised some influence. Officials in Russia would have found comfort in it during the time leading to the enlargement of aggression on February 24, 2022, an action on the ground which, following its logic, the *Coastal State Rights* Tribunal might say is a further "development" entailing further "sovereignty disputes." After all, Russia's enlarged aggression has involved Russia adding even further legally unsupportable claims to parts of Ukraine's territory.[193] The award of February 21, 2020, suggested that aggression, plus the passage of time, leads to the acceptance of legal claims where, before, there was nothing but naked force. In this, the award conveyed a sanguinary message.

There are other related ways in which the award is a failure. Necessary debate has arisen in response to proposals for the control of "misinformation" and "disinformation" at the international level.[194] By contrast, it is clear-cut that a tribunal faced with a dispute should

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[191] U.N. Convention on the Law of the Sea Preamble, ¶ 4, Dec. 10, 1982, 1833 U.N.T.S. 397.

[192] *See* Crawford, *supra* note 150, at 193.

[193] As to which see G.A. Res. ES-11/4, ¶¶ 2, 3 (Oct. 12, 2022) ("Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations") (condemning Russia's putative "referendums" in Donetsk, Kherson, Luhansk, and Zaporizhzhia and declaring the "subsequent attempted illegal annexation of these regions" to have "no validity under international law").

[194] *See, e.g.*, Henning Lahmann, *Infecting the Mind: Establishing Responsibility for Transboundary Disinformation*, 33 EUR. J. INT'L L. 411 (2022); Kate Jones, *Protecting Political Discourse from Online Manipulation: The International Human Rights Law Framework*, 1 EUR. HUM. RTS. L. REV. 68 (2021); discussants

exercise a control function over parties' assertions when grounds exist to suspect that these are deliberate falsehoods. The control function does not extend to merits questions which a tribunal has no jurisdiction to settle. However, where a jurisdictional exclusion is concerned, such as that said to pertain to territorial disputes under UNCLOS, Part XV, Section 2, a tribunal must exercise its authority to scrutinize relevant evidence pertinent to jurisdiction. If it fails to do so, then it fails in its function as adjudicator.

The ECtHR's conclusions in regard to territory and sovereignty in *MH17* and *Crimea* could not contrast more with those of the Annex VII Tribunal in *Coastal State Rights*. The ECtHR finds itself in harmony with the widespread acknowledgement that Russia's assertion of sovereignty over territory in Ukraine is void and of no legal effect. It exemplifies the proper exercise of the fact-finding function in international dispute settlement procedure. *MH17* and *Crimea* are welcome contributions to a jurisprudence of world order at a time when the decision-makers who address international disputes can ill afford to ignore the challenge that armed aggression now presents.

Doug Wilson & Sue Robertson, *The Promise and Limits of Cyber Power in International Law*, 114 AM. SOC'Y INT'L PROC. 127, 132-133 (2020).


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CAN RELIGIOUS SCHOOLS DISCRIMINATE ON THE BASIS OF RELIGION?: A COMPARATIVE LAW APPROACH

Stéphanie Hennette Vauchez *

ABSTRACT

In numerous democracies today, religious freedom claims are unsettling previously stabilized equilibria. In U.S. constitutional law, the issues of the public funding and educational standards of private religious schools are increasingly salient. This Article contends that private schools are a highly relevant, yet unexplored site of constitutional analysis and makes three major contributions. The first is to present the concept of "exemption," which is central to antidiscrimination theory (especially with respect to religion) as too broad and in need of refinement and qualification. The second is to offer a typology of regimes of exemption from antidiscrimination law for religious schools grounded in a comparative law analysis. The third is to show that the specific case of religious schools should be taken seriously to further our understanding of the broader constitutional regime of state neutrality.

Religious schools are readily presented in literature as spaces that enjoy full or partial exemption from antidiscrimination law. Because of their commitment to religious freedom, liberal democracies generally deem it legitimate for religious schools to exist and affirm a distinct character. However, the exact scope and nature of this regime of exemption are woefully understudied. This Article fills this important gap by identifying and unpacking the regime of exemption enjoyed by religious schools. In doing so, it addresses a twofold question—are religious schools free to base their employment and student admissions decisions on religion?

The Article answers this question via a comparative analysis of American, English, and French law, delineating three models of exemption of religious schools from antidiscrimination requirements. In the first, the American model, the regime of exemption is governed by a logic of separation; religious schools are arguably located beyond the scope of antidiscrimination law. State neutrality effectively allows religious schools to operate as enclaves within the American polity. The second, the English model, allows religious schools to derogate from antidiscrimination law to an extent and under explicitly defined conditions. English law simultaneously expresses the State's commitment to the normative project of antidiscrimination and grants limited leeway to religious schools in the name of the autonomy of religious organizations. In the third, the French model, the exemption operates by preterition. While antidiscrimination law does not carve out exceptions for religious schools, their specificity is largely accommodated by the adaptation of broader constitutional principles. State neutrality here entails important accommodations for religious schools, which is a highly revisionist approach to the French constitutional regime of secularism and, indeed, a very innovative one.

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I. INTRODUCTION

Religious schools are often presented in political and legal theory literature alike as spaces that enjoy a regime of full or partial exemption from antidiscrimination law.[1] Because of their commitment to religious freedom, legal systems committed to constitutional democracy generally deem it legitimate for religious schools to exist and affirm a distinct character. The ethos of religious schools typically includes what political theorist Cécile Laborde has labeled "integrity protecting commitments" that liberalism, as a political theory, prides itself in protecting.[2] Thus, religious schools' freedom to exist and operate is largely mandated in constitutional democracies. Because these regimes respect a plurality of views and aim to remain neutral, they can hardly prevent religious schools from affirming the legitimacy of congregating around particular worldviews in matters as important as education; and, if religious schools are free to exist, they should also be free to act on their beliefs. This freedom encompasses displaying signs, professing beliefs, using specific educational material, as well as, potentially, hiring teachers and staff who are loyal to their ethos and restricting admission to students of particular faiths. To the extent that religious schools exist, they represent a modality for the exercise of religious freedom and, as such, they also represent a form of free exercise that almost inevitably yields demands for accommodation. Seen from this angle, these "logical" consequences of the premise that

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[1] *See* HUGH COLLINS, *Discrimination And The Private Sphere*, *in* THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION 360, 363 (KASPER LIPPERT RASMUSSEN ed., 2018) (referring to religious private schools as examples of an "unregulated sphere of conduct" that remains immune from the application of anti-discrimination law); JANE NORTON, FREEDOM OF RELIGIOUS ORGANIZATIONS 34-39 (2016) (taking religious schools as an example of those religious organizations that are exempted from antidiscrimination laws, especially in terms of membership (admission policies)); Martha Minow, *Should Religious Groups Be Exempt From Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007); Eoin Daly & Tom Hickey, *Religious Freedom and The 'Right to Discriminate' in the School Admissions Context: A Neo-Republican Critique,* 31 LEGAL STUD. 615 (2011); Jeff Spinner-Halev, *Extending Diversity: Religion in Public and Private Education*, *in* CITIZENSHIP IN DIVERSE SOCIETIES 68 (Will Kymlicka & Wayne Norman eds., 2000); Eamonn Callan, *Discrimination and Religious Schooling*, *in* CITIZENSHIP IN DIVERSE SOCIETIES 45 (Will Kymlicka & Wayne Norman eds., 2000). *See also* the contributions in SCHOOL CHOICE: THE MORAL DEBATE (Alan Wolfe ed., 2003).

[2] CÉCILE LABORDE, LIBERALISM'S RELIGION 9 (2017).

religious schools should be free to exist and operate might well conflict with the requirements of equality.[3]

The tensions between religious schools' right to freely establish, operate, and affirm a distinctively religious character, and requirements of equality and nondiscrimination in the field of education, are the tensions this Article seeks to describe and critically analyze. In doing so, it offers an in-depth study of the exact scope and nature of the regime of exemption benefitting religious schools – a regime that is largely overlooked and seldom studied in detail.[4] The Article claims that this object of inquiry sheds new and relevant light on issues that currently lie on the frontlines of the culture wars around which the very core values undergirding many constitutional democracies are being challenged and blurred.[5] Because the study of the legal regime of religious schools necessitates that it be read against wider issues of antidiscrimination law and state neutrality, it contributes greatly to the understanding of the tensions between religion and equality in democratic regimes.

This Article proceeds to study religious schools' legal regime in a comparative fashion to provide insights pertaining both to core concepts of antidiscrimination law (what does it really mean to say that religious schools benefit from exemptions from antidiscrimination law?) and to constitutional theory (how does the legal regulation of religious schools affect state neutrality?). It turns the theoretical question into a concrete inquiry by focusing on two distinct questions. If religious schools are to affirm a distinct (religious) character, they might wish to hire only staff and teachers who share their ethos and/or to admit only students who share the same religious beliefs. But are they entitled to discriminate on the basis of religion in terms of (i) their employment and (ii) admissions decisions? While the answers to these questions vary significantly across jurisdictions, many of them could easily be described as delineating "exemptions" from antidiscrimination law for religious schools. As the Article analyzes the details of various legal systems' concrete responses to these questions by taking into account the rationales they rest on and the broader constitutional regimes they belong to, the Article thus claims that the comparative in-depth study of the legal regime of religious schools illuminates the overbroad dimension of the

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[3] For examination of this tension in the field of political theory see Meira Levinson, *Liberalism Versus Democracy? Schooling Private Citizens in the Public Square*, 27 B.J. POL. S. 333 (1997); Amy Gutmann, *Civic Education and Social Diversity*, 105 ETHICS 557 (1995). *See also* Nomi Maya Stolzenberg, "*He Drew A Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

[4] *Cf.* Gila Stopler, *The Ultra-Orthodox Community in Israel and the Right to an Exclusively Religious Education*, *in* CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 311 (Susanna Mancini & Michel Rosenfeld eds., 2014) (the author focuses on state funding of religious schools rather than on their subjection to antidiscrimination law).

[5] *See* Douglas NeJaime & Reva Siegel, *Conscience Wars in the Americas*, 5 LATIN AM. L. REV. 1 (2020); Douglas NeJaime & Reva B. Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, *in* RELIGIOUS FREEDOM AND LGBT RIGHTS: POSSIBILITIES AND CHALLENGES FOR FINDING COMMON GROUND 69 (Robin Fretwell Wilson & William Eskridge Jr. eds., 2018); THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY (Michel Rosenfeld & Susanna Mancini eds., 2018); Isabelle Rorive & Emmanuelle Bribosia, *Why a Global Approach to Non-Discrimination Law Matters*, *in* HUMAN RIGHTS TECTONICS 111 (Emmanuelle Bribosia & Isabelle Rorive eds., 2018); JOHN ADENITIRE, A GENERAL RIGHT TO CONSCIENTIOUS EXEMPTION: BEYOND RELIGIOUS PRIVILEGE (2020). *See also* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017) (for a proposed method of solving conflicts between religious freedom and equality).

concept of "exemption." Because it may apply to vastly different models of balancing the right to education with antidiscrimination law, its analytical virtue is fleeting, calling for the need to unpack and refine it. The variety in legal regimes applicable to religious schools across jurisdictions thus supports the idea that the concept of exemption—which is central to antidiscrimination theory, especially in the religion context—might be too broad. Accordingly, the Article offers a classification of the various responses legal systems bring to these questions. It maps out the competing normative commitments at stake in the conjoined existence and legitimacy of religious schools and commitment to state neutrality.

The Article identifies three main models of balancing between these competing interests. In the first model – the "separation" model – religious schools' "exemption" from antidiscrimination law is the strongest. They are envisioned as a space that is separate and distinct from the spaces regulated by antidiscrimination law. In other words, religious schools are effectively located outside or beyond the reach of antidiscrimination law. The second model is the "derogation" model. Here, religious schools are in theory subject to antidiscrimination law, but, under certain conditions, some may be exempted from all or parts of its requirements. These derogations express the legal system's acknowledgement of the legitimacy of religious schools' affirmation of a distinct character. The third is a model of exemption "preterition," whereby the specificity of religious education is acknowledged and handled via mechanisms that allow for the accommodation of core constitutional principles while antidiscrimination law affirms its full application.

Part II of the Article describes the first model of exemption as separation. By examining the rules that apply to religious schools in the United States, it exemplifies this model as one in which religious schools' decision to discriminate on the basis of religion in their employment or admissions policies is hardly sanctionable by law – thus resulting in a situation where religious schools are effectively insulated from the sphere governed by antidiscrimination law. Part III presents the derogation model, as exemplified by English law, under which religious schools are in principle subjected to antidiscrimination law, but nonetheless allow a number of exemptions as far as hiring staff or students of particular faiths. The exemptions are explicit and conditional upon several circumstances; they are grounded in the acknowledgement of the legitimacy of religious schools' existence and affirmation of distinct values. Part IV turns to the third model, that of exemption by preterition. This model is commonly found in France, where numerous elements converge to suggest that religious schools' specificities would neither be recognized nor accommodated. However, the Article claims that French law does in fact acknowledge the legitimacy of religious schools' existence and affirmation of a particular ethos – and indeed, protects and accommodates it. Unlike the model of derogation, however, the mechanisms of accommodation that take place are neither explicit nor stem from the internal logics of antidiscrimination law. Accommodation by preterition suggests that the accommodation of religious schools' specificities proceeds from significant twists and turns in the interpretation of principles external to antidiscrimination law – and indeed, primarily, of the constitutional principle of secularism (*laïcité* in legal parlance).

II. EXEMPTION AS SEPARATION: RELIGIOUS SCHOOLS BEYOND THE SCOPE OF ANTIDISCRIMINATION LAW

In the first model of balancing between religious freedom and antidiscrimination requirements, the kind of "exemption" that the religious schools are granted is the most extreme. Under this model, religious schools are withdrawn from the application of antidiscrimination law more than they are exempted from it. Hence the label of "separation" as applying to legal regimes in which religious schools are effectively located beyond the scope – or out of reach – of equality and antidiscrimination requirements with respect to religion. Concretely in this model, religious schools have wide latitude to take religious criteria into account when they select staff or students. The United States is an example of the model of separation. This Part begins by offering the specific background of the U.S. laws at stake and explains the legal framework applicable to religious schools. It then examines the extent to which they may take religion into account as they hire personnel or admit students.

A. RELIGIOUS SCHOOLS IN THE U.S. CONSTITUTIONAL FRAMEWORK

Under U.S. constitutional law, the Establishment Clause of the First Amendment prohibits the entanglement of religion and public education. As a result, religious schools are necessarily private. They do, however, enjoy a constitutionally protected freedom of establishment. The particular geography of equality and antidiscrimination norms in U.S. law further results in private religious schools being effectively located beyond their reach.

1. THE ESTABLISHMENT CLAUSE: RELIGIOUS SCHOOLS AS PRIVATE SCHOOLS

Lemon v. Kurtzman contains the controlling standard for the interpretation of the Establishment Clause requiring that religious schools in the United States necessarily be private.[6] The challenged rule must have a secular purpose and its primary effect must neither advance nor inhibit religion, and it must not result in excessive "entanglement" of government with religion; It follows relatively clearly that religion cannot be professed in public schools, as that would amount to the "establishment" of religion.[7]

However, further delineation of the Establishment Clause's judicial interpretation with respect to schools is blurry at best—all the more so with respect to private religious schools. While the Free Exercise Clause protects private religious schools' right to exist and operate, the Establishment Clause does not bar public authorities from supporting them financially.[8] In fact, this very issue is currently under renewed debate in both the public sphere and the courts. In a 1947 landmark case, the Supreme Court ruled that the Establishment Clause does not allow state governments to pass laws which "aid one religion, aid all religions or prefer one religion over another."[9] To support the holding, Justice Hugo Black, writing for the majority, cited Thomas Jefferson's notion of a "wall of separation" between churches and

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[6] Lemon v. Kurtzman, 403 U.S. 602, 6 (1971).

[7] Engel v. Vitale, 370 U.S. 421 (1962) (teacher-led prayers in public schools are a violation of the Establishment clause).

[8] KENT GREENAWALT, RELIGION AND THE CONSTITUTION. VOL. 2: ESTABLISHMENT AND FAIRNESS 3 (2006) (the issue of financial aid to private schools is the single "most litigated issue" under the Establishment clause).

[9] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

the State supposedly erected by the First Amendment.[10] The very same ruling did, however, uphold a New Jersey statute allowing the reimbursement by local school boards for the costs of transportation to and from schools regardless of whether they were private or public—and regardless of the fact that in the particular case, 96% of the private schools benefitting from the program were Catholic. Since then, indirect forms of support to religious education have repeatedly been upheld[11] and indeed enlarged, subject merely to the conditions that schools compartmentalize government funds so that the public funds are used to support secular activities only,[12] and that they be directed to families rather than schools. What was once a constitutional possibility for families to direct school vouchers and other forms of public funds to religious education[13] has now become a right. In *Carson v. Markin*, the Supreme Court ruled that families have a constitutionally protected right to do so.[14] As a result, the issue of the public funding of religious schools is deeply convoluted:

> Loans of textbooks to children in private schools were upheld, but loans of other instructional materials (such as laboratory equipment) were struck down. Funds to administer standardized tests in private schools were upheld, but funds to pay for non-standardized tests were struck down. Funding for diagnostic health services in private schools was upheld, but payments to parochial school teachers to provide remedial teaching, guidance, counseling and other testing services were struck down. And a program providing money to private schools to pay for the transportation costs of field trips also was deemed to be unconstitutional, even though it was another transportation subsidy (for conveying students to and from school) that was the first form of state aid to private schools held to be constitutional. Subsidies for teacher salaries, tuition tax credits and building maintenance grants likewise were struck down.[15]

Whatever their precise contours, there certainly is a growing line of cases allowing public funds to benefit religious schools. Some judges and scholars of religion and law now contend that the metaphor of the wall of separation is inaccurate for describing a legal state of affairs that no longer echoes the image, resting, rather, on a principle of religious neutrality of government.[16]

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[10] *Id.* at 16.

[11] Direct forms of support have also sometimes been upheld, with the Supreme Court reversing Aguilar v. Felton, 473 U.S. 402 (1985) and accepting that public teachers intervene directly in private schools: Agostini v. Felton, 521 U.S. 203 (1997).

[12] Mitchell v. Helms, 530 U.S. 793 (2000).

[13] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[14] Carson v. Makin, 596 U.S. ___ (2022) (the State of Maine had disallowed school vouchers to be used to pay for religious-based private schools. In a 6–3 decision the Supreme Court ruled that Maine's restrictions on vouchers violated the Free Exercise Clause, as they discriminated against religious private schools); *see also* Espinoza v. Montana Department of Revenue, 591 U.S.___ (2020).

[15] DAVID N. MYERS & NOMI M. STOLZENBERG, AMERICAN SHTETL: THE MAKING OF KYRIAS JOEL, A HASIDIC VILLAGE IN UPSTATE NEW YORK 193 (2021) (recalling the ironic question asked by Democratic senator Patrick Moynihan on this strand of case law: if governments could provide books but not maps to religious schools, "what about atlases?").

[16] JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 414 (2018) ("the metaphor obscures more than illuminates and . . . ought to be discarded.

2. EDUCATION AS A CONSTITUTIONAL ISSUE: THE CONSTITUTIONAL PROTECTION OF PRIVATE SCHOOLS' FREEDOM OF ESTABLISHMENT

Although somewhat counter-intuitive given the overall paucity of social and cultural rights in the U.S. legal tradition, education is an important matter of American law.[17] Constitutional scholar Justin Driver has even recently claimed that "the public school has served as the single most significant site of constitutional interpretation within the nation's history."[18] He convincingly evidences that, although the Supreme Court has clearly refused to elevate the right to education to a constitutional right,[19] a wide range of seminal topics of constitutional adjudication have originated in school settings – including racial equality, freedom of expression, secularism, and criminal law. Driver, however, only examines public schools, a mere portion of the reality covered by "the right to education" in the United States.[20]

Equally interesting and counter-intuitive is the fact that it took a Supreme Court decision to ensure that the existence and free establishment of private schools was a constitutionally protected right. Even though the United States has generally accepted the absence of a tradition of positive intervention by the State to mean that the private initiative was to be left free and essentially unbounded,[21] this principle is not reflected in the field of education. Early in the 20th century, what came to be known as the Common Schools Movement was very active in asserting the necessity of education in the creation and development of an American culture and in the satisfactory integration of the waves of immigration experienced by the country.[22] This movement was not unproblematic, especially from the perspective of religion. It was largely heralded by Protestants to ensure the assimilation of religious minorities. The then mostly Catholic and Jewish private denominational schools were thus

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The more useful Establishment Clause test turns not on strict separation but on neutrality, inquiring whether the state's conduct through its express terms either advances or inhibits religion and non-religion"); Nelson Tebbe et al., *The Quiet Demise of the Separation of Church and State*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/opinion/us-constitution-church-state.html.

[17] Jeff King, *Two Ironies About American Exceptionalism Over Social Rights*, 12 INT'L J. OF CONST. L. 572 (2014) (In U.S. law, the right to education is also an important social right in its own right – one that actually belies the notion that 'social rights' are a concept and tradition alien to U.S. law).

[18] DRIVER, *supra* note 16, at 9.

[19] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); King, *supra* note 17, at 572 (states' constitutional laws draw a very different picture, with numerous constitutional clauses acknowledging the right to education, significant amounts of statutory law defining minimum educational standards, and interesting judicial interventions pursuing their enforcement).

[20] *Private School Enrollment*, NAT'L CTR. FOR EDUC. STAT. https://nces.ed.gov/programs/coe/indicator/cgc/private-school-enrollment (last visited May 12, 2023) [establishes that "in the fall of 2019 some 4.7 million kindergarten through grade 12 students (9 percent) were enrolled in private schools"].

[21] DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006) (for a parallel in the field of reproductive technologies, the regulation of which has been left to the individual States, thus resulting in the USA being coined the "Wild west" of reproductive justice).

[22] PAOLA MATTEI & ANDREW S. AGUILAR, SECULAR INSTITUTIONS, ISLAM AND EDUCATION POLICY: FRANCE AND THE U.S. IN COMPARATIVE PERSPECTIVE 162 (2016) ("The common school reform of the nineteenth century [in the US] was linked to the preservation of the Republic in the U.S. Civic education in the U.S. was viewed at its historical origins by educational reformers to be functional to achieve unity in a country divided by political issues and religious and ethnically contested grounds.").

perceived as a threat, not only to the successful integration of these religious minorities, but also to the Protestant identity and domination the country had largely rested on so far.[23]

This is the background against which the 1922 Oregon Compulsory Education Act[24] ought to be read. The Act made attendance of public schools mandatory. Although this was a first in U.S. law, Catholic leaders at the time feared that the measure "represented only an early skirmish in a forthcoming war on Catholic education across the country."[25] The Supreme Court struck down the Act, holding that it violated the parents' constitutional right to make decisions regarding their children's education:

> The Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control: as often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[26]

The parents' right over their children's destiny was thus the grounds on which the freedom of establishment of private schools was constitutionally affirmed.

B. RELIGIOUS SCHOOLS AND ANTIDISCRIMINATION LAW

Finally, it is important to recall the particular geography of equality and antidiscrimination law in the United States. The Fourteenth Amendment's Equal Protection Clause is contained by the State Action Doctrine. As a result, its application is only triggered when a public authority can be viewed as associated with or supportive of the challenged rule or provision. Absent state action, the Equal Protection Clause does not apply; it is not a norm of "horizontal applicability" and does not reach into private relationships.[27] Hence the Clause's irrelevance to the legal regime of private religious schools. Conversely, antidiscrimination law *does* apply to private relationships. In fact, this is one of its most significant purposes, as epitomized by employment discrimination, which, by definition,

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[23] DRIVER, *supra* note 16, at 50-57.

[24] Proposed Constitutional Amendments and Measures (With Arguments) To Be Submitted to the Voters of Oregon at the General Election Tuesday, November 7th, 1922. https://digital.osl.state.or.us/islandora/object/osl%3A999246/datastream/OBJ/view at p. 21

[25] DRIVER, *supra* note 16, at 55, 56 ("One reliable source has suggested that at least ten additional states had active plans to eradicate private and parochial schools when the Court issued *Society of Sisters*.").

[26] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534-535 (1925).

[27] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) ["In 1883, this Court in The Civil Rights Cases set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield.'" (internal citations omitted)].

limits the freedom of contract.[28] However, federal antidiscrimination law concerns private religious schools only minimally.

While Title IV of the Civil Rights Act (CRA) pertains to education, its scope is restricted to public schools. In that, the CRA echoes the political and historical importance of schools as one of the central spaces where antidiscrimination law was shaped (as well as applied, resisted, and challenged) in the aftermath of *Brown v. Board of Education*. In *Brown*, the Court ruled that racial segregation in (public) schools violates the Equal Protection Clause.[29] Infamously, the decision gave rise to "massive resistance" – as labeled and sloganized by Democratic senator Harry Byrd of Virginia, who championed the movement made of a host of initiatives designed to prevent racial integration.[30] In numerous places, the actual enforcement of *Brown* necessitated the intervention of federal troops to tame riots, disperse white mobs, and see Black children into schools.[31] This resistance often led to the creation of private schools, either because locally, authorities had preferred to close all public schools rather than integrating them,[32] or because public schools were abandoned to the "new public" of Black students by fleeing white families who preferred to enroll their own children elsewhere.[33] As the principle of racial equality affirmed by *Brown* only concerned public schools, private schools emerged as enclaves that could be shielded from the application of antidiscrimination norms—hence the strong political relevance of private schools, in particular private religious schools. On the one hand, their existence and autonomy benefit from strong constitutional guarantees. Rooted in free exercise, they enjoy a right to affirm their special character, which can be construed as a right to discriminate, at least on religious grounds. On the other hand, as history has shown, private schools could turn into a locus and iteration of the "massive resistance" to racial integration.

This is the context in which legal efforts of the 1970s, 1980s, and 1990s aimed at strengthening antidiscrimination law's authority over private schools. In 1983, the Supreme Court affirmed that universities practicing racial discrimination did not qualify for tax exempt status by referring to a "fundamental, overriding interest [of the government] in eradicating racial discrimination in education."[34] In doing so, it confirmed and somewhat extended the philosophy undergirding Title VI of the CRA, prohibiting all entities receiving

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[28] Hence the critique by authors such as: RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

[29] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[30] *Massive Resistance,* VA. MUSEUM OF HIST. AND CULTURE, https://virginiahistory.org/learn/historical-book/chapter/massive-resistance (last visited May 12, 2023).

[31] This is what happened in Little Rock in September 1957. Hannah Arendt, *Reflections on Little Rock*, DISSENT, 1959, at 45 (recounting and critically analyzing these events); *see* KATHRYN T. GINES, HANNAH ARENDT AND THE NEGRO QUESTION (2014) (for information on *Reflections on Little Rock*).

[32] This happened, for instance, in Prince Edward County. *See* CHRISTOPHER BONASTIA, SOUTHERN STALEMATE: FIVE YEARS WITHOUT A PUBLIC EDUCATION IN PRINCE EDWARD COUNTY, VIRGINIA (2012).

[33] DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 169 (2004) (refers to "[T]he resegregation of once nominally desegregated schools").

[34] Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (the religion clauses of the First Amendment do not prohibit the Internal Revenue Service from revoking the tax-exempt status of a religious university whose practices are contrary to the compelling government interest of eradicating racial discrimination).

federal funds from engaging in the practice of racial discrimination.[35] The Court had also ruled that § 1981 of the U.S. Code prohibited racial discrimination in the exercise of the freedom of contract as applied to private schools' admission policies.[36]

After these and other cases suggested that the importance of combating racial discrimination was great enough to warrant anti-discrimination mandates in certain private settings, a similar hermeneutic process took place on the sex discrimination front. In 1972, the CRA was amended to echo Title VI and include a prohibition of sex-based discrimination in all institutions receiving federal funds.[37] Similarly situated in scope (while Title VI only concerns race and Title IX only concerns sex), the prohibition under Title IX is weaker than that under Title VI because of its built-in exemptions. Not only does it exempt schools and educational facilities that affirm a single-sex identity,[38] it also offers an exemption to religious schools: "[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."[39] Federal antidiscrimination law thus only marginally applies to religious schools: only if they benefit from federal funds are they subjected to the prohibitions of sex and race discrimination; and even if that is the case, their religious nature allows them to be exempted from the prohibition of sex discrimination. Furthermore, factors external to the CRA further diminish the force of the prohibition of sex discrimination in religious schools.

Courts and the Executive have recently embraced the notion that "sex" in antidiscrimination law should be interpreted as encompassing gender identity and sexual orientation both in terms of federal policies[40] and interpretation of federal statutes, particularly Title VII of the CRA.[41] Yet, opposition to these hermeneutics of "sex" is fierce. The growing number of cases in which freedom of expression, religious freedom, or freedom of association are claimed by florists[42], bakers[43], photographers[44], or healthcare providers[45] who refuse to serve (and thereby, in their view, condone) LGBTQI+ customers illustrate how LGBTQI+ rights have become the frontline of important political and judicial challenges

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[35] 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[36] Runyon v. McCrary*,* 427 U.S. 160, 172 (1976).

[37] 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation, in be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . .").

[38] 20 U.S.C. § 1681(a)(5) ("in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex").

[39] 20 U.S.C. § 1681(a)(3).

[40] Exec. Order No. 13, 988, 3 C.F.R. 7023 (2021).

[41] Bostock v. Clayton County, 590 U.S. ____, 140 S.Ct. 1731, 1742 (2020) (Title VII's reference to "sex" encompasses gender identity and sexual orientation).

[42] *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (U.S. 2018) [remanded for further consideration in the Court of Appeals of Washington in light of Masterpiece Cakeshop, Ltd. V. Colo. Civ. Rts. Comm'n, 584 U.S. ____ (2018)].

[43] *Masterpiece Cakeshop*, 584 U.S. _____; Klein v. Or. Bureau Lab. & Indus., 139 S.Ct. 2713 (2019).

[44] Elane Photography LLC v. Willock, 309 P.3d 53 (N.M. 2013).

[45] Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir., 2015), *cert. denied* 136 S.Ct. 2433 (2016).

premised on the notion that antidiscrimination law is little more than the illiberal imposition of liberal values. Because the questions raised by the pitting of religious freedom against equality and antidiscrimination norms are difficult, these cases can have unpredictable outcomes – even though many fear that the current composition of the Supreme Court of the United States will only lead to equality and antidiscrimination requirements increasingly yielding to free exercise claims. In fact, this is precisely what happened at the political level. In May 2022, the Biden administration required all schools receiving federal funds through the *Food and Nutrition Service* to adopt a policy to combat gender discrimination.[46] A Christian private school in Florida, supported by the Alliance Defending Freedom, challenged the decision, leading the administration, remarkably, to renounce its policy by including an automatic exemption for all private religious schools.[47]

In sum, private religious schools cannot be said to be generally subjected to federal antidiscrimination law. Only if, and when, they receive federal funds are they placed under an obligation not to engage in racial discrimination – and possibly, sex-based discrimination. Furthermore, no provision bars them from engaging in religious discrimination.[48] Instead, their choice seems to be legally protected, notably in their employment or admissions policies.

Private religious schools' decisions to select only employees or students of a particular faith seem protected by several legal rules and principles, hardly encountering any contradictory norms.

1. RELIGIOUS SCHOOLS AS EMPLOYERS

Employment discrimination is an important and highly developed part of U.S. antidiscrimination law.[49] As employers, private religious schools could in principle be subjected to antidiscrimination law, but they benefit from a statutory regime of exemption that is further reinforced by the judicial concept of the "ministerial exception."

Section 702 of Title VII carves out a general exemption from employment discrimination law for religious employers – and even specifically refers to educational institutions:

> this title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association or society with respect to the employment of individuals of a particular religion to perform connected with the

[46] Press Release, USDA, USDA Promotes Program Access, Combats Discrimination Against LGBTQI+ Cmty (May 5, 2022) (on file with author).

[47] Valerie Richardson, *Biden administration exempts religious schools from LGBTQ mandate on lunch funding,* WASH. TIMES, Aug. 13, 2022, https://www.washingtontimes.com/news/2022/aug/13/biden-administration-exempts-religious-schools-lgb/.

[48] Unless it comports an ethnic dimension, in which case it may be prohibited on account of the prohibition of racial discrimination. Molly E. Swartz, *By Birth or By Choice? The Intersection of Racial and Religious Discrimination in School Admissions*, 13 J. CONST. LAW 229 (2010) (for a study pertaining to the protection of Jews through the prohibition of discrimination on account of ethnic origin).

[49] This is not to say that it is effective. *Contra* SANDRA F. SPERINO, SUJA A. THOMAS, UNEQUAL. HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW (2017); TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW (2017).

> carrying on by such corporation, association or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work with the educational activities of such institution.[50]

The U.S. Code version clearly echoes this explicitly carved out regime of exemption for religious schools:

> it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[51]

Clearly, this regime of exemption originates in the concepts of church autonomy and religious freedom, which are read as requiring that the State give some leeway to religious organizations in terms of their internal affairs.[52]

Beyond these statutory provisions, judicial interpretation reinforces the regime of exemption from employment discrimination law enjoyed by religious organizations. The "ministerial exception" protects these organizations' sovereignty as they choose those persons whom they endow with particular tasks. In *Hosannah Tabor*,[53] the Supreme Court applied the ministerial exception to a teacher employed at a church-run school who taught the full secular curriculum, as well as religious classes during which she led class prayers. In this case, the teacher had been fired upon her return to work after a disability leave for Narcolepsy. She claimed that her termination was a violation of the Americans with Disabilities Act (ADA).[54] The Court reasoned, however, that because the "religious" elements of her job description outweighed the secular, her employer could use the ministerial exception and be immune from her employment discrimination suit.[55]

In *Our Lady of Guadalupe*,[56] the Court further expanded the ministerial exception by applying it to an employee who did perform some religious functions but was not

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[50] 42 U.S.C. § 2000e-1. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding a law permitting organizations whose "purpose and character are primarily religious" to exercise religious preferences when making employment decisions); *See also*: Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (extending the scope of religious exemption to commercial entities, if "closely held").

[51] 42 U.S.C. § 2000e-2.

[52] *See, e.g.*, Kedroff et al. v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am., 344 US 94, 116 (1952) (ruling that the First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

[53] Hosannah-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 US 171 (2012).

[54] *Id.* at 179.

[55] *Id.* at 194.

[56] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); *see also* St. James School v. Biel (Docket No. 19-348) (reasons similarly *à propos* a discrimination claim based on the violation of the ADA).

otherwise a minister.[57] This time, the ministerial exception barred courts from adjudicating the employee's discrimination claims based on the violation of the Age Discrimination in Employment Act (ADEA). In other words, the strength of the "ministerial exception" is to effectively neutralize antidiscrimination law vis-à-vis religious employers. The wording of these rulings is both clear in meaning and wide in scope, as it is characterized by general propositions such as that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions."[58] The concept of the ministerial exception delineates a regime of exemption from employment discrimination laws that reaches well beyond religious discrimination. Again, this is explicitly expressed by the Supreme Court as follows: "[T]he purpose of the exception is not to safeguard a church's decision to fire a minister *only when it is made for a religious reason*. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical.'"[59] As such, the ministerial exception effectively gives rise to a regime of immunity rather than to a regime of exemption – one that ought to be read as robustly locating private religious schools (as religious organizations) beyond and outside the reach of antidiscrimination law more than as allowing them to derogate on a case-by-case basis and depending on the kind of job position concerned from the requirement of nondiscrimination.[60]

2. RELIGIOUS SCHOOLS AS EDUCATIONAL FACILITIES

Are private religious schools free to choose their students, even if such a choice entails religious discrimination? The question itself may seem awkward from an abstract perspective given that the very purpose of a religious school is presumably to bring together a homogenous human community united by shared beliefs. How then would it be possible to prevent such schools from choosing students on religious grounds? Does the mere fact that some religious schools in the United States express a particular identity within a denomination (such as "orthodox" or "liberal") not testify to the fact that private religious schools are at liberty to choose to unite people from a similar faith?

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[57] *See Hosannah Tabor*, 565 U.S. at 192, [the Supreme Court defined four components to the category of "religious ministers" ("the formal title given . . . by the Church, the substance reflected in that title, [the employees] use of that title, and the important religious functions . . . performed for the Church."), it promoted a much wider definition in the subsequent *Our Lady of Guadalupe* ruling, considering lay teachers who neither had the title of ministers nor as extensive religious training as the claimant in Hosannah Tabor "religious ministers."]

[58] *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2060. Even prior to *Our Lady of Guadalupe,* this wide regime of exemption was discernable. *See* Carolina Mala Corbin, *The Irony of Hosannah-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U. L. REV. 951, 955 (2015) ["The combination of Smith and Hosannah Tabor means that religious individuals have absolutely no protection from neutral laws of general applicability, even if the laws bar them from participating in a sacrament (the Smith rule), while religious institutions may be protected absolutely, even if their acts have no religious basis (the ministerial exception approved by Hosannah Tabor)."].

[59] *Hosannah Tabor*, 565 U.S. at 194 (emphasis added).

[60] Sabine Tsuruda, *Disentangling Religion and Public Reason: An Alternative To The Ministerial Exception*, 106 CORNELL L. REV., 1265, 1257 (2021) ("Under this 'ministerial exception,' religious organizations can lawfully fire covered employees for being Polish, resisting sexual harassment, developing narcolepsy, being Black, developing a brain tumor, taking time off for breast cancer treatment, and a bevy of other reasons bearing no discernible connection to the organizations' religious beliefs or practices.") (citations omitted).

Legally, very few limits exist to private schools' ability to affirm their religious identity through admissions policies. The protections afforded by the First Amendment are wide ranging in this respect, particularly under the Free Exercise Clause. Conversely, few rules restrict schools' right to discriminate in admissions policies. As previously noted, absent state action, the Equal Protection Clause does not apply. Federal antidiscrimination law's reach is uncertain and, at any rate, limited either by Title VI (race discrimination) or Title IX (sex discrimination) of the CRA to those private religious schools that receive federal funds. Title II, which gives a comprehensive definition of places of public accommodation[61], does not mention schools – let alone private schools. Surely, § 1981 of the U.S.C. is also relevant, especially since the Supreme Court ruled in 1976 that it applies to "purely private acts of discrimination" in a case where a private school's decision to deny admission to Black students was read as a violation of the plaintiff's freedom to contract, but the Court did insist that it's ruling only concerned racial discrimination and did not present "any question of a right of a private school to limit its student body to boys, girls, or adherents of a particular religious faith"[62] – this last precision being particularly relevant for our purposes.[63]

Surely, the conclusion that a religious school's decision to accept students based on religious criteria is essentially out of reach of equality and antidiscrimination norms needs to be qualified once state law as well as, indeed, local law, is factored in. In all forty-five states that have public accommodation laws,[64] religion is listed as a protected ground[65] and the list or definition of those settings that qualify as public accommodations is generally broader than under federal law. State laws tend to go in much further detail, listing "ice cream parlors" or "swimming pools" as places of public accommodation[66] or, they cast wide nets, calling "all business establishments of every kind whatsoever" places of public accommodation.[67] When local or city ordinances pertaining to public accommodations also exist,[68] the interchangeability of federal, state and local law further complicates the law's legibility and certainty. Indeed, it is not because a specific space is not mentioned in a local ordinance that it is not covered by public accommodation laws, for it may well be included

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[61] Deberry v. Learydavis, No. 1:08CV582, 2009 U.S. Dist. LEXIS NEXIS 91774, at *8 (M.D.N.C. Sep. 30, 2009) ("Notably, section (b) of [Title II] contains a comprehensive list of establishments which are considered 'places of public accommodation'. Schools, be they public or private, are conspicuously absent from this list."). *See also* Runyon v. McCrary, 427 US 161, 164 (1976) ("Title II of the Civil Rights Act of 1964, of which the 'private club' exemption is a part, does not by its terms reach private schools."); Harless by Harless v. Darr, 937 F. Supp. 1351 (S.D. Ind. 1996) (ruling that public schools are not places of public accommodation either).

[62] *Runyon v. McCrary*, 427 U.S. at 167–8.

[63] While the Court insists that its ruling could not be replicated in the face of a school's admission policy discriminating on the basis of sex, this was later reversed by the adoption of Title IX in 1972. However, Title IX includes an exemption for religious schools whose tenets command a sex-segregated education.

[64] There are no public accommodation laws in Alabama, Georgia, Mississippi, North Carolina, or Texas. The District of Columbia also has a public accommodation law.

[65] Nat'l Conf. of State Legis. https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws (last visited April 19,2023) ("All states with a public accommodation law prohibit discrimination on the grounds of race, gender, ancestry and religion.").

[66] MONT. CODE ANN. §49-2-101(20)(a) (2021).

[67] CAL. CIV. CODE §51.5(a) (2023).

[68] While Atlanta has a public accommodation ordinance (in a State where there is no State public accommodation law), cities like Newark, Las Vegas or Honolulu have none.

in state laws (and vice versa). Not to mention the fact that, even when specific spaces are not expressly excluded (or included) from public accommodations laws, judges and courts may allow themselves to rule, notwithstanding, that the legislature's intent was indeed to exclude (or include) them.[69] For our purposes, it is crucial that private religious schools are sometimes included in state or local public accommodations laws. In Nevada, for example, public accommodations include: "any restaurant . . . theater . . . auditorium . . . or place of public gathering . . . sales establishment . . . nursery, *private school* . . . or place of education . . . any day care center . . . homeless shelter, food bank . . . [or] any other establishment or place to which the public is invited or which is intended for public use."[70]

In Vermont, the public accommodation law includes "any school" in the list,[71] while the Virginal law refers to "educational institutions" more broadly.[72] In 2016, Elisabeth Sepper had counted eleven states in which private schools fell into the category of "places of public accommodation" where discrimination is unlawful.[73] Does this mean that, in those States, private schools are subjected to antidiscrimination laws in the same ways that malls, parks and hotels or theaters and other spaces of recreation and commerce are – and cannot discriminate on the basis of religion in their admissions policies? The answer needs to be qualified – for exemptions for religious schools may then kick in. In fact, in 2019, no less than 21 States had religious exemptions in their public accommodations laws.[74] These exemptions sometimes explicitly cover admission policies by religious schools. The Washington, D.C. law is a case in point:

> nothing in this chapter shall be construed to bar any religious or political organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious or political organization, from limiting employment, or admission to or giving preference to persons of the same religion or political persuasion as is calculated by the organization to promote the religious or political principles for which it is established or maintained.[75]

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[69] Barker v. Our Lady of Mount Carmel Sch., CV No. 12-4308, 2016 WL 4571388, at *15 (Dist. N.J. Sept. 1, 2016) (citing Wazeerud-Din v. Goodwill Home & Missions, Inc., 737 A.2d 683 (App. Div. 1999)) ("('[Although churches, seminaries and religious programs are not expressly excluded from the definition of "place of public accommodation," *the Legislature clearly did not intend to subject such facilities and activities to the* [*public accommodations law*].') Thus, the claims against these institutional Defendants fail as a matter of law.") (emphasis added).

[70] Nev. Rev. Stat. §651.050 (2022) (emphasis added). *See also* (Ariz. Rev. Stat.§ 41-1492(11)(j) (2008) (in Arizona public accommodations include any: "(j): Nursery, elementary, secondary, undergraduate or postgraduate private school or other place of education" (emphasis added)).

[71] VT. STAT. ANN. tit. 9, §4501(1) (WEST 2023).

[72] VA. CODE ANN. § 2.2-3900(B)(1) (2021); *See also* MICH. COMP. LAWS § 37.2301 (2000).

[73] Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS UNIV. L.J. 613, 639 NN.27 (2016).

[74] MATTHEW BRANAUGH & RICHARD R. HAMMAR, 50 STATE PUBLIC ACCOMMODATIONS LAWS REPORT: HOW STATUTES AND COURT DECISIONS ACROSS THE COUNTRY DO–OR DON'T–AFFECT CHURCHES 10 (2020).

[75] D.C. CODE § 2-1401.03(b) (2005); s*ee* N.H. REV. STAT. ANN. § 354-1:18 (2021) (FOR SIMILAR PROVISIONS); s*ee also* NEW ORLEANS CODE OF ORDINANCES § 86-33.

In New Jersey, although "primary and secondary schools" are listed as public accommodations, "organizations operated for educational purposes" are not only granted a religious exemption that explicitly covers their admissions policies but are also broadly shielded from antidiscrimination law: "nothing herein contained shall be construed to include or to apply to any educational facility operated or maintained by a bona fide religious or sectarian institution."[76] Religious exemptions from public accommodation laws can also be granted to religious schools by judicial authorities. Strikingly, in Pennsylvania, where the state public accommodation law explicitly refers to "primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions,"[77] the court has ruled that a parochial school run by a Catholic church was not a place of public accommodation.[78]

Further, public accommodation laws are not the only sources of state statutory law that are relevant to the inquiry. For instance, even in those states where education seems to lie beyond the scope of antidiscrimination law,[79] many state statutes echo the CRA's Title VI prohibition on race discrimination in educational institutions by establishing that private schools' approval / registration / accreditation shall be denied to schools engaging in policies of racial segregation or discrimination.[80] In some states, benefits that religious schools may request are conditioned upon the prohibition from discrimination on a broader range of grounds[81] – that sometimes includes religion. In Colorado, for instance, boards of education may choose to provide library resources (such as textbooks) or special education programs to children enrolled in private schools, but such provision must be made "without discrimination on the basis of race, color, *religion*, sex or national origin."[82] Similarly, in Ohio, school boards may choose to provide transportation to private school students as long as the schools do not discriminate "in the selection of their pupils, faculty members, employees based on race, color, *religion* or national origin."[83]

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[76] N.J. STAT. ANN. § 10:5-5(l) (2019).

[77] 43 PA. CONS. STAT. § 954(I) (2023).

[78] Roman Cath. Archdiocese of Philadelphia v. Pennsylvania, 548 A.2d 328, 331 (Pa. Commw. Ct. 1988).

[79] *See generally* ALASKA STAT. § 18.80.200 (2023) ("[I]t is the policy of the state and the purpose of this chapter to eliminate and prevent discrimination in employment, in credit and financing practices, in places of public accommodation, in the sale, lease, or rental of real property because of" race, religion, marital status, sex, etc.); ALASKA STAT. § 18.80.210 (2023) ("The opportunity to obtain employment, credit and financing, public accommodations, housing accommodations, and other property without discrimination because of sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, race, religion, color, or national origin is a civil right.").

[80] *See* WASH. REV. CODE § 28A.195.040 (2023); MD. CODE. ANN. Educ. § 2-206(e) (2021); 95 ILL. COMP. STAT. § 5/6-104(B) & (D) (2015).

[81] Norwood v. Harrison*,* 413 U.S. 455, 467 (1973) ("the Mississippi textbook program" under which textbooks are purchased by state and lent to students in both public and private schools without ensuring that private schools that have racially discriminatory policies are excluded is constitutionally infirm in that it significantly aids organization and continuation of separate system of private schools which might discriminate if they so desire.).

[82] COLO. REV. STAT.§ 22-32-110(cc) & (dd) (2023) (emphasis added).

[83] OHIO REV. CODE ANN § 3327.01 (West 2021) "No transportation of any pupils shall be provided by any board of education to or from any school which in the selection of pupils, faculty members, or employees, practices discrimination against any person on the grounds of race, color, religion, or national origin" (emphasis added).

The combination of public accommodation laws and other statutory sources sometimes leads to normative contradictions. In New York, for instance, while state law includes "kindergartens, primary and secondary schools, high schools, academies, colleges and universities" in the category of "public accommodations,"[84] a provision of the Executive Law explicitly excludes them from the category of public accommodations and exempts them from antidiscrimination law:

> Such term [public accommodations] shall not include kindergartens, *primary and secondary schools, high schools*, academies, colleges and universities, extension courses and all educational institutions under the supervision of the regents of the state of New York" and: "for the purposes of this section, a corporation incorporated under the benevolent orders laws or described in the benevolent orders law but formed under any other law of this state *or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private*.[85]

Overall, then (even though it would be necessary to undertake a systematic and comparative analysis of all the applicable laws in all fifty States to draw more assertive conclusions), a general rule prohibiting private schools from discriminating on the ground of religion in their admissions policies is nowhere to be found at the federal level, and only rarely ascertainable at the state level. The state statutory rules that exist to that effect are often indirect, in the form of a condition for the eligibility to state aid programs. By contrast, examples of states where religious schools appear positioned well beyond the reach of antidiscrimination statutes abound. The local press regularly echoes decisions whereby schools deny admission to students on the grounds of faith. For example, in Arkansas, a Christian school recently denied admission to a Mormon student on the ground that the Mormon cult is a flawed version of Christianism.[86] School websites describing their admissions policies often relay the notion that religion can be a factor in admissions.[87] A chart designed by the Maryland chapter of the American Civil Liberties Union vividly illustrates that private religious schools largely escape antidiscrimination law.

Prohibited from Discriminating on the basis of:	**Maryland Public Schools**	**Maryland Private Schools**
Race, color, national origin	Yes	Yes*
Sexual Orientation	Yes	No

[84] N.Y. CIV. RIGHTS LAW § 40.

[85] N.Y. EXEC. LAW § 292 (emphasis added).

[86] Charlie Frago, *LR Christian Academy Rejects Mormon as Pupil*, ARKANSAS DEMOCRAT GAZETTE (May 31, 2012, 5:05 AM), https://www.arkansasonline.com/news/2012/may/31/lr-christian-academy-rejects-mormon-pupil-20120531/.

[87] *About Us,* GOLDA OCH ACADEMY (last visited May 12, 2023) ("We ground a dual academic curriculum in the culture and tenets of Conservative Judaism, while welcoming students and families *from a range of synagogue affiliations and Jewish expression*.") (emphasis added)).

Ethnicity	Yes	No
Religion	Yes	No
Gender	Yes	No
Language	Yes	No
Socioeconomic status	Yes	No
Age	Yes	No
Disability	Yes	No
		*condition of eligibility for state funding, but not enforceable by victims of discrimination

Source : https://www.aclu-md.org/sites/default/files/field_documents/nonpublic_schools_discrim_factsheet.pdf

The issue of individual states' abilities to control private religious schools has become particularly salient. In New York, for instance, concerns around Hasidic education have led to increasing tensions, both within the Jewish community and between Hasidic schools and state authorities. The New York Jewish community accounts for more than 1.5 million people, of which 200,000 are Hasidic Jews.[88] Approximately 110,000 children are educated in Hasidic private schools.[89]

For several years now, the lagging educational standards in Hasidic schools have been raising questions. Multiple sources converge in harsh assessments.[90] The emphasis on Talmudic education is said to lead to lacunae in secular education and thus to low standards in mathematics, English, history, or sciences. In 2019, one of the largest Hasidic schools of the City of New York, the Central United Talmudic Academy, had 1,000 of its students take standardized tests in math and English. None of them passed.[91] Confronted with what amounts to a violation of state law requiring that education delivered in private schools be "substantially equivalent" to that delivered in public schools,[92] state authorities have sought to reinforce the constraints weighing on private schools.

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[88] Eliza Shapiro & Brian M. Rosenthal, *In Hasidic Enclaves, Failing Private Schools Flush With Public Money*, N.Y. TIMES, https://www.nytimes.com/2022/09/11/nyregion/hasidic-yeshivas-schools-new-york.html, (last updated Sept. 12, 2022).

[89] Zalman Rothschild, *Free Exercise's Outer Boundary: The Case of Hasidic Education*, 119 COLUM. L. REV. F. 200 (2019).

[90] Over the past decade, the press has regularly documented this issue. *See Id.*; Shapiro & Rosenthal, *supra* note 88; *see also* ALISA PARTLAN, YOUNG ADVOCS. FOR FAIR EDUC., NON EQUIVALENT: THE STATE OF EDUCATION IN NEW YORK CITY'S HASIDIC YESHIVAS (2017) [Founded in 2012, the YAFFED organization (Young Advocates for Fair Education) aims to alert on education standards in ultra-Orthodox Jewish communities].

[91] Shapiro & Rosenthal, *supra* note 88.

[92] N.Y. EDUC. LAW § 320-45 (McKinney 2022); *Teach NYS Confirms 3.5 Hour Daily Core Subject Requirement (Grades 7 and 8) in NYSED Enforcement Guidance,* TEACH COALITION, https://teachcoalition.org/blog/teach-nys-confirms-3-5-hour-daily-core-subject-requirement-grades-7-and-8-in-nysed-enforcement-guidance/ (last visited Sept. 22, 2023) (new regulations adopted in 2018 require that secular teaching represent at least 3.5 hours daily and include a minimum of 36 minutes of mathematics.).

In 2018, new regulations adopted by the New York State Department of Education were challenged in court. While it was initiated by the Hasidic community, the lawsuit was also joined by a broader coalition of Catholic and elite private schools of the region, all united around the defense of private schools' autonomy. They won on procedural grounds before the New York Supreme Court who struck down the challenged regulations.[93] New provisions adopted in 2020 were withdrawn after the Hasidic community voiced their protest.[94] In September of 2022, new regulations were yet again adopted; and in October of 2022, the State Commissioner for Education officially found a Brooklyn school to be in violation of state law.[95] The conflict is, however, ongoing. Though it pertains to educational standards and not to admissions policies, it could only erupt in schools that are only frequented by children of a single denomination.[96]

Another story – also one that originated in the state of New York – further illustrates the difficulty for laws, be they state or federal, constitutional, or statutory, to effectively constrain private religious schools' modes of operation. In the 1970s, a segment of the Brooklyn-based Hasidic community acquired land in a county in upstate New York. As they settled in the village of Kyrias Joel,[97] they developed an ultra-Orthodox lifestyle that some have described as a theocracy.[98] The town was incorporated in 1977; today, it is populated by 33,000 inhabitants. Since the beginning, children of the community were enrolled in private religious schools that were founded, managed, and administered by the community itself. After some years, the community felt the need for special education programs for some of their children. It turned to public authorities, claiming that the legal obligation weighing on the local school district to offer special education programs existed regardless of whether the children in need of services attended public or private schools. But the state authorities would only provide special education programs in public schools.[99] This created multiple difficulties. For Hasidic children, frequentation of public schools amounted from exposition to stigmatization and humiliation because of their dress and customs. For some within the community, such secular contacts appeared as a threat to the integrity of Hasidic life. For the

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[93] Rochel Leah Goldblatt, *State Supreme Court strikes down 'substantial equivalency' guidelines for private schools*, LOHUD. (Apr. 19, 2019, 8:03 AM), https://www.lohud.com/story/news/education/2019/04/18/state-court-strikes-down-substantial-equivalency-guidelines/3507728002/ (held by New York Supreme Court, April 17, 2019).

[94] Shapiro & Rosenthal, *supra* note 88.

[95] Tim Balk, *NY State Says Brooklyn Yeshiva's Instruction Breaks Law, Orders NYC to Fix,* NEW YORK DAILY NEWS, (last updated Oct. 13, 2022), https://www.nydailynews.com/new-york/education/ny-doe-rules-brooklyn-yeshiva-failed-students-20221012-dz5fjd5kmrejbbln4u3p7r274a-story.html.

[96] Surely, not all instances of religiously homogenous schools signify discriminatory admission policies; it might well be that only children and families of certain denominations (or certain orientations) turn to certain schools – such as, quite probably, Hasidic schools. Schools could thus effectively be populated by homogenous groups of students without having to use religious criteria in their admission practices.

[97] LOUIS GRUMET & JOHN CAHER, THE CURIOUS CASE OF KYRIAS JOEL: THE RISE OF A VILLAGE THEOCRACY AND THE BATTLE TO DEFEND THE SEPARATION OF CHURCH AND STATE (2016); MYERS & STOLZENBERG, *supra* note 15.

[98] GRUMET & CAHER, *supra* note 97.

[99] The community's initial move was to create a school specifically dedicated to educating children with special needs; and the local public school district did provide special ed teachers to instruct these children. This arrangement was however suspended after the US Supreme Court ruled that the Establishment clause prohibited public school teachers could from intervening in private religious schools. *See* Aguilar v. Felton, 473 U.S. 402 (1985) *rev'd*, 521 U.S. 203 (1997). *See* MYERS & STOLZENBERG, *supra* note 15, at 199-202.

public authorities, it generated multiple demands for accommodations that generated further conflict, such as the community's insistence that no female bus driver be allocated to the Hasidic routes.[100] Eventually, the Hasidic community challenged the school authorities' decision in court. The New York Court of Appeals delivered a cautious ruling. On the one hand, it determined that the state department of education's insistence that special education programs could only be offered inside public schools was excessive. On the other hand, it acknowledged that it was legitimate to refuse to offer services inside private schools.[101] Effectively, the ruling amounted to suggesting that special education programs be delivered in neutral spaces;[102] it was, however, for the New York State Department of Education (NYDOE) to make the final determination. The NYDOE did not budge: special education programs would only be provided in public schools.[103]

The Hasidic community then decided to leave the judicial terrain and engage in the political one. It turned to members of the State legislature, seeking to obtain the creation of a new school district shaped on the contours of Kyrias Joel.[104] The upshot of this approach was obvious: should the district be elevated, community members would become the ones in charge of administering all the programs, including special education programs. The request garnered substantial support, including from then-Governor Mario Cuomo, for reasons not unrelated to the political weight of the community. The district was indeed created in 1989, and it garnered a decade-long judicial battle with the New York State School Boards Association, whose Executive Director, Louis Grumet, read it as a clear violation of the Establishment Clause. When the case reached the U.S. Supreme Court,[105] the decision to create the district was found to violate the Establishment Clause because the law was not general but instead specially designed for the Hasidic community. However, as the Court's reasoning hinged on the unconstitutionality of the legislative process rather than on the merits of the law, the legislature was subsequently successfully lobbied into maintaining its choice – and a school district that coincides with the village of Kyrias Joel continues to exist to this day.[106]

The story thus illustrates the paucity of legal obstacles to the creation and operation of private religious schools whose distinct character results in admissions policies that rely on religious criteria. It even shows how existing legal rights and principles can be successfully mobilized by such schools, such as the reliance on Free Exercise and property rights in the

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[100] MYERS & STOLZENBERG, *supra* note 15, at 195-96.

[101] Bd. of Educ. v. Wieder, 878 N.Y.S. 2d 882 (App. Div. 1987).

[102] MYERS & STOLZENBERG, *supra* note 15, at 202 (authors explain that for similar reasons, other public educational programs were indeed already offered in mobile units (Mobile Educational Units) which allow to bring them to private religious schools without infringing upon the Establishment Clause.).

[103] MYERS & STOLZENBERG, *supra* note 15, at 207-208.

[104] *Id.*, at 214-20.

[105] Bd. of Educ. of Kyrias Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

[106] MYERS & STOLZENBERG, *supra* note 15, at 278, 291-96 (the story is more complicated than this summarized account can explain. After the U.S. Supreme Court ruling, three Acts voted by the Legislature confirming the creation of the district were challenged in court by the same Louis Grumet. The indefatigabledefensor of the principle of non-establishment had, however, retired by 1999 when a fourth vote by the New York State legislature confirmed again the creation of the school district and was thus left unchallenged.).

founding of Kyrias Joel, and the equality and anti-discrimination norms and paradigms central to the civil rights legacy.[107]

In sum, private religious schools in the United States seem to exist and operate in a social space that is largely separated from those governed by equality and antidiscrimination requirements. The Equal Protection Clause of the U.S. Constitution does not apply. Federal antidiscrimination law only does to the extent that the schools receive federal funds – and even then, race discrimination seems to be the only firmly protected ground; there are religious exemptions to the prohibition of sex discrimination and religious discrimination is not prohibited. This finding is congruent with the notion that U.S. constitutional law more generally allows for religious communities to form enclaves within the legal and political order – even though this state of legal affairs has generated some criticism.[108]

III. EXEMPTION AS DEROGATION: EXPLICIT ACCOMMODATION OF RELIGIOUS SCHOOLS' DISTINCT CHARACTER WITHIN ANTIDISCRIMINATION LAW

The second model identified in this Article is one of derogation, in which the background legal framework seeks to reconcile two competing claims. On the one hand, the model acknowledges the legitimacy of religious education and religious schools' affirmation of a distinct character. On the other hand, it affirms its commitment to the normative program of equality and nondiscrimination and therefore commands that religious schools are in principle subjected to antidiscrimination requirements. Derogations are the mechanisms that allow this reconciling to take place. Antidiscrimination legislation defines a number of circumstances in which schools are authorized to derogate from prohibitions on discrimination. While this model is probably the most common one in liberal democracies, this Article focuses on English law as its central case study.

A. RELIGIOUS SCHOOLS UNDER ENGLISH LAW

The English legal framework for religious schools is marked by the existence of the established Church of England—a feature of the legal order that percolates throughout the educational system where state-run religious schools ("faith schools") are operated.[109] In the United Kingdom as a whole, religious schools represent over a third of state-funded schools (which represent 93% of the total number of schools)[110] and three-quarters of the remaining

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[107] MYERS & STOLZENBERG, *supra* note 15, at 183-90 (documenting the intersection and overlap between the rise of a disability rights movement supporting special ed programs and the inclusion of concerned children with the mobilization inside the Hasidic community of Kyrias Joel and the litigation that ensued).

[108] Judith Lynn Failer, *The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kyrias Joel*, 72 IND. L.J. 383 (1997); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997).

[109] Philip Petchey, *Legal Issues for Faith Schools in England and Wales*, 10 ECCLES. L.J. 174 (2008) [on the history of the 1870 Act making education compulsory by the State relying on (and subsidizing) existing religious schools].

[110] Myriam Hunter-Henin, *English Schools with a Religious Ethos: For a Re-Interpretation of Religious Autonomy*, *in* 13 RELIGION AND HUMAN RIGHTS 3, 11 N. 44 (2018) ("Approximately 37 per cent of state-funded primary schools and 19 per cent of state-funded secondary schools were faith schools as of January 2017.").

7% of independent schools that are not publicly funded.[111] Proportions are similar in England specifically.[112] Furthermore, religious education is mandatory throughout the educational system. The 1944 Education Act provided as much, and its 1988 amendment further clarified that religious education in state-run schools should be "wholly or mainly of a broadly Christian character."[113] Parents retain the right to withdraw their children from religious education classes as well as daily collective worship. A 1994 Circular of the Department of Education prescribed that religious education syllabi ought to "include all the principal religions presented in the country" – even if "the relative content dedicated to Christianity should predominate."[114]

English law distinguishes between numerous different categories of schools,[115] each with varying degrees of dependency upon public authorities. The most basic distinction is between "maintained" (publicly funded)[116] and "independent" (private) schools. The latters' funds come largely from the fees paid by families, affording more leeway in terms of the curriculum etc. Categories of public (maintained) schools include "community schools", "voluntary-aided" or "voluntary-controlled." Categories of independent schools include "academies" and "free schools."[117] Historically, the existence of a large number of "faith schools" reflects the fact that the Church preceded the State in the provision of education. More recently, however, there has been a renewed expansion of the number of religious schools and of the involvement of faith organizations in state schooling. This evolution was

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[111] Richy Thompson, *Religion, Belief, Education and Discrimination*, *in* 14 THE EQUAL RTS. REV. 71, 72 (2015).

[112] Education law varies across the UK; this paper focuses on English law. For information on Wales, Scotland, and Northern Ireland, s*ee* Anna Buchanan, *Religion, Regionalism and Education in the UK: Tales from Wales*, in LAW, RELIGIOUS FREEDOM AND EDUCATION IN EUROPE 107 (MYRIAM HUNTER HENIN ED., 2012) (for Wales); Ian Menter, *The Same but Different? Post-Devolution Regulation and Control in Education in Scotland and England*, 6 EUR. EDUC. RSCH. J. 250 (2007) (for Scotland); Christopher McCrudden, *Religion and Education in Northern Ireland: Voluntary Segregation Reflecting Historical Divisions*, in LAW, RELIGIOUS FREEDOM AND EDUCATION IN EUROPE 133 (MYRIAM HUNTER HENIN ED., 2012) (for Northern Ireland).

[113] Education Reform Act 1988, Part 1, c.40, § 7 (UK): https://www.legislation.gov.uk/ukpga/1988/40/pdfs/ukpga_19880040_en.pdf (7. "7. – (l) Subject to the following provisions of this section, in the case of a county school the collective worship required in the school by section 6 of this Act shall be wholly or mainly of a broadly Christian character.").

[114] Education Reform Act 1988, D.F.E. Circular 1/94 ¶ 35 (UK).

[115] *See* Thompson, *supra* note 111 (faith schools exist in both public (maintained) and independent schools. "Publicly maintained" schools include: "community schools", "voluntary-aided" and "voluntary-controlled", and "academies." Voluntary aided schools are granted more independence (2/3 of managers/governors and all staff can be appointed or dismissed on religious criteria). In voluntary-controlled schools (who enjoy larger state funding than voluntary aided schools), only 1/3 of managers/governors may be so appointed, and only up to 1/5 teachers can be required to adhere to a particular faith). "Academies" (who have appeared and developed since the 2000s) are directly funded by and accountable to the central government (whereas other publicly maintained schools are generally placed under the authority of a local educational authority – LEA). "Independent schools" include "free schools" and "foundation schools." In foundation schools, there is a cap (1/5) on the share of teachers that may be required to adhere to a particular faith. Free schools are set by private groups (possibly religious); they have control over their admissions policies, employment decisions and curriculum.); *See also* House of Commons, *Faith Schools in England: FAQs*, Report by Robert Long and Shadi Danechi, 2019.

[116] Publicly funded schools can either be established by the State or by private actors – including churches. Within this category of public (maintained) schools, "community schools" and "voluntary controlled schools" are run by local authorities, while "voluntary aided schools" are run by their own governing bodies, which are often religious. Independent schools, by contrast, have less ties to public authorities.

[117] MARK HILL ET AL., RELIGION AND LAW IN THE UNITED KINGDOM 181 (3rd ed. 2021).

paralleled by increased religious pluralism in education. While a great majority of religious schools remain associated with the Christian tradition, the first Muslim state primary school was approved in 1997 and since then, publicly financed Sikh, Seventh-Day Adventist, Greek Orthodox, and Hindu schools have opened.[118]

The strong embeddedness of religion in education, including publicly funded education, does not, however, cause antidiscrimination law to recede. Rather, antidiscrimination law's application to religious schools is affirmed.[119] Part 6 of the Equality Act 2010[120] (the backbone of antidiscrimination legislation in England) is dedicated to education. Multiple other pieces of legislation, such as the School Standards and Framework Act 1998,[121] echo the authority of antidiscrimination law in the field. These statutes nonetheless contain provisions that accommodate the specificity of religious schools. On specific topics, the Equality Act and the SSFA list and define certain conditions under which schools may be exempted from antidiscrimination rules, even though they fall under their scope. This model of balancing between the existence of religious schools, their legitimacy to affirm a religiously distinct character, and equality and antidiscrimination requirements is thus one where, contrary to the separation model, religious schools are not outside the purview of anti-discrimination law while being accommodated.

B. RELIGIOUS EXEMPTIONS TO ANTIDISCRIMINATION LAW FOR RELIGIOUS SCHOOLS

Under English law, religious schools can be exempted from antidiscrimination law requirements both in terms of employment practices and admissions policies. The former exemption fits squarely within wider mechanisms of derogation under employment discrimination law for all religious employers. While the latter is more specific to schools, it is not unique. It echoes comparable exemptions that can also be granted to associations and private clubs. Because they are applicable to employment practices or to admission policies, regimes of exemption are precisely defined and only kick in under specific sets of conditions, and since they are premised on the idea that religious schooling is a legitimate enterprise, they only apply to discrimination based on religion—all other protected characteristics remain protected.

1. RELIGIOUS SCHOOLS AS EMPLOYERS

English law generally acknowledges the possibility for religious employers to be exempted from some aspects of employment discrimination law, especially with respect to

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[118] JOEL S. FETZER & J. CHRISTOPHER SOPER, MUSLIMS AND THE STATE IN BRITAIN, FRANCE, AND GERMANY 46 (2021); Hunter-Henin, *supra* note 110, at 12 (indicating that as of January 2017 "48 Jewish, 27 Muslim, 11 Sikh and 5 Hindu schools" existed).

[119] Catherine Casserley, *Education*, *in* BLACKSTONE'S GUIDE TO THE EQUALITY ACT 2010, 124 (ANTHONY ROBINSON ET AL., 4th ed. 2021) ("The schools provisions apply, in England and Wales, to the following: a school maintained by a local authority, an independent educational institution . . . , a special school. . . .").

[120] Equality Act 2010, c.15 (UK) https://www.legislation.gov.uk/ukpga/2010/15/contents

[121] Schools Standards and Framework Act 1998, c.31 (UK) https://www.legislation.gov.uk/ukpga/1998/31/contents.

employment decisions taking religion into account. Given the design of the English educational system, many teachers employed by state-run faith schools are effectively employed by the State. Unlike private employers, the State is under an obligation of religious neutrality (notwithstanding the fact that England has an established church). This means that public employers may not have a religious *ethos* and may not be considered as religious employers. Exemptions from employment discrimination do, however, remain possible; rather than being grounded in the employer's identity (as it may not be religious), they take root in the admissibility of certain occupational requirements for certain posts. [122]

English law has classically acknowledged the legitimacy of religion as a determining occupational requirement for some positions in religious organizations, particularly in religious schools. The difficulty has been to ascertain where to draw the line for these positions. Whether public (maintained) or private (independent) religious schools tend to value a wide understanding of those posts for which religious criteria are occupational requirements. Lucy Vickers cites the Church of England's strategic document *The Way Ahead*,[123] which expresses a broad commitment to staffing Christian schools with Christian personnel, especially those in leadership roles and teachers.[124]

But in a case under Scottish law in 2007, the Employment Tribunal promoted a more restrictive interpretation of those posts that could fall under a genuine occupational requirement exemption. The tribunal ruled that the position of pastoral care teacher in a Catholic school was not one that allowed the school to trigger the genuine occupational requirement exception. It was not found essential to the post that the holder share the Catholic faith of her employer.[125] In English law, employment in faith schools is regulated by the School Standards and Framework Act 1998. The statute both affirms the norm of religious nondiscrimination and delineates the precise conditions under which religious schools can be exempted therefrom. Essentially, it allows religious schools in general "to impose requirements regarding religion and belief on teaching staff" and allows some of them – depending on the category of school – to "impose religious requirements and require certain standards of conduct from teaching staff and non-teaching staff."[126] The legal regime that ensues is complex since the scope and nature of the exemptions vary according to the category of schools considered. Some of them are expressed in qualitative terms, others in quantitative terms.

For instance, in "voluntary controlled schools," religion can affect employment decisions regarding reserved teachers and the head teacher. Failure to comply with the tenets of the school's religion can also be grounds for dismissal – potentially beyond the scope of occupational requirements. For instance, "a head teacher in voluntary controlled school could potentially be dismissed for living in a relationship outside of marriage, or marrying a

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[122] FRANK CRANMER, RELIGION AND BELIEF IN UNITED KINGDOM EMPLOYMENT LAW: AN INTRODUCTION TO THE CASE-LAW (2017).

[123] Lucy Vickers, *Religion and Belief Discrimination and the Employment of Teachers in Faith Schools*, 4 RELIGION & HUM. RTS. 137, 142 (2009) (the document was first released in 2001 and was updated for 2007-2011).

[124] *Id.* at 143.

[125] Glasgow City v. McNab (2007) EAT (Scot.) [under the Employment Equality (Religion and Belief) Regulations of 2003, religious discrimination by religious organizations could be excused when there was a genuine occupational requirement exception of religious nature – if it was determining].

[126] Vickers, *supra* note 123, at 149 (this particular wording applies to "voluntary aided schools").

divorcee, even though this may have no relation to his or her ability to teach."[127] But other categories of schools enjoy even wider exemptions. As far as *hiring* decisions, the School Standards and Framework Act 1998 provides that in voluntary aided schools, "preference may be given, in connection with the appointment, remuneration or promotion of teachers at the school, to persons (ii) who attend religious worship in accordance with those tenets, or (iii) who give, or are willing to give, religious education at the school in accordance with those tenets."[128] In independent schools, the *termination* of teachers' contracts can be based on any conduct on their part deemed incompatible with the school's ethos.[129] Variations can also be quantitative, as is the case when they refer to the number of positions that can be filled by taking religion into account. In voluntary-controlled or independent schools, only a fifth of all teachers ("reserved teachers") can be hired on the basis of their faith,[130] while there is no such cap in voluntary-aided schools – where the derogation also applies to other (non-teaching) staff.

2. ADMISSIONS POLICIES

The issue of admissions policies is central to English antidiscrimination law. As far as religious schools are concerned, a mechanism of derogation to the general rule according to which admissions policies cannot be discriminatory[131] allows religious schools to restrict admissions on grounds of religion or belief. Neither Section 29 of the Equality Act (relative to nondiscrimination in the provision of services such as, inter alia, education) nor Section 85(1) (relative to nondiscrimination in admissions policies) are applicable to religious schools.[132]

Instead, such derogations only apply under certain conditions. Admissions policies are only allowed to factor in religious criteria when the religious school in question is oversubscribed. In other words, a religious school may not deny admission to applicants of a different faith if the school still has spots available. The school can only do so when it must choose between applicants for a specific spot.[133] In that case only, schools have the legally admissible option to favor homogeneity and cohesiveness over equal treatment.[134] And again, the level of discretion varies according to the category of school. For instance, community schools may not discriminate on the basis of religion, whereas free schools and academies can only do so for a maximum share of 50% of the spots they offer; voluntary aided schools may have 100% faith-based oversubscription criteria in their admissions.[135]

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[127] *Id.* at 151.

[128] School Standards and Framework Act 1998, c. 5, § 60 (UK).

[129] *Id.* at art. 124A, § 3.

[130] *Id*. at art. 124A, § 4.

[131] Equality Act 2010, c. 15, § 85 (UK).

[132] *Id.* at, sch.3, ¶ 11; *Id.* at sch. 11, ¶ 5 (with exemptions being specifically outlined).

[133] School Admissions Code 2021, § 1(36) (Eng.) ("Schools designated by the Secretary of State as having a religious character (commonly known as faith schools) may use faith-based oversubscription criteria and allocate places by reference to faith where the school is oversubscribed."). https://www.gov.uk/government/publications/school-admissions-code--2.

[134] *Id.* at § 1 (further details the requirements weighing on schools in terms of defining and publicizing their admissions criteria).

[135] House of Commons*, supra* note 115*,* at 6.

Also of crucial importance in assessing the meaning of the derogation enjoyed by faith schools is the fact that it only covers decisions based on religion; schools cannot discriminate on other protected grounds. This is the basis for the controversy generated by the U.K. Supreme Court's famous case *Jewish Free School* in 2010.[136] The prestigious and largely oversubscribed London educational institution was found guilty of violating the Race Equality Act for denying admission to an applicant on the grounds that his mother (a former Catholic who had converted to Judaism under the auspices of a Masorti liberal tradition) was not Jewish in the sense of halakah –and that therefore he was not Jewish either. Religious discrimination in this case was not the issue: had the applicant been discriminated against only on religious grounds, no legal problem would have ensued. What created the difficulty was the double reliance of the school on religious and ethnic criteria in its admissions policy. The Supreme Court held that a matrilineal test (descendance from a Jewish mother as a condition to enter the school) was a test of ethnic origin.[137] Later cases confirmed this reading: absent any other criteria than that of religion, a Catholic school requiring a certificate of baptism was *not* construed as discriminatory.[138] A Jewish Orthodox high school's admission policy whose oversubscription criteria stated that the "observation of the laws of family purity" was one of the tests for the faith practice requirement was successfully challenged in front of the Office of the Schools Adjudicator as unreasonable, unfair and not objective.[139]

At times, however, it proves difficult to disentangle religion from other grounds in the decisions and practices of religious schools. Such is the case when schools practice forms of gender segregation they claim are grounded in religious beliefs. Such cases may troublingly resuscitate "separate but equal" modes of reasoning, with judges deferring to the choice of separation and limiting their review of substantive equality in terms of the education received by both groups. In a voluntary-aided school with a Muslim religious character, boys and girls from the age of nine were segregated. The policy was transparently announced and indeed publicized as part of the school's ethos. When a court was asked to decide whether this policy was compatible with the Equality Act (§ 149(1)(a)), it concluded that "the fact that the motive for this segregation is religious belief is irrelevant. Nor is it relevant that the school is clearly taking account of the wishes and preferences of the parents."[140] However, the judge also found that segregation in and of itself was not necessarily discriminatory,[141] and that harm

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[136] Christopher McCrudden, *Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered*, 9 INT'L J. CONST. L. 200 (2011); Haim Shapira, *Equality in Religious Schools: the JFS Case Reconsidered*, *in* INSTITUTIONALIZING RIGHTS AND RELIGION-COMPETING SUPREMACIES 165 (Leora Batnitzky & Hanoch Dagan eds., 2017); R v. Governing Body of JFS (2009) UKSC 15 & 1 (UK), https://www.supremecourt.uk/cases/uksc-2009-0105.html.

[137] R v. Governing Body of JFS [2009] UKSC 15 & 1. Conversely, English courts have determined that Sikhs were members of a racial or ethnic group. *See* Mandla v. Lee [1983] 2 WLR 620 (UK), .

[138] R v. Schools Adjudicator [2015] EWHC 1012 (Admin) (Eng.).

[139] 2015 Office of the Schools Adjudicator ADA2990 (the OSA is appointed by the Secretary for Education but works independently and "decide on objections and variations to admission arrangements, appeals from schools directed to admit pupils, significant changes to schools and ownership of school land").

[140] Interim Exec. Bd. of X Sch. v. Her Majesty's Chief Inspector of Educ., Child.'s Servs. and Skills, [2016] EWHC (Admin) 2813 [¶ 101] (Eng.).

[141] *Id.* at ¶ 127 ("[O]ne act/treatment of equivalent nature and character, and with equivalent consequences for both sexes - it cannot be said . . . that one sex is being treated less favourably than the other.").

would only ensue from evidence of inequalities in the education received. In other words, although normatively such a ruling creates a social situation analogous to the one that is designed by the regime of exemption expressed in Title IX of the U.S. Civil Rights Act, the mode of reasoning is quite different. Here, the legitimacy of religious motives for sex segregation practices is denied. The judge found the policy to be non-discriminatory based on her understanding of the concept of discrimination as one that tolerates separate but equal forms of treatment, rather than on a free exercise or religious autonomy rationale.[142] Other court decisions seem to have rested more firmly on the terrain of antidiscrimination. The Court of Appeal held that a Muslim school had engaged in direct discrimination by segregating their pupils according to gender-- "it is irrelevant … that in adhering to its strict policy of segregation of sexes the school is motivated by conscientious adherence to what it regards as the applicable tenets of Islam."[143] In her chapter on the application of the Equality Act to the field of Education, Catherine Casserley summarizes these rules by giving the following examples with respect to admissions policies:

- A Muslim school may give priority to Muslim pupils when choosing between applicants for admissions (although the Admissions Code will not allow it to refuse to accept pupils of another or no religion unless it is oversubscribed). However, it may not discriminate between pupils on other prohibited grounds, such as by refusing to admit a child of the school's own faith because she is black or lesbian.
- A Jewish school which provides spiritual instruction or pastoral care from a rabbi is not discriminating unlawfully by not making equivalent provision for pupils from other religious faiths.
- A Roman Catholic school which organizes visits for pupils to sites of particular interest to its own faith, such as a cathedral, is not discriminating unlawfully by not arranging trips to sites of significance to the faiths of other pupils.
- A faith school would be acting unlawfully if it sought to penalize or exclude a pupil because he or she had renounced the faith of the school or joined a different religion or denomination.[144]

The legal framework is thus relatively clear: antidiscrimination applies to religious schools, but they can, under certain conditions and circumstances, include religious criteria in their employment or admissions policies. This framework is, however, increasingly controversial. Numerous reports and initiatives testify to a growing set of concerns. In 2006, the Department of Education issued a Schools' Admission Code with a view towards discipline and monitoring practices and, since 2008, the inspectorate body (Office for Standards in Education, Children's Services and Skills – Ofsted) oversees its enforcement. During the debates over what became the Education and Inspections Act 2006, Lord Baker of Dorking had proposed that a 25% quota of non-faith pupils should be mandatory for new

[142] *Id.* at ¶¶ 113-74.

[143] Chief Inspector of Educ., Child.'s Servs. and Skills v. Interim Exec. Bd. of Al-Hijrah School [2017] EWCA (Civ)1426, ¶ 81 (Eng.).

[144] Casserley, *supra* note 119, at 133.

"faith schools"; the proposal did not go through and indeed garnered strong opposition of churches and religious organizations.[145] Partly as a reaction to a decade of active reliance of the government on faith organizations in the provision of education – as well as of public services more generally[146] – a coalition of organizations working to end the special treatment of religion in school admissions policies formed in 2008.[147] Parents and secular organizations complain about both the difficulty of accessing secular education in some areas and the inadmissibility of some practices of religious discrimination in religious schools.[148]

Concerns about religiously segregated schools are also increasing.[149] In 2015, the Commission on Religion and Belief in British Public Life recommended that "faith schools should take measures to reduce selection of pupils and staff on grounds of religion," as "it is not clear that segregation of young people into faith schools has promoted greater cohesion."[150] Conversely, some authors deplore these recent judicial and administrative developments as signifying an unwarranted intrusion of the secular into religious matters.[151] The debates are thus evolving, much like the broader context they reflect.[152]

As the detailed rules and cases have established, religious schools in England are not immune from antidiscrimination law. Neither does antidiscrimination law apply to them without taking into account the legitimacy of their desire to form religiously homogeneous communities by controlling who they hire and admit. By generally subjecting schools to antidiscrimination rules, English law reaffirms its commitment to the normative program that undergirds them. By allowing for some derogations that vary according to the circumstances (oversubscription)–the legal status (categories of schools) and exemptions motivated by religious considerations (as opposed to racial or gendered ones)–English antidiscrimination law acknowledges the legitimacy of religious schools' distinct character and accommodates it. In this model, the definition of the scope and conditions for religious schools' right to enjoy exemptions in the form of derogations to antidiscrimination norms is a task taken up by antidiscrimination legislation itself. In a third model of balancing between religious schools' right to exist and their right to form as homogenous communities, the language of

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[145] Petchey, *supra* note 105, at 183.

[146] Vickers, *supra* note 117.

[147] ACCORD COALITION, https://accordcoalition.org.uk (last visited. Oct. 8, 2023) (the coalition's name is Accord).

[148] *Diocese Frustrates Parents Seeking to Access Secondary Schools Outside of Faith*, ACCORD COALITION (Dec. 9, 2021), https://accordcoalition.org.uk/2021/12/09/diocese-frustrates-parents-seeking-to-access-secondary-schools-outside-of-the-faith/; *see also* Polly Curtis, *Big Rise in Parental Complaints About School Admissions*, THE GUARDIAN (Nov. 2, 2008, 19:01 EST) https://www.theguardian.com/education/2008/nov/03/schooladmissions-schools.

[149] *See* SHAMIM MIAH, MUSLIMS, SCHOOLING AND THE QUESTION OF SELF-SEGREGATION (2015).

[150] KERRY O'HALLORAN, RELIGIOUS DISCRIMINATION AND CULTURAL CONTEXT: A COMMON LAW PERSPECTIVE 215 (2018) (quoting COMMISSION ON RELIGION AND BELIEF IN BRITISH PUBLIC LIFE, LIVING WITH DIFFERENCE 33 (2015)).

[151] Hunter-Henin, *supra* note 110 at 8 (the case "betray[s] these philosophical roots" of Church autonomy and provokes "an unwarranted and inconsistent mingling of the secular and the religious"); *id.* at 15 ("[The Supreme Court's] intervention hits at the heart of the definition of religious membership itself and hereby largely contradicts the statutory exemption from religious discrimination which faith schools supposedly enjoy" and "in drawing sharp lines between 'religion' and 'ethnicity', the Court frames religion in Protestant terms.").

[152] *See generally* MYRIAM HUNTER-HENIN, WHY RELIGIOUS FREEDOM MATTERS FOR DEMOCRACY: COMPARATIVE REFLECTIONS FROM BRITAIN AND FRANCE FOR A DEMOCRATIC 'VIVRE ENSEMBLE' (2020).

exemption and exception is absent from antidiscrimination law and indeed, the accommodation of religious schools' distinct character proceeds, rather, from the reinterpretation of broader legal rules and principles.

IV. EXEMPTION AS PRETERITION: IMPLICIT ACCOMMODATION OF RELIGIOUS SCHOOLS THROUGHOUT THE ADAPTATION OF BROADER CONSTITUTIONAL PRINCIPLES

The key feature of this third model is that it operates as a preterition: the legal system does exactly what it purports *not* to be doing. While it claims that religious schools are subject to all generally applicable laws, including antidiscrimination law, and therefore denies them any special status in the form of exceptions or exemptions, it accommodates their (religious) specificity. This is often the case in jurisdictions where the logics of antidiscrimination law either remain unmastered or continue to be perceived as a threat to national identity or core legal values. Although there are other examples, this part focuses on France as a key illustration of this accommodation model.

In accordance with the dominant political and legal narrative that portrays French law and the French model of equality as alien to any notion of accommodation or exception to generally applicable laws, the regulation of private schools is not formulated as allowing exceptions. To the contrary, antidiscrimination law's application to private schools is explicitly affirmed: even though private schools are the only schools that are allowed to affirm a religious character in France (public schools fall under a strict regime of *laïcité*), they are barred from selecting their students on the grounds of their origins, opinions, or beliefs. Article 1 of the 1959 Act that defines private schools' legal regime affirms that "[a]ll children can access [private schools]without distinction of origin, opinion or belief."[153] Notwithstanding this clear and explicit subjection of religious schools to an antidiscrimination rule, numerous mechanisms and hermeneutical dynamics acknowledge and accommodate their specificity under French law. Surely, these mechanisms of accommodation operate very differently from the derogation model studied above. They do not result from the explicit definition of conditions and circumstances under which exceptions and exemptions can be awarded to religious schools. Unlike English law, French antidiscrimination law remains silent about exceptions and exemptions. Religious schools' distinct character is accommodated, except that this accommodation operates outside of antidiscrimination law by *other* legal rules and principles – including at the apex of the constitutional order. Remarkably, the constitutional rule of *laïcité* itself is adapted in order to allow for religion to be taught in private (religious) schools (even though over 80% of them are legally bound to the State and formally associated to the public service of *Education nationale*), for public funds to support private (religious) education, and for employment discrimination law to yield in the name of the legitimacy of their religious ethos.

A few words of justification are in order, as it might be considered paradoxical, if not provocative, to label the French example as one of accommodation. The French political and legal tradition prides itself on having crafted a model of secularism and equality that is opposed and superior to any concept of accommodation. French *laïcité* is indeed readily

[153] Loi n°59-1557 du 31 décembre 1959 sur les rapports entre l'Etat et les établissements d'enseignement privés [Act no 59-1557 of December 31, 1959 on the relationship between the State and private schools] (Fr.).

presented as a guarantee of equality premised on the valorization of what is common to all and, conversely, on the transcendence and ignorance of what distinguishes and divides. In other words, the French model is anything but accommodationist.

Such narratives of French law do, however, raise several questions. As narratives of *laïcité*, they hide the plurality of regimes that have long existed, from the colonial era to contemporary times.[154] As narratives of equality and universalism, they feed concepts that are partly mythical, and silence a host of positive law norms that have long accepted accommodation mechanisms – including in religious matters.[155] However, this Article contends that the study of the legal regime applicable to private schools justifies a label that should not appear as either paradoxical or provocative but merely expresses the plural rather than uniform dimensions of *laïcité*. This Part offers elements of background to explain the French legal regime applicable to religious schools. It underlines the incongruity this legal regime rests on, as it simultaneously affirms religious schools' right to affirm a distinct character and subjects them to a prohibition of denying admission of students on religious grounds. It then argues that this apparent tension or contradiction between competing logics is taken in charge, upstream from antidiscrimination law, by an *ad hoc* reinterpretation of the constitutional regime of *laïcité*.

A. THE LEGAL REGIME OF RELIGIOUS SCHOOLS

The long history of education in France is, for the most part, a story of the lasting domination of religious readings and Catholic education. From the *Ancien Régime* throughout the 19th century, Catholic schools played a crucial role in the provision of education. Although the Revolution had articulated the project of affirming a state monopoly in the field of education, it essentially fell short due to multiple other pressing challenges revolutionary regimes had to face. In the early years of the 19th century, the emperor Napoleon did create a version of such a monopoly by placing all educational facilities under the authority of l'*Université impériale*. But that structure was both relatively short-lived and effectively focused on secondary education. It left the church's stronghold on primary education largely untouched. Only from the 1830s onwards did the State become a significant actor in the field of education. And at any rate, until the so-called great secular laws voted at the end of the 19th century (*les grandes lois scolaires laïques*), religion remained taught and visible in both public (state) and private (Catholic) schools. Historians of education thus speak of a model of co-production of education by the Catholic church and

[154] *Laïcité* never applied to many colonial territories, largely because the State feared that a regime of separation would lead it to loosen its grip and control over local populations. This territorial absence of uniformity of the regime of *laïcité* endures to this day, as more than 3,5 million French citizens live in territories—overseas and in the mainland—where the 1905 Act on the separation of churches and the State does not apply. On colonial regimes of *laïcité, see generally* Raberh Achi, *Laïcité d'empire. Les débats sur l'application du régime de séparation à l'islam impérial*, *in* POLITIQUES DE LA LAÏCITÉ 237 (Patrick Weil ed., 2015); ELIZABETH A. FOSTER, RELIGION, POLITICS, AND COLONIAL RULE IN FRENCH SENEGAL, 1880-1940 (2013).

[155] *See* Elsa Fondimare & Stéphanie Hennette-Vauchez, *Incompatibility between the 'French Republican Model' and Anti-Discrimination Law? Deconstructing a Familiar Trope of Narratives of French Law*, ANTI-DISCRIMINATION LAW IN CIVIL LAW JURISDICTIONS 56 (Barbara Havelkova & Mathias Möschel eds., 2019) (on the deconstruction of these mythical narratives of French law).

the State, until the model that only weakened at the end of 19th century as the public schools' sector became stronger and eventually dominant.[156]

The public and the private sector also became increasingly estranged and differentiated after the government affirmed the *laïque* nature of public education with the Act of 28 March 1882.[157] Since then, public schools are secular in terms of curriculum, personnel, and norms of religious neutrality that prohibit the display of religious signs. As a consequence, religious schools are necessarily private. While in fact, private (and therefore, religious) schools' freedom of establishment remained an essentially unchallenged norm until the 19th century,[158] it was hardly juridified. It is only the emergence and growth of a strong public sector after the 1820s and 1830s that prompted private (mostly religious) schools, as they felt they were losing steam, to request – and obtain – legal protections. The freedom of establishment of private schools was thus affirmed as a legislative rule by a series of Acts voted between 1830 and 1875.[159] Since 1977, it has been elevated to constitutional dignity: the constitutional principle of *liberté de l'enseignement* protects both private schools' freedom of establishment and their choice to affirm a distinct character – including a religious one.[160] To this day, private schools operate within a legal framework that is defined by the principles laid out in the Debré Act of 1959.[161] Essentially, the 1959 Act presents private schools – 95% of which are religious and 95% of which are Catholic [162] – with the choice of either entering a contract with the State or remaining fully independent. Those who sign a contract (*contrat simple* or *contrat d'association*) are said to be associated with public service. Accordingly, they are under an obligation to respect the national curriculum in exchange for which they receive large amounts of public funding (depending to the type of contract, all salaries of the teaching staff plus a variable amount of operating costs are

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[156] *See generally,* HÉLÈNE ORIZET, LE SERVICE PUBLIC DE L'EDUCATION NATIONALE SOUS LA TROISIÈME RÉPUBLIQUE (2021).

[157] Loi sur l'enseignement primaire obligatoire du 28 Mars, 1882 [Law of March 28, 1882 on Compulsory Primary Education], MINISTÈRE DE L'ÉDUCATION NATIONALE ET DE LA JEUNESSE [MINISTRY OF NATIONAL EDUCATION AND YOUTH], Mar. 28, 1882 (Fr.) (one of the first major Acts pertaining to education and public schools under the authority of Jules Ferry, the 1882 Act affirms that only secular subjects can be taught in public schools - and vacates one day weekly for families to organize for religious instruction to be delivered to their children if they wish.); Loi sur l'organisation de l'enseignement primaire du 30 Octobre, 1886 [Law of October 30, 1886 on the Organization of Primary Education], MINISTÈRE DE L'ÉDUCATION NATIONALE ET DE LA JEUNESSE [MINISTRY OF NATIONAL EDUCATION AND YOUTH], Oct. 30, 1886 (Fr.) (forbidding religious ministers from teaching in public schools).

[158] *See* BERNARD TOULEMONDE, LE SYSTÈME ÉDUCATIF EN FRANCE 260 (3rd ed. 2009) (the Constitution of 1795 had elevated the freedom to establish private schools, but in 1806 Napoleon proclaimed a state monopoly. This freedom of establishment of private schools would not reemerge in a constitutional text before 1830.).

[159] Loi sur l'instruction primaire, Loi Guizot du 28 Juin 1833 [Law of June 28, 1833 on Primary Education, Guizot Law], MINISTÈRE DE L'ÉDUCATION NATIONALE ET DE LA JEUNESSE [MINISTRY OF NATIONAL EDUCATION AND YOUTH], Jun. 28, 1833 (Fr.); Loi relative à l'enseignement du 15 Mars 1850 [Law of March 15, 1850 relating to education], MINISTÈRE DE L'ÉDUCATION NATIONALE ET DE LA JEUNESSE [MINISTRY OF NATIONAL EDUCATION AND YOUTH], Mar. 15, 1850 (Fr.); Loi Dupanloup relative à la liberté de l'enseignement supérieur du 12 Juillet 1875 [Law of July 12, 1875 relating to freedom of higher education], July 12, 1875 (Fr.).

[160] Conseil Constitutionnel [CC] [Constitutional Court] decision No. 77-87 DC, Nov. 23, 1977, J.O. 5530, 23 (Fr.) (elevated this unenumerated principal to constitutional dignity).

[161] Loi n°59-1557 du 31 décembre 1959 sur les rapports entre l'Etat et les établissements d'enseignement privés [Act no. 59-1557 of December 31, 1959, on the relationship between the State and private schools] (Fr.).

[162] FRANCIS MESSNER, PIERRE-HENRI PRÉLOT & JEAN-MARIE WOEHRLING, TRAITÉ DE DROIT FRANÇAIS DES RELIGIONS 1827 (2d ed. 2013).

covered by public funds). Schools who choose to remain wholly independent (*hors contrat*) are ineligible for public funding and retain greater pedagogical autonomy.[163]

When it was first designed, the framework defined by the Debré Act was rather polemical. Large segments of *laïque* forces felt it represented too big of a compromise in favor of private schools – and indeed, of Catholic schools. As such, it was met with strong resistance. The *Comité national d'action laïque* organized a huge petition protesting the text, to no avail. In a remarkable turnaround that occurred within a mere couple of decades, defenders of private schools became the leading force of the opposition to the socialist government's project to absorb private schools into an aggrandized public service of *Education nationale.*[164] By 1984, the socialist threat (and fears of the disappearance of school choice[165]) had replaced the Catholic one (and fears of challenges to *laïcité*). Today, however, the framework offered by the Debré Act operates in a markedly different context. Firstly, the social reality of private education has shifted dramatically. Even if spiritual and religious choice remains a factor in families' decisions to enroll, others now compete or sometimes supplant it, such as social distinction, educational strategizing, or the search for a heightened ability to respond to specific needs of children.[166] Second, the landscape of religious schools has diversified. Catholic schools themselves are more diverse, as many of them have mitigated, if not lost, their religious character. This evolution has prompted the emergence of a new generation of Catholic schools in reaction to what they perceive as creeping secularization. [167] Other denominations have embraced the framework of the Debré Act. The number of Jewish schools has risen significantly since the 1980s and Muslim schools have appeared since the beginning of the 21st century.[168] While most Jewish schools are under a contract of association with the State,[169] only a handful of Muslim schools have managed to secure such contracts. They thus remain independent from the State, not so much because of

[163] They remain subjected to minimal standards in terms of academic achievement and the content of education as well as to safety and security regulations.

[164] JEAN BATTUT, CHRISTIAN JOIN-LAMBERT & EDMOND VANDERMEERSCH, 1984: LA GUERRE SCOLAIRE A BIEN EU LIEU (1995) (the socialist government of François Mitterrand had formulated the project to largely abolish the distinction between public schools and the then existing private schools by integrating the latter in an enlarged public service of Education nationale. The perceived threats on the ability of schools to continue to affirm a religious character triggered such resistance that the project was eventually abandoned).

[165] The rhetoric of school choice is less prevalent and much weaker in France than it is in the United States, for instance. Remarkably, however, it is increasingly being embraced, including by governmental figures. *See* Aude Bariéty & Caroline Beyer, *Mixité sociale à l'école: les declarations de Pap Ndiaye sur le privé font réagir*, LE FIGARO, Apr. 14, 2023 https://www.lefigaro.fr/actualite-france/mixite-sociale-a-l-ecole-les-declarations-de-pap-ndiaye-sur-le-prive-font-reagir-20230414 (the minister of Education nationale, Pap Ndiaye, recently referred to "school choice" as a value that ought to guide any reform of private schools' legal regime).

[166] François Héran, *École publique, école privée: qui peut choisir?,* 293 ÉCONOMIE ET STATISTIQUE 17 (1996).

[167] This new generation of Catholic schools privileges their independence to the extent that they overwhelmingly decline any kind of association with the State in order to preserve their full integrity. *See* Luc Cédelle, *Anne Coffinier: militante hors cadre de la liberté scolaire*, LE MONDE, Oct. 29, 2019 (an interview by one of the leaders of this renewed movement for private Catholic education).

[168] Approximately 100 schools would exist, enrolling approximately 10,000 students. Only six of these are currently under a contract of association with the State.

[169] Approximately 100 Jewish schools enroll approximately 30,000 students. Most of these schools have signed a contract with the State. *See* Katy Hazan, *Du heder aux écoles actuelles: l'éducation juive, reflet d'un destin collectif*, 35 ARCHIVES JUIVES 4 (2002); Martine Cohen, *Jewish Day Schools in France: Mapping their Jewish Identity Proposals*, in LAW, RELIGIOUS FREEDOM AND EDUCATION IN EUROPE 55 (2016).

their active preference but as a consequence of the rule requiring that all private schools exist for five years before they can apply for association with the State. In fact, the head of the federation of private Muslim schools has repeatedly claimed that many schools are eager to sign a contract with State authorities and denounced their reluctance.[170]

In principle, all private schools are subject to a rule of non-discrimination in their admissions policies. In this respect, the French example strongly contrasts with the American and English ones. The option of simultaneously acknowledging the legitimacy of private religious schools and denying them the possibility to select their students on religious grounds is rather original, if not incongruous. It is unclear whether this antidiscrimination provision is truly respected and enforced.[171]

Notwithstanding, as a matter of principle, norms of equality and antidiscrimination law do trump the affirmation of religious schools' distinct character. This peculiarity was an innovation of the 1959 Act, for until then, private schools were free to apply religious criteria in admissions, as illustrated by the works of historians who document the practice of Catholic schools requesting certificates of baptism.[172] The 1959 Act does not suppress all margin of choice for principals, but they are no longer allowed to take religious criteria into account. Initially, this antidiscrimination rule reflected the trade-off undergirding the 1959 Act. In exchange for significant public funding, private (religious) schools committed to welcoming all students regardless of opinion or belief. The trade-off would benefit all parties concerned. On the one hand, the financial windfall was all the more welcome by schools that post-World War II religious (essentially, Catholic) schools were often impoverished.[173] On the other hand, the consolidation and perpetuation of the private educational sector allowed the State to officially rely on it in order to meet its newly affirmed constitutional responsibility to provide for a rapidly growing youth population with the public good of education.[174]

It would be mistaken however to read this legal regime as one that merely enrolled private schools in public action without acknowledging their differences and specificities. In fact, they were never summoned to abide by generally applicable laws. Rather, these were largely bent to accommodate religious schools' distinct character, even though this regime of accommodation has remained largely invisible. This may have to do with the fact that it operates outside the realm of antidiscrimination law and appears to be in contradiction to dominant narratives of French law according to which the "Republican tradition" commands a universal understanding of the law as necessarily equal for all. It might also have to do with

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[170] *See* SÉNAT, RAPPORT N°595 SUR LES RÉPONSES APPORTÉES PAR LES AUTORITÉS PUBLIQUES AU DÉVELOPPEMENT DE LA RADICALISATION ISLAMISTE ET LES MOYENS DE LA COMBATTRE 247 (Mahmoud Makhleche, the president of the *Fédération nationale de l'enseignement privé musulman*, has frequently insisted that many Muslim schools have applied for a contract to no avail) (2020). *See* STÉPHANIE HENNETTE VAUCHEZ, L'ÉCOLE ET LA RÉPUBLIQUE; LA NOUVELLE LAÏCITÉ SCOLAIRE (2023) (another explanation on the low number of Muslim schools having signed a contract might then be that of a greater reluctance of State authorities with respect to demands for contracts formulated by Muslim schools).

[171] *See* BERNARD TOULEMONDE ED., LE SYSTÈME ÉDUCATIF EN FRANCE 260 (3d ed. 2009) (for testimonies to the contrary, especially with respect to Orthodox and ultra-Orthodox Jewish schools).

[172] Jacqueline Lalouette, *L'évolution de l'école catholique en France après la loi Debré et la déclaration Gravissimum educationis momentum*, *in* L'ÉTAT ET L'ENSEIGNEMENT PRIVÉ 87, 102 (Bruno Pouchet ed., 2011).

[173] Sara Teinturier, L'enseignement privé dans l'entre-deux-guerres. Socio-histoire d'une mobilisation catholique (2013) (Ph.D. dissertation, Université de Rennes 1).

[174] *See* 1946 CONST. Preamble, para. 13 (Fr.).

the essentially implicit fashion in which this regime of exemption operates. Nonetheless, there is a strong case to be made for the fact that religious schools' distinct character is both accepted as legitimate and accommodated within the French legal order; and that this is allowed by adaptations of the wider constitutional framework – and indeed, of the meaning of no less central a principle than that of *laïcité.*[175]

B. THE ACCOMMODATION OF *LAÏCITÉ* TO RELIGIOUS SCHOOLS' DISTINCT CHARACTER

Concretely, there are two main illustrations of the accommodation of the constitutional principle of *laïcité* to the specificities of religious schools. First, religious schools largely escape the rule of religious neutrality that otherwise governs public action – not only classical public action undertaken by public entities, but also the functioning and operation of those private actors who collaborate with the State in providing public services. Second, they benefit from significant adaptations in the field of employment law.

1. THE STRANGE REGIME OF *LAÏCITÉ* FOR PRIVATE SCHOOLS

One of the most striking features of the legal regime designed and defined by the 1959 Act is that private religious schools can affirm (that is, teach and express) their religious identity when over 80% of them are associated with the public service of *Education nationale* and thus benefit from significant public funding.[176] This state of affairs contrasts with the otherwise demanding – even militant – regime of *laïcité* that otherwise features the French constitutional system.[177] The issue of the visibility and public expression of religious beliefs has grown increasingly controversial in France over the past three decades. That an entire segment of the educational system be a space in which neither the association to the public service nor the massive public funding correlate with the application of the principle of religious neutrality is striking. Quantitatively, approximately 20% of all K-12 students[178] in France attend a private school; 95% of which affirm a religious character.[179] Qualitatively, French law's commitment to (and indeed promotion of) norms of religious neutrality is evermore imperious.

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[175] *See* Fondimare & Hennette Vauchez, *supra* note 155.

[176] République française, Budget Général [French Republic, General Budget] (2023), https://www.budget.gouv.fr/index.php/documentation/documents-budgetaires/exercice-2023/projet-de-loi-de-finances/budget-general/enseignement-scolaire.

[177] Ran Hirschl, *Comparative Constitutional Law and Religion*, *in* COMPARATIVE CONSTITUTIONAL LAW 422, 423 (Tom Ginsburg & Rosalind Dixon eds., 2011) (writes of "assertive, even militant, secularism" in the case of France).

[178] *Repères et Références Statistiques,* MINISTERE DE L'EDUCATION NATIONALE *2021*, https://www.education.gouv.fr/reperes-et-references-statistiques-2021-308228#:~:text=Repères%20et%20références%20statistiques%20(RERS,Recherche%20et%20de%20l%27Innovation (last visited June 10, 2023) [approximately 2,147,500 students were enrolled in private schools as of 2021, which represents 17.7% of the total schooled population (13.2% in primary education and 21.1% in secondary education)].

[179] Sébastien Colliat, sous-direction de l'enseignement privé du ministère de l'Éducation nationale). SÉNAT, RAPPORT D´INFORMATION N° 757 AU NOM DE LA MISSION D'INFORMATION (1) SUR L'ORGANISATION, LA PLACE ET LE FINANCEMENT DE L'ISLAM EN FRANCE ET DE SES LIEUX DE CULTE, 460 (2016) (FR.).

Such an exception to the rule of religious neutrality at the heart of the educational system testifies to the fact that *laïcité* is best described as a plural regime – contrary to many of its most common but simplistic descriptions. Private schools' legal regime operates as an invitation to reconsider the constitutional concept of *laïcité* as one that tolerates, rather than opposes, the expression of religious beliefs, including in schools officially associated to the public service. Given the constant debates about the expression of religious beliefs in France, there is no overstressing the importance of this element. Surely, these tense debates relate to anxieties pertaining to a perceived contradiction between the message conveyed by religions (and notably, by the Islamic veil) and that of republican values.[180] A powerful rhetoric pitting the former against the latter has affirmed a stronghold over both the public and the learned debate since the end of the 1980s. It has progressively translated into several significant legal evolutions and indeed, into a new definition of the principle of *laïcité* as essentially entailing requirements of religious neutrality. While such requirements were traditionally contained and limited to public authorities (buildings and personnel) for most of the 20th century, they have largely expanded since the beginning of the 21st century. A significant step in that respect has been the 2004 Act prohibiting public school students from wearing signs by which they ostensibly communicate their religious beliefs.[181] This was the law that read a requirement of religious discretion (if not neutrality) bearing on private individuals into the constitutional principle of *laïcité.*[182] Subsequently, numerous legal and political actors sought to extend this logic, requesting religious neutrality from private individuals in a growing number of situations—at school, in the public space, in the workplace. Rules restricting the expression of religious beliefs have multiplied.[183] A recent 2021 statute even expanded requirements of religious neutrality in the workplace to all employees of private organizations contracted out by public authorities for the performance of public functions. Baristas in trains serving public service lines, IT companies' in-house service to public administrations, or tellers in local counters of tax or social welfare administrations are now subjected to a rule of religious neutrality.[184]

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[180] *See* MAYANTHI FERNANDO, THE REPUBLIC UNSETTLED (2014); JOAN WALLACH SCOTT, THE POLITICS OF THE VEIL (2007); CÉCILE LABORDE, CRITICAL REPUBLICANISM: THE HIJAB CONTROVERSY AND POLITICAL PHILOSOPHY (2008); Stéphanie Hennette Vauchez, *Is French Laïcité Still Liberal? The Republican Project Under Pressure (2004-15),* 17 HUM. RTS. L. REV. 285 (2017).

[181] Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law no. 2004-228 of march 15, 2004 regulating in application of the principle of secularism, the wearing of signs or outfits demonstrating religious affiliation in public schools, colleges and high schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, No. 65.

[182] *See* Conseil d'État [CE] [highest administrative court], Nov. 2, 1992, No. 130394, Rec. Lebon (Fr.); Stéphanie Hennette Vauchez, *Arrêt Kherouaa*, in LES GRANDS ARRÊTS POLITIQUES DE LA JURISPRUDENCE ADMINISTRATIVE 460 (JACQUES CAILLOSSE ET AL. EDS., 2019) (Prior to the 2004 Act, requirements of religious neutrality only weighed on public authorities and therefore, on the State's embodiments: public buildings as well as civil servants and public agents. In fact, numerous rulings clearly established that public school students retained their freedom of religion, which encompassed the right to express one's religious beliefs at school, and that this did not contradict the constitutional principle of laïcité)).

[183] Hennette Vauchez, *supra* note 180.

[184] Stéphanie Hennette Vauchez, *L'État néolibéral face à lui-même: quand l'affirmation des valeurs républicains bute sur le recul du service public*, 10 ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF [ACTUAL. JURID. DR. ADMIN.] 570 (2022) (Fr.).

These dynamics strongly contrast with rules governing private religious schools. By definition, the private schools governed by the 1959 Act are allowed to express their core values and to affirm a distinct character; and to this day, their character is predominantly religious. Clearly then, these schools escape the rules limiting the expression of religious beliefs: the 2004 Act prohibiting the wearing of religious signs in public schools does not apply to private (religious) schools, where students retain the right to express their religious beliefs.[185] Teachers and staff, too, are exempted from otherwise generally applicable laws and principles: while, as a general rule, public and private employees of organizations associated with a public service are subject to a rule of religious neutrality in the workplace, religious schools' personnel remain free to express their religious beliefs in the workplace.

Remarkably, the significant exemptions enjoyed by religious schools go largely unnoticed, let alone commented on or analyzed. This is all the more striking that close to all of the existing private schools are religious and over 80% of them are associated with the State.[186] Despite its conceptual importance and ubiquity, this major accommodation of *laïcité* is never presented as such. Rather, it is mostly silenced. When it exceptionally surfaces, it is downplayed and normalized. Normalization is in fact a notion that accurately captures the dynamics that presided over the adoption of the 2021 Act comforting the principles of the Republic (also known as the Act against separatisms).[187] The Act contains provisions extending the requirements of religious neutrality that previously only applied to civil servants and public employees to private employees whose employers have been contracted out by the State (or a local public authority) for the performance of a public service. Remarkably, however, these provisions were immediately presented as inapplicable to private religious schools – even though the necessity or justification of this exception was neither discussed nor debated. It all happened as if it were a very normal, obvious thing to do. Earlier on in the legislative process, the Conseil d'Etat had already recommended it in its advisory opinion on the draft bill.[188] However, the Conseil had cautiously avoided the semantics of exceptions and exemptions, privileging instead a language of common sense and the register of the obvious. Its opinion acknowledged that the bill entailed a remarkable expansion of the scope of religious neutrality requirements in the workplace, but it laconically affirmed,

> the scope [of the principle of religious neutrality] does not however extend to all entities in charge of a mission of public service. [The Conseil d'Etat] takes note of the fact that the retained scope seeks not to upend existing restrictions to the

[185] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ. I, June 21, 2005, Bull. civ. I, No. 02-19.831 (Fr.) (private schools remain free to individually determine their own dress policy. Interestingly, some tend to develop religious neutrality policies, which of course is highly paradoxical in the case of religious schools – and testifies to the pervasiveness of the culture of religious neutrality); Tribunaux de grande instance [TGI] [ordinary courts of original jurisdiction] Tarbes, Dec. 23, 2014, 14/00278 (some schools even subject their students' parents to a requirement of neutrality. Again, albeit less convincingly, such rules have been upheld).

[186] MINISTERE DE L'EDUCATION NATIONALE, *Repères et Références Statistiques*, *supra* note 178 [80.8% of the 8.281 private schools (primary and secondary) have signed a contract with the State].

[187] Loi 2021-1109 du 24 août 2021 confortant le respect des principes de la République [Law No. 2021-1109 of Aug. 24, 2021 [reinforcing respect for the principles of the Republic]], 197 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], (Aug. 25, 2021).

[188] CE Ass., Avis, Dec. 3, 2020, No. 401549 (Fr.).

> application of the principle of *laïcité* in public services that are affirmed either by legislation, such as the provisions of the Code of Education pertaining to private schools or of the Code of Public Health pertaining to private hospitals, or by caselaw.[189]

This reasoning remained unchallenged throughout the parliamentary debates and was thus normalized, only referred to in passing, without further justification. The Act itself did not even make the exception explicit. After members of Parliament referred the question to the legal services of the ministry of Interior,[190] the reassurance they obtained that this was the obviously correct interpretation of the new religious neutrality requirements comforted their determination that there was no need to clarify it. Regardless of the resulting fragility of the exemption, the making of this new rule of religious neutrality and its implicit regime of exemption for private (religious) schools (and hospitals) shows how these institutions came to escape the principles of *laïcité* and neutrality even when the core objective of the legislation was ostensibly to extend these principles.

Moreover, *laïcité* is generally understood to entail a rule prohibiting the public funding of religions. Although the rule is not absolute, tolerating exceptions where motives of general interest (including environmental policy or the promotion of tourism) justify public investment in the maintenance or repair of buildings or infrastructures operated by religious communities,[191] it is striking that private, mostly religious schools, are massively funded by the State under French law. This is another way in which the constitutional regime of *laïcité* accommodates the specificity of religious schools. Exceptions to the rule prohibiting the public financing of religion are usually punctual and relatively narrow in scope and nature.

By contrast, the kind of exception built-in to the 1959 Debré Act is structural and massive. Because of the importance of both the sums at stake and their nature, the public financing of private schools by the 1959 Act expresses an entirely different logic – one than reads as an adaptation rather than as an exception. Public funding is necessary to the very existence of most private schools. Far from merely supplementing their budget to enrich the curriculum or fund extracurricular activities, it often represents an essential condition. Many schools are indeed completely dependent on public funds. Were these to be reduced or

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[189] *Id.* at 14 (translated into English for this publication).

[190] SENAT, *Rapport n°454 sur le projet de loi confortant les principes de la République par Mmes Jacqueline Eustache Brinio et Dominique Vérien* (18 mars 2021) at 34-35 (quoting a legal memo, "[D]élimitation du champ de l'article 1er : Lorsqu'une catégorie d'organisme privé, même désignée par la loi, est soumise à une habilitation de l'autorité publique, il est exclu du champ d'application du I de l'article 1er. La loi ou le règlement en pareil cas n'a pas manifesté la volonté que soit confié systématiquement à tout organisme remplissant le même objet l'exécution d'une mission de service public. (…) C'est également le cas des établissements d'enseignement privé sous contrat qui sont également écartés de ce dispositif, en ce qu'ils ne ressortissent pas d'une catégorie homogène qui est automatiquement associée au service public, et on ne peut déduire de la loi ou du règlement que le législateur a souhaité associer tout établissement au service public de l'éducation. C'est l'acte par lequel le préfet passe un contrat qui désigne l'établissement comme étant « associé » au service public de l'éducation nationale. En outre, ces établissements ne sauraient être soumis à une obligation de respecter le principe de laïcité en application du principe de la liberté de l'enseignement, principe fondamental reconnu par les lois de la République, et de la protection du caractère propre qui s'attache aux établissements d'enseignement privés et qui est expressément prévue par le code de l'éducation (L. 442-1 du code de l'éducation)").

[191] Laurie Marguet, *Liberté religieuse et séparation: les ambivalences du financement du culte*, REVUE FRANÇAISE DE DROIT ADMINISTRATIF [REV. FR. DR. ADMIN.] 1041 (2021).

suppressed, most of them would have to shut their doors. The vital nature of these monies is obvious from the sums at stake. In 2023, the national budget of the State set aside close to 8.5 billion euros to the public financing of private schools. This represents close to 14% of the total budget of *Education nationale* – one of the country's largest budgets.[192] And this does not include other public sources of financing that may come from local governments. In other words, public funds represent a much greater share in private schools' budget than tuition paid by families. In Catholic schools, for instance, it represents 42% of all resources,[193] and public financing of religious schools is not only possible and important, but mandated by constitutional law. The Conseil constitutionnel has indeed ruled that financial aid to private schools represented "an essential condition" of the principle of *liberté de l'enseignement*.[194] Many authors read this as meaning that it is constitutionally mandated.[195] This reasoning is worth underscoring for it represents a rare endorsement in French constitutional scholarship of the Marxist distinction between "real" and "formal" liberties.[196] These authors insist that because Article 1 of the 1959 Act is written in the present tense ("l'Etat garantit l'exercice de la liberté de l'enseignement"), a positive obligation ensues. However, constitutional scholars hardly transpose this mode of reasoning to other topics. For instance, a similar interpretation of Article 1 of the 1905 Act on the separation of churches and the State ("La République garantit le libre exercice du culte"), that should yield an obligation to fund the building of places of worship, is yet to be adopted. These discrepancies expose the normalization and invisibilization processes that cover up the accommodation of *laïcité* which is taking place at the heart of the legal regime of private schools.

2. RELIGIOUS SCHOOLS AS EMPLOYERS

French law generally prides itself on its strong commitment to the principle of universality, requiring that the law be the same for all. Consequently, the concepts of exemption from generally applicable laws or accommodation of certain specificities are largely construed as alien to the French constitutional tradition. Although this idea long remained essentially a trope of constitutional scholarship, it was reinvigorated by an intervention by the Conseil constitutionnel in 2004. In a ruling in which it held that some aspects of the – subsequently defeated – Treaty establishing a Constitution for Europe necessitated a prior constitutional amendment, the Conseil chose to specify that no one can legally invoke their religious preferences in order to be exempted from general rules.[197] Since

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[192] *See generally* Budget Général, *supra* note 176.

[193] *Les chiffres clés de l'enseignement catholique 2018-2019*, 38 ENSEIGNEMENT CATHOLIQUE ACTUALITÉS 13 (2019) (Fr.).

[194] Conseil Constitutionnel [CC] [Constitutional Court] decision No. 77-87 DC, Nov. 23, 1977, § 2 ("la sauvegarde du caractère propre d'un établissement lié à l'Etat par contrat (. . .) n'est que la mise en oeuvre du principe de la liberté de l'enseignement").

[195] *See* LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL 338-339 (Louis Favoreu, André Philip eds., 14th edn, 2007); Jacques Robert, *La loi Debré sur les rapports entre l'Etat et les établissements privés*, REVUE DU DROIT PUBLIC 213 (1962); Louis Favoreu, *Les collectivités publiques et l'école*, REV. FR. DR. ADMIN. 597 (1985).

[196] BERNARD BOURGEOIS, *Marx et les droits de l'Homme*, *in* PHILOSOPHIE ET DROITS DE L'HOMME, 99 (1990).

[197] Conseil Constitutionnel [CC] [Constitutional Court], decision No. 2004-505 DC, § 18 Nov. 19, 2004: (". . .les dispositions de l'article 1er de la Constitution aux termes desquelles 'la France est une République laïque', qui

this affirmation was by no means necessary to the resolution of the constitutional questions the Conseil was faced with, it is read as an *obiter dictum*. It has nonetheless proved quite successful, as it is regularly invoked and relied upon by legal actors. Recently, for instance, the Conseil d'Etat referred to this idea as it struck down a municipal order to the effect that modest swimming attire called burkinis would be allowed in local pools.[198]

These (and other) factors explain why French law does not include a general prescription exempting religious organizations from, here, employment discrimination laws. As mentioned earlier, such exemptions are found in U.S. and English law, among other jurisdictions. They are absent in French law, despite EU law. Art. 4 § 2 of the 2000 Directive establishing a general framework for equal treatment in employment and occupation allows Member States to exempt religious organizations from certain aspects of employment discrimination laws, if they can establish genuine, legitimate and justified occupational requirements having regard to the organization's ethos. This provision, however, rests on a standstill clause: only in States that already had either national legislation or documented national practices to the effect of such exemptions in force at the date of its adoption does it kick in.[199] Yet, this was not the case in France.[200] Surely, French law does include a concept of genuine and determining occupational requirements for all employers, and nothing prevents religious employers from invoking it.[201] French law also includes several piecemeal, *ad hoc* rules that have effectively organized the internal life of dominant (i.e. Catholic) religious organizations' immunity from generally applicable employment laws.[202]

However, once again, private (religious) schools are an exception with regard to employment discrimination laws. In fact, it is precisely because of private schools that a regime of exemption made its way into an otherwise hostile legal tradition, first judicially and then, legislatively. Judicial developments include rulings by the supreme judicial court (Cour de cassation), the constitutional court (Conseil constitutionnel) as well as the supreme administrative court (Conseil d'Etat). In 1978, the Cour de cassation upheld the firing of a teacher by a Catholic school on the grounds that, due to her divorce, she was no longer loyal

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interdisent à quiconque de se prévaloir de ses croyances religieuses pour s'affranchir des règles communes régissant les relations entre collectivités publiques et particuliers. . .".)

[198] Conseil d'État [CE] [highest administrative court], June 21, 2022, No. 464648, réf., § 18.

[199] COUNCIL DIRECTIVE 2000/78/EC OF 27 NOVEMBER 2000 establishing a general framework for equal treatment in employment and occupation, art. 4, § 2, 2000 O.J. (L303)16: ("Member States may *maintain national legislation in force at the date of adoption of this Directive* or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos" (emphasis added)).

[200] Anne Marie Rougeot Delyfer, *Entreprise de tendance* (DICTIONNAIRE DES RECHERCHES EN DROIT SOCIAL IRERP ed., 2022), https://drds-irerp.fr/entreprise-de-tendance/ (last visited May 12, 2023).

[201] CODE DU TRAVAIL [C. TRAV.] [Labor Code] Art. L. 1133-1 (Fr.) ("Art. L. 1132-1 does not prevent differences in treatment when they meet an essential and determining professional requirement and provided that the objective is legitimate and the requirement proportionate.").

[202] *See* Loi No. 50-222 du Feb. 19, 1950 précisant le statut des ministres du culte catholique au regard de la législation sociale, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 22, 1950, No. 46, Art. 1 ("L'exercice du ministère du culte catholique n'est pas considéré comme une activité professionnelle au regard de la législation sociale en tant qu'il se limite à une activité exclusivement religieuse").

to the school's religious ethos.[203] Absent any kind of legislative framework for this kind of exemption,[204] this reasoning was very much judge-made and specifically tailored to the alleged needs and specificities of religious schools. In 1977, the Conseil constitutionnel upheld a statute that affirmed an obligation weighing on private schools' teachers to "respect" the "distinctive character" of the school that employed them.[205] With respect to the fact that private schools' "distinctive character" is religious in 95% of the cases in France, this again was a strong exemption from generally applicable employment law. Finally, in 1991, the Conseil d'Etat upheld the internal rule of a private religious school that subjected *all personnel* to an obligation of loyalty to the school's ethos.[206] The logic of exemptions was thus not only confirmed, but it was also extended from teachers to all staff. As explained by the *commissaire de gouvernement*, "it is not immediately obvious why the doorperson or the janitors may be concerned with the school's distinctive character. However, they all interact with the pupils and their parents and therefore they all contribute in their own ways to shape the identity of the establishment.[207]

These judge-made exemptions to otherwise generally applicable employment discrimination laws[208] were enshrined into legislation upon the passing of the important 2021 Act reinforcing the principles of the Republic. In its inaugural provisions, the 2021 Act largely expands the obligations of religious neutrality (as well as political or philosophical neutrality) that traditionally weigh on civil servants and public agents under French law. Similar obligations now also apply to private employees whenever their employer has been contracted out to fulfill a public service.[209] During the parliamentary debates that led to the adoption of the Act, it occurred to MPs that private religious schools, the vast majority of which have signed a "contrat d'association" with the State, would fall under the new provisions. Subjecting the staff of private schools, 95% of which affirm a religious character, to an obligation of religious neutrality appeared contradictory. It was thus decided that, despite the importance attached to this newly expanded scope of religious neutrality requirements by the government and other promoters of the bill, religious schools (as well

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[203] Cour de Cassation [Cass.] [Supreme Court for Judicial Matters], Assemblée plénière [ass. plén], May 19, 1978, Bull. Civ. No. 76-41.211, *Dame Roy c. Ass. Pour l'éducation populaire Sainte Y.*

[204] Surely, employment discrimination law was a very limited branch of statutory law at the time.

[205] Conseil constitutionnel [CC] [Constitutional Court] decision No. 77-87DC, Nov. 23, 1977, J.O. 5530 (Fr.)["Considérant qu'il résulte du rapprochement des dispositions de l'article 4, alinéa 2, de la loi du 31 décembre 1959, dans la rédaction nouvelle qui leur est donnée par la loi soumise à l'examen du Conseil constitutionnel, et de celles de l'article 1er de la loi du 31 décembre 1959 que *l'obligation imposée aux maîtres de respecter le caractère propre de l'établissement, si elle leur fait un devoir de réserve, ne saurait être interprétée comme permettant une atteinte à leur liberté de conscience*" (emphasis added)].

[206] CE, July. 20, 1990, 85429, Rec. Lebon 223(Fr.).

[207] Marcel Pochard, *Reglement interieur et obligation de respecter le caractere propre des etablissements d'enseignement prive* [Internal regulations and obligation to respect the proper character of private educational institutions], Droit Social, 862-66 n.12 (1990) (opinion regarding the imposition on the staff of private schools of engagement in their own characteristics, according to CE, Jul. 20, 1990, 85429, Rec. Lebon 223. This was translated by the author.).

[208] Religion has been a protected ground for a long time in French law. *See* Law 72-546 of July 1, 1972 (Fr.) (for a criminal code provision that has prohibited discrimination since 1972); *See also* Law 82-689 of August 4, 1982, L.122-45 (Fr.), (wherein the provision was migrated to the labor code to further implement the principle of non-discrimination); Law 83-634 of July 13, 1983 (Fr.), (for statutory protections regulating the rights and obligations of civil servants).

[209] Hennette Vauchez, *supra* note 180.

as religious hospitals) would be exempted. Again, this is an important development, as it not only represents one of the rather rare explicit exemptions in French law, but also, similar to the judicial developments that created exemptions from employment discrimination law in the first place, it is one that is precisely tailored to the specificity of religious schools.

V. CONCLUSION

The first conclusion that can be drawn from this Article lies in the field of antidiscrimination theory. It suggests that the classic notion that religious organizations (here, schools) benefit from a regime of exemption from some aspects of antidiscrimination law in virtue of their religious character needs to be refined and qualified. The case studies presented and the fine-grained analysis they allow reveal that the concept of exemption might be too broad to serve any rigorous analytical purposes. Indeed, it captures legal regimes that are so different that its descriptive relevance is weakened. As the Article demonstrates, if religious schools in the United States, England and France can make some employment or admissions decisions based on religious criteria, it is for very different, and indeed opposing, reasons. U.S. religious schools enjoy such leeway because they are more or less out of reach of antidiscrimination law. Conversely, English religious schools must in principle comply with antidiscrimination law; but they can be exempted from its prescriptions under specific conditions. As for France, although religious schools are legally barred from discriminating in their admissions policies, they have much more leeway with respect to their employment decisions. Overall, the legal regime that applies to them in terms of affirming a distinctly religious character rests on a logic of accommodation that sets aside many otherwise generally applicable laws and principles.

In all three countries studied in this Article, the issue of religious schools' legal regime is dynamic. In the United States, private schools are on the frontlines of the moves and project of parting with the paradigm of the separation of churches and the state, and of forging an interpretation of State neutrality that not only commands equal treatment of the secular and the religious, but also requires special treatment for religion.[210] In England, the status quo is challenged by various dynamics. Some relate to the expressed need for a greater share of secular schools, and others to the fears that religiously segregated schools are threatening social and political integration. In France, the legislative framework that applies to religious schools is under growing pressure because of the tensions caused by increased religious diversity. As the law and politics of *laïcité* make it difficult for this framework to be discussed in terms of secularism and religion, the framework is increasingly being discussed in terms of private schools' duties of social integration and greater inclusiveness of children and families from poorer backgrounds, in exchange for the massive public funding they benefit from. As these three case studies eloquently show,

[210] LINDA GREENHOUSE, JUSTICE ON THE BRINK 96-99 (2021) [analyzing recent Supreme Court decisions (especially those pertaining to assembly restrictions during the Covid-19 pandemic) as requiring that religious practices (such as worship attendance) receive special treatment rather than equal treatment (compared to secular activities)].

schools, and in particular private schools, are a very relevant site of observation and analysis for greater constitutional issues of state neutrality and regimes of secularism.