C.J. I.L.

ARTICLES

Volume 41 Spring Issue 1

THE EDITORIAL BOARD MEMBERS

OF

THE CONNECTICUT JOURNAL OF INTERNATIONAL LAW

WISH TO THANK

EBONI NELSON
DEAN OF THE UNIVERSITY OF CONNECTICUT
SCHOOL OF LAW

AND

THE UNIVERSITY OF CONNECTICUT
LAW SCHOOL STUDENT BAR ASSOCIATION

AND

THE UNIVERSITY OF CONNECTICUT
LAW SCHOOL FOUNDATION, INC.

The Connecticut Journal of International Law *is published at least twice a year by the student members of the* Journal *at the University of Connecticut School of Law. Office of publication: 65 Elizabeth Street, Hartford, CT 06105. Please address all inquiries to the Administrative Editor at the publication office. Telephone (860) 570-5297. Facsimile (860) 570- 5299. Electronic mail address: cjil@uconn.edu*

Subscriptions: *Subscriptions are $35.00 annually. Absent timely notice of termination, subscriptions are automatically renewed upon expiration. Copies of all issues are available from the publication office. Electronic copies can also be found at HeinOnline (http://heinonline.org) or EBSCO Publishing (http://www.ebscohost.com). Requests for copyright permissions should be directed to Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923, (978) 750-8400.*

Production: *The* Journal *is printed by Sheridan Select, 450 Fame Ave., Hanover, PA 17331. The* Journal *invites the submission of articles and book reviews. Citations should conform to the most recent edition of* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, *published by* The Harvard Law Review Association.

Postmaster: *Send address changes to* Connecticut Journal of International Law, *65 Elizabeth Street, Hartford, CT 06105-2290.*

Web Address: *The* Journal's *home page is located at http://www.cjil.org.*

Vol. 41, No. 1 of 2. Cite as CONN. J. INT'L L.

UNIVERSITY OF CONNECTICUT
SCHOOL OF LAW

FACULTY AND OFFICERS OF ADMINISTRATION
FOR THE ACADEMIC YEAR 2024-2025

Officers of Administration

Radenka Maric, M.S., B.S., Ph.D., *President, University of Connecticut*
Anne D'Alleva, B.A., M.A., Ph.D., *Interim Provost and Executive Vice President for Academic Affairs*
Eboni S. Nelson, B.A., J.D., *Dean, School of Law*
Molly K. Land, B.A., J.D., *Associate Dean for Academic Affairs, Catherine Roraback Professor of Law*
Jessica Rubin, B.A., J.D., *Associate Dean for Experiential Education, Clinical Professor of Law*
Anne C. Dailey, B.A., J.D., *Associate Dean for Faculty Development and Intellectual Life, Ellen Ash Peters Professor of Law*
Christina Mohr, B.S.B.A., J.D., *Assistant Dean for Finance and Administration*

Faculty Emeriti

Robin Barnes, B.A., J.D., *Professor of Law Emerita*
Loftus E. Becker, Jr., A.B., LL.B., *Professor of Law Emeritus*
John C. Brittain, B.A., J.D., *Professor of Law Emeritus*
Deborah A. Calloway, B.A., J.D., *Professor of Law Emerita*
Clifford Davis, S.B., LL.B., *Professor of Law Emeritus*
Timothy H. Everett, B.A., M.A., *Clinical Professor of Law Emeritus*
Todd D. Fernow, B.A., *Professor of Law Emeritus and Former Director, Criminal Law Clinic*
Timothy Fisher, B.A., J.D., *Dean and Professor of Law Emeritus*
Richard S. Kay, A.B., M.A., J.D., *Wallace Stevens Professor of Law Emeritus and Oliver Ellsworth Research Professor of Law*
Peter R. Kochenburger, A.B., J.D., *Associate Clinical Professor of Law Emeritus*
Lewis S. Kurlantzick, B.A., LL.B., *Zephaniah Swift Professor of Law Emeritus and Oliver Ellsworth Research Professor of Law*
James Kwak, A.B., Ph.D., J.D., *Jesse Root Professor of Law Emeritus*
Jennifer Brown Mailly, A.B., J.D., *Clinical Professor of Law Emerita and Oliver Ellsworth Research Professor*
Patricia A. McCoy, B.A., J.D., *Professor of Law Emerita*
R. Kent Newmyer, Ph.D., *Professor of Law and History Emeritus*
Nell J. Newton, B.A., J.D., *Dean and Professor of Law Emerita*
Jeremy R. Paul, A.B., J.D., *Dean and Professor of Law Emeritus*
Eileen Silverstein, A.D., J.D., *Professor of Law Emerita*
James H. Stark, A.B., J.D., *Roger Sherman Professor of Law Emeritus and Oliver Ellsworth Research Professor*
Kurt A. Strasser, B.A., J.D., LL.M., J.S.D., *Phillip Blumberg Professor of Law Emeritus*
Colin C. Tait, B.A., LL.B., *Professor of Law Emeritus*
Carol Ann Weisbrod, J.D., *Professor of Law Emerita*
Nicholas Wolfson, A.B., J.D., *Professor of Law Emeritus*
Stephen G. Utz, B.A., J.D., *Roger Sherman Professor of Law Emeritus*

Faculty of Law

Jill C. Anderson, B.A., University of Washington; J.D., Columbia University; *Professor of Law*
Ashley B. Armstrong, B.A., Cornell University; J.D., LL.M., Georgetown University Law Center; *Assistant Clinical Professor of Law*
Jon Bauer, B.A., Cornell University; J.D., Yale University; *Clinical Professor of Law and Richard D. Tulisano '69 Human Rights Scholar*

Joseph A. MacDougald, A.B., Brown University; M.B.A., New York University; J.D., University of Connecticut; M.E.M., Yale University; *Professor-in-Residence; Executive Director, Center for Energy and Environmental Law*

Willajeanne F. McLean, B.A., Wellesley College; B.S., University of Massachusetts; J.D., Fordham University; LL.M., Free University of Brussels; *Distinguished Professor of Law*

Thomas H. Morawetz, A.B., Harvard College; J.D., M.Phil., Ph.D., Yale University; *Tapping Reeve Professor of Law and Ethics*

Minor Myers, B.A., Connecticut College; J.D., Yale University; *Professor of Law*

Eboni S. Nelson, B.A., Wake Forest University; J.D., Harvard Law School; *Dean and Professor of Law*

Paschaline Nsiah-Asare, LL.B., University of Science and Technology; LL.M., S.J.D., University of Connecticut School of Law; *Energy and Environmental Law Teaching Fellow*

Ángel R. Oquendo, A.B., M.A., Ph.D., Harvard University; J.D., Yale University; *George J. and Helen M. England Professor of Law*

Sachin S. Pandya, B.A., University of California, Berkeley; M.A., Columbia University; J.D., Yale University; *Professor of Law*

Travis Pantin, B.A., University of Chicago; J.D., Yale Law School; *Director of the Insurance Law Center and Associate Professor of Law*

Lisa Perkins, B.S., J.D., Michigan State University; LL.M., Georgetown University Law Center; *Clinical Professor of Law and Director, Tax Clinic*

Richard D. Pomp, B.S., University of Michigan; J.D., Harvard University; *Alva P. Loiselle Professor of Law and Board of Trustees Distinguished Professor*

Rachel Reeves, B.S., University of Southern Maine; J.D., University of Maine School of Law; *Director of Field Placement and Pro Bono Programs and Assistant Clinical Professor of Law*

Erin Romano, B.A., University of Bryn Mawr College; J.D., Seton Hall University School of Law; *Criminal Defense Clinic Teaching Fellow*

Jessica S. Rubin, B.S., J.D., Cornell University; *Associate Dean for Experiential Education, Clinical Professor of Law*

Susan R. Schmeiser, A.B., Princeton University; J.D., Yale University; Ph.D., Brown University; *Professor of Law*

Peter Siegelman, B.A., Swarthmore College; M.S.L., Ph.D., Yale University; *Phillip I. Blumberg Professor of Law*

Julia Simon-Kerr, B.A., Wesleyan University; J.D., Yale Law School; *Evangeline Starr Professor of Law*

M. Kat Smith, M.S., Florida State University; J.D., University of Minnesota Law School; *Assistant Clinical Professor of Law*

Rachel Timm, B.A., University of Nebraska; J.D., Creighton School of Law; *Assistant Clinical Professor of Law*

Anna VanCleave, M.A., University of Michigan; J.D., NYU School of Law; *Director of the Criminal Defense Clinic and Associate Professor of Law*

Alexander West, B.A., Clark University; J.D. Seattle University School of Law; *Visiting Assistant Clinical Professor of Law and Associate Director of the Housing and Eviction Defense Clinic*

Steven Wilf, B.S., Arizona State University; Ph.D., J.D., Yale University; *Anthony J. Smits Professor of Global Commerce*

Richard A. Wilson, BSc., Ph.D., London School of Economics and Political Science; *Gladstein Chair of Human Rights and Board of Trustees Distinguished Professor of Law and Anthropology*

Carleen Zubrzycki, B.A., Yale University; J.D., Yale School of Law; *Associate Professor of Law*

Adjunct Faculty of Law

Mauricio Agudelo, *Adjunct Professor of Law*

Peter G. Austin, *Adjunct Professor of Law*

Bethany L. Barrese, B.S., University of Connecticut; J.D., University of Connecticut; *Adjunct Professor of Law*

Anne D. Barry, B.S., University of Connecticut; M.S., Union College; J.D., University of Connecticut; *Adjunct Professor of Law*

James W. Bergenn, B.A., Catholic University; J.D., Columbia University; *Adjunct Professor of Law*

Susana Bidstrup, L.L.B., Universitat Pompeu Fabra, L.L.M., Fordham University, *Adjunct Professor of Law*

Christine Bromberg, *Adjunct Professor of Law*

John G. Buchanan III, A.B., Princeton University, Honours B.A., University of Oxford, J.D. Harvard Law School, *Adjunct Professor of Law*

Audrey R. Chapman, A.B., Wellesley College, M.A., Columbia University, Ph.D., Columbia University, *Adjunct Professor of Law*

Louanne Cooley, *Adjunct Professor of Law*

Andy I. Corea, B.A., College of William and Mary, J.D., George Mason University School of Law, *Adjunct Professor of Law*

Marina F. Cunningham, B.S., Columbia University, M.S., Massachusetts Institute of Technology, J.D. University of Connecticut School of Law, *Adjunct Professor of Law*

Michael Darby, B.A., University of Hartford, J.D. Duke University School of Law, *Adjunct Professor of Law*

Deborah Dorfman, *Adjunct Professor of Law*

Gerald P. Dwyer Jr., A.B., Colgate University, J.D., Gonzaga University School of Law, L.L.M., Georgetown University Law Center, *Adjunct Professor of Law*

Michael J. Eisele, B.S., U.S. Merchant Marine Academy, J.D., Georgetown University Law Center, *Adjunct Professor of Law*

Natalie Elicker, B.A., University of Virginia, J.D., University of Virginia School of Law, *Adjunct Professor of Law*

Philip England, B.A., J.D., University of North Carolina at Chapel Hill; L.L.M., New York University Graduate School of Law; *Adjunct Professor of Law*

Steven M. Fast, B.A., Dartmouth College, J.D., Columbia University, *Adjunct Professor of Law*

Scott Fischer, B.A., Dickinson College; J.D., New York University School of Law; *Adjunct Professor of Law*

Laura Foggan, *Adjunct Professor of Law*

Michael Gailor, B.A., Cornell University, J.D., University of Connecticut School of Law, *Adjunct Professor of Law*

Adam Gendelman, *Adjunct Professor of Law*

Donald Gershman, B.A., Tufts University, J.D., Boston College Law School, *Adjunct Professor of Law*

William D. Goddard, B.A., M.B.A., Dartmouth College, J.D., University of Connecticut; *Adjunct Professor of Law*

Daniel E. Goren, B.A., Dartmouth College, M.S., Columbia University Graduate School of Journalism, *Adjunct Professor of Law*

James Greenfield, A.B., Brown University, J.D., Columbia Law School, M.B.A., Columbia Business School, *Adjunct Professor of Law*

Andrew S. Groher, B.A., University of Virginia; J.D., University of Connecticut; *Adjunct Professor of Law*

John Harris, B.S.E., Princeton University; J.D., University of Wisconsin School of Law; *Adjunct Professor of Law*

Wesley Horton, B.A., Harvard University; J.D., University of Connecticut; *Adjunct Professor of Law*

John J. Houlihan, Jr., B.A., Providence College; J.D., St. John's University; *Adjunct Professor of Law*

Jared B. Howenstine, B.S., University of Massachusetts Amherst, J.D., South Texas College of Law Houston, *Adjunct Professor of Law*

An-Ping Hsieh, *Adjunct Professor of Law*

Daniel Klau, B.A., University of California; J.D., Boston University; *Adjunct Professor of Law*

Charles Klippel, B.A., Harvard University, M.A., Harvard University Graduate School of Education, M.A., Harvard T.H. Chan School of Public Health, J.D. Harvard Law School, *Adjunct Professor of Law*

Robert M. Langer, A.B., Franklin & Marshall College, J.D., University of Connecticut School of Law, *Adjunct Professor of Law*

Melissa Lauretti, *Adjunct Professor of Law*

Brendon P. Levesque, B.S., Saint Michael's College, J.D., Quinnipiac School of Law, *Adjunct Professor of Law*
Erik Lohr, J.D., University of Connecticut School of Law, *Adjunct Professor of Law*
Kathleen Lombardi, B.A., University of Massachusetts Lowell, J.D., New England School of Law, *Adjunct Professor of Law*
Robert L. Marconi, B.A., Yale University, M.A., Georgetown University, J.D., University of Connecticut School of Law, L.L.M., University of Connecticut School of Law, *Adjunct Professor of Law*
Thomas S. Marrion, A.B., College of the Holy Cross; J.D., University of Connecticut; *Adjunct Professor of Law*
Amber L. Martin Stone, B.A., Rutgers University, J.D., University of Connecticut School of Law, *Adjunct Professor of Law*
Kirt Mayland, B.A., Dartmouth College, M.A., Tecnológico Monterrey, J.D., University of Connecticut School of Law, L.L.M., Vermont Law School, *Adjunct Professor of Law*
Marcos A. Mendoza, B.A., Baker University, J.D., Washburn University School of Law, L.L.M., University of Connecticut School of Law, *Adjunct Professor of Law*
Mary M. Miller, B.A., Swarthmore College, J.D., William & Mary Law School, *Adjunct Professor of Law*
Steven A. Mirmina, B.A., Brandeis University, J.D., University of Connecticut School of Law, L.L.M., Leiden University Faculty of Law, L.L.M., Georgetown University Law Center, *Adjunct Professor of Law*
Umar Moghul, B.A., M.A., University of Pennsylvania, J.D., Temple University, *Adjunct Professor of Law*
Thomas B. Mooney, B.A., Yale University; J.D., Harvard University; *Adjunct Professor of Law*
Paul Narducci, A.B., College of the Holy Cross, J.D., Suffolk University Law School, *Adjunct Professor of Law*
John Neumon, *Adjunct Professor of Law*
Cornelius O'Leary, B.A., Williams College; M.A., Trinity College; J.D., University of Connecticut; *Adjunct Professor of Law and Mark A. Weinstein Clinical Teaching Fellow* Vincent Pace, B.A., Fairfield University, J.D., L.L.M., S.J.D., University of Connecticut School of Law, *Adjunct Professor of Law*
Vincent Pace, B.A., Fairfield University; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*
Adele Patterson, B.A., Brown University, J.D., University of Connecticut School of Law, *Adjunct Professor of Law*
Humbert J. Polito, Jr., A.B., College of the Holy Cross; J.D., University of Connecticut; *Adjunct Professor of Law*
Leah M. Reimer, B.S. Baylor University; J.D., University of Connecticut; Ph.D., Stanford University; *Adjunct Professor of Law*
Roger Reynolds, B.A., Malcalester College, J.D., New York University School of Law, *Adjunct Professor of Law*
Barbara Rezner, B.A., Gettysburg College, J.D., Washington and Lee University, *Adjunct Professor of Law*
Christopher J. Rooney, B.A., University of Virginia, J.D., University of Connecticut School of Law, *Adjunct Professor of Law*
Patrick J. Salve, B.S., J.D., University of Pennsylvania; *Adjunct Professor of Law* Carl Schiessl, B.A., Trinity College-Hartford, J.D., University of Connecticut School of Law, *Adjunct Professor of Law*
Carl Schiessel, *Adjunct Professor of Law*
Maxine Segarnick Keefe, *Adjunct Professor of Law*
Angelo P. Sevarino, B.A., M.A., University of Connecticut, J.D., Western New England School of Law, *Adjunct Professor of Law*
Hon. Michael R. Sheldon, A.B., Princeton University; J.D., Yale University; *Adjunct Professor of Law*
Sandra Sherlock-White, *Adjunct Professor of Law*

David F. Sherwood, B.A., University of Pennsylvania, Ph.D., Yale University, J.D. University of Connecticut School of Law, *Adjunct Professor of Law*

Jay E. Sicklick, B.A., Colgate University; J.D., Boston College; *Adjunct Professor of Law* Douglas Simpson, A.B., Dartmouth College, J.D., University of Connecticut School of Law, *Adjunct Professor of Law*

Douglas Simpson, A.B., Dartmouth College; J.D., University of Connecticut School of Law; *Adjunct Professor of Law*

David T. Smith, B.A., M.S., Fairfield University, J.D., Quinnipiac University School of Law, *Adjunct Professor of Law*

Joshua Stein, B.A., Yale University, J.D., University of Connecticut School of Law, *Adjunct Professor of Law*

Daniel J. Steinbock, J.D., Yale University, *Adjunct Professor of Law*

Martha Stone, B.A., Wheaton College, J.D., L.L.M., Georgetown University Law Center, *Adjunct Professor of Law*

Tahlia Townsend, J.D., Yale Law School, *Adjunct Professor of Law*

Walter C. Welsh, B.S., Tufts Engineering; J.D., University of Connecticut; LL.M., New York University; *Adjunct Professor of Law*

Robert W. Werner, B.A., Amherst College, M.A., Columbia University, J.D., New York University School of Law, *Adjunct Professor of Law*

Wesley W. Whitmyer, Jr., B.A., Ohio Wesleyan University, J.D. Ohio State University, *Adjunct Professor of Law*

David J. Wilfert, B.A., J.D., University of Virginia, *Adjunct Professor of Law* Robert Yass, B.A., Binghamton Young, J.D., New York Law School, L.L.M. University of Connecticut School of Law, *Adjunct Professor of Law*

Charles Wilson, *Adjunct Professor of Law*

Robert Yass, B.A., Binghamton University; J.D., New York Law School; L.L.M., University of Connecticut School of Law; *Adjunct Professor of Law*

Peter T. Zarella, B.S., Northeastern University, J.D., Dr. iur. h.c., Suffolk Law School, *Adjunct Professor of Law*

ABOUT THE

CONNECTICUT JOURNAL OF INTERNATIONAL LAW

Founded in 1985, the *Connecticut Journal of International Law* publishes articles covering a range of topics in international and comparative law, including analysis of the extraterritorial effects of domestic law and policy. Past publications have examined, amongst other things, developments and issues in intellectual property, corporate, human rights, trade, national defense, and environmental law. The *Journal* publishes 2-3 issues per year.

The subscription fee of $35.00 may be paid by check or billed directly to your Visa or MasterCard account. Visit cjil.law.uconn.edu/subscriptions/ for more information. Back issues of the *Journal* may be ordered by contacting William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209, (716) 882-2600, www.wshein.com.

Please take this opportunity to support a leading journal in the field of international law.

Connecticut Journal of International Law
65 Elizabeth Street
Hartford, Connecticut 06105-2290
CJIL@law.uconn.edu

Name ______________________________
Address ______________________________
____
____
Telephone ______________________________
Email ______________________________

□ Yes, I'd like a subscription.
□ Check enclosed
□ Please bill me.
□ Credit Card:
MasterCard or Visa
Name on Card ______________________________
Account Number ______________________________
Expiration Date ______________________________
□ No, but I would like to support the Journal with a gift of ______________

UNIVERSITY OF CONNECTICUT

1881

UNIMAGINABLE CRIMES, UNDERWHELMING SENTENCES: THE INTERNATIONAL CRIMINAL COURT'S STRUGGLE TO MATCH PUNISHMENT WITH THE SEVERITY OF THE CRIME

*Nicole Macdonald**

ABSTRACT

The International Criminal Court is the culmination of years of international criminal law and has served the global community by prosecuting the worst of crimes—genocide, crimes against humanity, war crimes, and crimes of aggression. The ICC Guidelines, however, do not adequately detail its sentencing policy nor describe the purpose behind the determination of the court's sentencing decisions. Subsequently, the ICC often fails to assert what policy guides them in making sentencing decisions, such as retribution, deterrence, or rehabilitation. This often leads to a disconnect between the harshness of the crime and the sentence imposed. The ICC has jurisdiction over the worst crimes known to humanity, and yet it states that long sentences should rarely be assigned to perpetrators. Although it is unclear if the ICC values deterrence over retribution, its unusually light sentences suggest that it values deterrence when it should instead focus on retribution. In analyzing the ICC's sentencing decisions, this Comment asserts that the ICC can only be understood within the context of the other previous international courts that came before it. This Comment will address the background of Nuremberg's International Military tribunal, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda. After assessing each of these courts and their sentencing guidelines, this Comment will address the current state of international criminal law at the ICC and the reasoning behind each of the court's sentencing guidelines, assessing how those reasons may affect sentencing length and harshness. This Comment then will analyze different cases assessed by the various tribunals and the sentences reached, followed by the sentencing policies' impact on the ICC's judgments. As the sentencing policy of retribution has slowly been replaced by deterrence, this has led to lighter and lighter sentencing as the years have progressed. This Comment asserts the importance of the ICC and its influence in international criminal law, while stating that it must work to more actively follow the sentencing policy of retribution. The ICC must clearly delineate the purposes behind its sentencing decisions to ensure that the punishment fits the crime of perpetrators who have committed the worst crimes known to humanity.

THE
CONNECTICUT JOURNAL
OF
INTERNATIONAL LAW

TABLE OF CONTENTS

THE
CONNECTICUT JOURNAL
OF
INTERNATIONAL LAW

I. Introduction

The International Criminal Court (ICC) was created to address the worst possible crimes humanity could face—genocide, crimes of aggression, war crimes, and crimes against humanity.[1] This Court is the culmination of many years of international criminal law, and would not exist in its current form if it were not for the International Military Tribunal at Nuremberg (IMT), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR).[2] These tribunals were assembled to address heinous crimes committed by individuals.[3] The IMT handed out sentences to the Nazi leaders who were responsible for the Holocaust, slave labor, the expulsion of people from their homes, and for the invasion into the sovereign territory of other states.[4] Decades after the IMT, the ICTY prosecuted crimes in war-torn Yugoslavia, where in the town of Srebrenica alone over 7,000 Bosnian Muslim civilians were executed by the Bosnian Serb army.[5] Within a year of the ICTY's creation, the ICTR was established after the Rwandan genocide, where 800,000 Tutsi individuals were killed after "the coexistence of different social groups evolved into political problems with overwhelmingly racial dimensions."[6]

Such atrocious crimes called for condemnation, with this condemnation taking the form of sentencing. The ICTY stated that "[o]ne of the fundamental elements in any rational and fair system of criminal justice is consistency of punishment," and the ICC strives to accomplish this through its sentencing guidelines.[7] Notably, however, the ICC hands out sentences that are much lighter than those of any of the previous international

---

[1] INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 23 (2020), https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf.

[2] *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 5–13 (1st ed. 2001) ("The International Law Commission draft envisaged a court with 'primacy,' much like the *ad hoc* tribunals that had been set up by the Security Council for the former Yugoslavia and Rwanda.").

[3] *Id.*

[4] *See* Ben S. Austin, *The Nuremberg Trials: Brief Overview of Defendants & Verdicts*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/brief-overview-of-defendants-and-verdicts-at-nuremberg-trials?utm_content=cmp-true (last visited Sept. 30, 2024) (listing the defendants at Nuremberg, including Martin Bormann, who was responsible for "the expulsion of millions of Jews to Poland," and "the utilization of Ukrainian women as slave labor.").

[5] MILENA STERIO, *The Yugoslavia and Rwanda Tribunals: A Legacy of Human Rights Protection and Contribution to International Criminal Justice*, *in* THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW 15 (Milena Sterio & Michael P. Scharf eds., 2019) ("The ICTY was the first international criminal tribunal to enter a genocide conviction in Europe.").

[6] George S. Yacoubian, *Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law*, 165 WORLD AFFS. 133, 133–34 (2003) (describing the history of the conflict in Rwanda).

[7] Barbora Hola et al., *Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice*, 22 LEIDEN J. INT'L. L. 79, 80 (March 2009) (quoting Prosecutor v. Delalić, Mucić, Delić and Landžo, Judgement, Case No. IT-96-21-A, App. Ch., 20 February 2001, ¶ 756).

tribunals.[8] Looking back at the commonality of the death penalty in Nuremberg[9] and the life sentences given by the ICTR and the ICTY,[10] the current ICC has sentenced defendants only within the average range of nine to eighteen years.[11] Thus, even though the IMT, the ICTY, and the ICTR paved the way for the creation of the ICC, the courts have diverged in the harshness of punishments.[12] While this may be because the ICC Rules and Statue do not require the ICC to follow precedent (similar to provisions in the statutes of the ICTY or the ICTR), and have very minimal sentencing guidelines,[13] each court also has emphasized different policy reasons behind their judgment protocols.[14] While the ICTY, ICTR, and ICC all held that deterrence and retribution were the most important aspects to consider for sentencing, the differing harshness of punishments across the institutions shows that these policy reasons may have had more of an influence in the length of the sentence.[15] The stated sentencing policies varied from case to case as referenced in each judgment, and analyzing these further may help clarify why the sentencing for these courts has diminished in harshness over time and which policies each court favors.[16]

The ICC can only be understood within the context of the other previous international courts that came before it. In Part I, this Comment will address the background of each of the courts, how they were constituted, and their sentencing guidelines. Part II will address the current state of international criminal law at the ICC and the reasoning behind each of the court's sentencing guidelines, assessing how those reasons may affect sentencing length and harshness. Then this Comment will analyze different cases assessed by the tribunals and the sentences reached in Part III, followed by Part IV which will address the sentencing policies' impact on the ICC's judgments. This Comment will conclude by asserting that the change in sentencing is affected by each tribunal's policy, which has led to lighter and lighter sentencing as the years have progressed.

II. Background

---

[8] *See* ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 471 (4th ed. 2019) (describing how the ICTY and ICTR gave out some life sentences, while the ICC has ranged from only nine to eighteen years as of 2019).

[9] *See* Austin, *supra* note 4 (noting that many of the defendants were sentenced to death).

[10] CRYER, *supra* note 8, at 471.

[11] *Id.*

[12] *See* SCHABAS*, supra* note 2, at 13 ("In 1994, the United Nations General Assembly decided to pursue work towards the establishment of an international criminal court.").

[13] Adrian Hole, *The Sentencing Provisions of the International Criminal Court*, 1 INT'L J. PUNISHMENT SENT'G 37, 54 (2005).

[14] *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (1st ed. 2003) (describing the different ideals held by the ICTY and the ICC).

[15] *See* CRYER, *supra* note 8, at 468 ("The ICTY, ICTR and ICC emphasize retribution and general deterrence as primary purposes of punishment. These two goals were deemed to be of equal importance."); CASSESE*, supra* note 14, at 428 (noting that the ICTY considered also reprobation).

[16] *See* CRYER, *supra* note 8, at 469 ("Overall, the inventories of sentencing objectives varied by case. The impact on sentence calculations, and their relationship with the broader aims of international criminal justice, are difficult to discern from the sentencing jurisprudence.").

A. The Nuremberg Trial: Constitution and Sentencing Guidelines

The International Military Tribunal at Nuremberg was the first modern attempt at creating an international criminal tribunal.[17] Lord Justice Lawrence described the IMT as "unique in the history of the jurisprudence of the world."[18] At this trial, judges from the United States, Britain, France, and the Soviet Union handed out sentences to leaders of the Nazi party after the second World War's conclusion.[19] The United Nations condemned the Nazi party's practice of executing captives without giving them a trial and had thus agreed to give the Nazi leaders a fair trial.[20] Furthermore, as the Nazi leaders were responsible for actions that had affected more than one nation, the Allies decided that the criminals would face an international criminal tribunal rather than a trial by an individual nation.[21]

The sentencing guidelines that directed the IMT were few and relatively undeveloped as there was very little precedent upon which the court could rely.[22] However, "many of its pronouncements form[ed] part of the modern canon of international law" and acted as a tangible compilation of the then-current international agreements.[23] The Nuremberg Charter was created at the same time as the United Nations, and thus each organization influenced the other.[24] The IMT was the first to declare that individuals—and not just the state itself—were themselves responsible for crimes that they committed on a state's behalf,[25] meaning the IMT acknowledged that German citizens as a collective were not responsible for the crimes carried out by individuals.[26] This did not free the nation's citizens from "collective guilt," but simply ensured that those who actively committed the

---

[17] Elizabeth Borgwardt, *A New Deal for the Nuremberg Trial: The Limits of Law in Generating Human Rights Norms*, 26 L. AND HIST. REV. 679, 689 (2008).

[18] PHILIPPE SANDS, EAST WEST STREET: ON THE ORIGINS OF "GENOCIDE" AND "CRIMES AGAINST HUMANITY" 271 (2016). Lord Justice Lawrence was one of the two British judges comprising the tribunal.

[19] *See* Quincy Wright, *The Nuremberg Trial*, 246 ANNALS AM. ACAD. POL. AND SOC. SCI. 72, 72 (1946) (describing the common law nature of the trial that follows a "litigious rather than inquisitorial" model and the lack of jury).

[20] *See id.* at 74 (giving the Nazi leaders a fair trial showed an attempt at fairness that the Nazi party had refused to show to their enemies).

[21] *See id.* (explaining that Germany was incapable of prosecuting the Nazi leaders as "there was no German government except the Allied Control Council composed of the four powers that actually constituted the Tribunal."). The United Nations wanted to avoid the inefficiencies of when Germany had tried its citizens in the Leipzig trials. *See* Borgwardt, *supra*, note 17, at 688.

[22] Uwe Ewald, *Predictably Irrational—International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices*, 10 INT'L CRIM. L. REV. 365, 372–73 (2010) (describing how the Nuremberg Trial was the first of its kind and added important aspects to international criminal law).

[23] Leila Nadya Sadat, *Judgment at Nuremberg: Foreword to the Symposium*, 6 WASH. U. GLOB. STUD. L. REV. 491, 578 (2007).

[24] *See id.* at 580 ("We see this in Article 2(4) of the UN Charter prohibiting the use of force against the territorial integrity and political independence of Member States, and in the limited exceptions to that prohibition enshrined in Article 51 (on self-defense) and the powers of the Security Council under Chapter VII.").

[25] *See* Sadat, *supra* note 23, at 496 (describing "the notion that those who had committed, planned, or ordered the atrocities perpetrated during the war (as well as the war itself), should be held personally responsible.").

[26] *See id.* ("Certainly, a focus on individual, as opposed to collective punishment, avoids blaming the innocent for the deeds of the guilty and better aligns moral and legal culpability for the commission of atrocities during a war.").

crimes would answer for their actions.[27] International law scholars have noted several patterns among the sentencing guidelines, including the fact that the tribunal did not decrease sentences for individuals who held lower ranking positions, giving similar punishments across ranks.[28] However, while the IMT did prevent high-ranking officers from putting forth the defense of following superior orders, it allowed this defense for lower-ranking officers when the soldier could prove that the superior order was facially lawful.[29] Using this method of individual responsibility on behalf of state actions, the IMT wanted to create an example that no individuals could escape responsibility for their actions, despite their positions of power.[30] This new development of international law was just one of the many contributions that the IMT added to international criminal law.[31]

a. The IMT's Development of the Jurisprudence of Crimes Against Humanity, Genocide, and War Crimes

The IMT added many new principles to the international criminal law sphere. The "crime against humanity" concept was first established by the IMT and has served important international criminal law purposes since that time.[32] At the time of the trial, there was no concept of a crime against humanity, and thus some scholars critiqued this as "criminal law *ex post facto,*" meaning it violated the principle that a crime cannot be punished if there was no law in place defining that crime when it was first committed.[33] However, the Nuremberg Charter tried "to blur the issue of criminal law being applied retrospectively" by requiring crimes against humanity to have a nexus with war crimes (an already existing concept).[34] Furthermore, the United Nations General Assembly confirmed this crime's codification soon after Nuremberg, allowing crimes against humanity to be prosecuted at the IMT and any time after it.[35] In this way, the court's goal was to

---

[27] *Id.* ("[I]t may leave an impunity gap, whereby only the leaders are punished, and many of those who carried out heinous acts are never called to account. . . . [W]hen a State deliberately leads, helps, trains, arms, clothes, pays, and inspires those who commit genocide, even if the passive citizenry does not share collective guilt, they do share responsibility, in the civil sense, for the wrongs done.").

[28] *See* Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 93 (1999) (contrasting this aspect of the Nuremberg Tribunal with that of the ICTY).

[29] *Id.* at 93 ("Even though the Nuremberg Charter precluded this defense for high-ranking officials, subsequent Nuremberg proceedings against lower ranking officials permitted it where the defendant showed that the order was not, on its face, unlawful. In that spirit, the 1998 statute of the international criminal court was drafted so as to allow such a defense.").

[30] *See* Leila Nadya Sadat, *The Nuremberg Trial, Seventy Years Later*, 15 WASH. U. GLOB. STUD. L. REV. 575, 581 (2016) (describing how "reliance upon internal law is no defense to crime for which an individual may have responsibility under international law.").

[31] *Id.* ("Thus at the international level, the Nuremberg principles became an essential part of the new world order.").

[32] Borgwardt, *supra* note 17, at 688 (noting that the Nuremberg Trial leaders "saw the gist of their legal enterprise as codifying the Kellogg-Briand Pact of 1928, banning aggressive war.").

[33] Timothy McCormack, *Sixty Years from Nuremberg: What Progress from International Criminal Justice?*, 5 N.Z. ARMED FORCES L. REV. 1, 6 n.8, 7–8 (2005) (describing this violation by "applying the Charter to past events.").

[34] *Id.* at 7.

[35] G.A. Res. 95(1), *Affirmation of Principles of International Law recognized by the Charter of the Nuremberg Tribunal,* U.N. GAOR, 1st Sess., 55th plen. mtg., U.N. Doc. G/RES/95(1) (Dec. 11, 1946); *see also*

eventually create "a code of international criminal law."[36] After codifying what constituted crimes against humanity and war crimes, the Nuremberg Tribunal did not address or define crimes of aggression, which the ICC now prosecutes.[37] However, unlike the international tribunals that followed this trial, the Nuremberg Charter did not give the individuals the ability to challenge the court's jurisdiction.[38]

The court further honed international criminal law concepts by holding that the crime of genocide derives from crimes against humanity, but has an element of "persecution" attached to it.[39] The term "genocide" was first used in court at the IMT, but did not exist on its own until after Nuremberg.[40] The IMT also established that war crimes "are crimes of universal jurisdiction under customary international law," a concept which has remained until this day.[41] The tribunal adopted the war crime definition from the Hague Regulations of 1907 and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, holding both of these documents as showing the general practice of states.[42] This codification of laws was connected to the many goals of the tribunal.

b. Guiding Policies for IMT Sentencing

The goal of the international tribunal was fivefold: (1) to sentence the criminals "according to the law and the evidence before the Tribunal," (2) to show that the four nations were capable of such a joint operation, (3) to "give the world a historical record" of the crimes that occurred during the Nazi Regime, (4) to give a fair trial, (5) and to create international law.[43] The public proof of the crimes committed by those on trial importantly prevented any "denial of the crimes" committed by the Nazi party leaders and prevented any "myth of martyrdom" that would arise had the leaders been executed without a trial.[44] The distillation of international criminal law serves as the IMT's longest-running impact, with the Nuremberg Charter acting as "the constitution of the Tribunal."[45] Before the IMT,

---

McCormack, *supra* note 33, at 9 ("The international legal status of the so-called 'Nuremberg Principles' was endorsed by the UN General Assembly soon after judgment was delivered by the Trial.").

[36] Borgwardt, *supra* note 17, at 691 (describing the viewpoint of the American judge, Francis Biddle).

[37] *See* Sadat, *supra* note 25, at 497 (describing how crimes against humanity and war crimes "were codified after the Nuremberg judgment in the four Geneva Conventions of 1949 (war crimes) and the genocide, apartheid, and torture conventions with respect to particular crimes against humanity.").

[38] *See* James O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. OF INT'L L. 639, 643 (1993) (describing how the Nuremberg Charter differs from that of the ICTY).

[39] Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. AND CONTEMP. PROBS. 67, 86 (2001) (describing how the General Assembly later codified this in the Genocide Convention.).

[40] *See* SANDS, *supra* note 18, at 271 ("[P]rosecutor Pierre Mounier became the first person to use [the term 'genocide'] in a court of law.").

[41] *Id.* at 91 (describing the long-lasting effects of the Nuremberg trial).

[42] *See id.* at 91–92 (analyzing how these conventions gave the tribunal jurisdiction over war crimes).

[43] Wright, *supra* note 19, at 74–76 (describing how the United States had ensured that its armies did not destroy any documentation found and thus helped ensure that there would be a historical record).

[44] Sadat, *supra* note 30, at 578 ("[T]he thirst for vengeance, which had been amply demonstrated in the French purge of thousands of former collaborators, could, if applied to the Germans, lead to doubt about [the occurrence of the crimes].").

[45] Wright, *supra* note 19, at 76 (describing aspects of the Charter).

the only crimes that were punishable under international criminal law were war crimes.[46] Thus, the IMT developed "new classes of international criminality," with this field expanding to this day.[47]

These goals, which contributed to the IMT's formation, also affected the sentences given to the defendants. At the time of the IMT, the death penalty was widely in use and most defendants received capital punishment.[48] This may be because precedent prior to the IMT "recognized the death penalty as a maximum sentence in the case of war crimes."[49] Furthermore, the prosecutor opened the trial by emphasizing the tribunal's purpose: "devastating wrongs" must be condemned, as "[c]ivilization would not tolerate their being ignored, and they must not be repeated."[50] This framed the entire trial and thus the high number of capital punishments handed out must be viewed through this lens.

B. The International Criminal Tribunal for the former Yugoslavia: Constitution and Sentencing Guidelines

The IMT not only contributed substantive law to the international criminal law sphere but served as a model for future courts as well. Creating an international tribunal after Nuremberg was largely unsuccessful due to the threats of the Cold War, which made it politically impossible.[51] However, once the Cold War era ended and the atrocities of the events in the former Yugoslavia and Rwanda unfolded, the ICTY and ICTR came into existence out of necessity and based on the IMT's precedent.[52] The IMT's legacy can thus be seen through the creation of these tribunals.

The ICTY was established by the United Nations Security Council (UNSC) in 1993 to punish the perpetrators of crimes committed in the former Yugoslavia during and after 1991.[53] The ICTY further contributed to the realm of international criminal law and was established due to the belief that the judicial systems of the involved countries would fail to prosecute criminals in a fair manner.[54] The UNSC noticed that the ethnic cleansing and human rights violations in Yugoslavia could potentially "motivate future conflicts," and thus felt it necessary to intervene.[55] The Council initially elected not to hold persons

---

[46] *See* CASSESE, *supra* note 14, at 16 ("It is only since the Second World War that new categories of crimes have developed, while that of war crimes has been reinstated.").

[47] *Id.* at 16 (describing how the international criminal law jurisprudence has been constantly developing since Nuremberg, such as the criminalization of international terrorism and torture).

[48] *See* SCHABAS, *supra* note 2, at 163 ("[C]apital punishment was imposed with unhesitating enthusiasm.").

[49] *Id.* at 138.

[50] SANDS, *supra* note 18, at 278.

[51] *See* Sadat, *supra* note 44, at 581 (meaning that about half a century passed until an international tribunal came into being).

[52] *See id.* at 581–82 (describing how the ICTY and ICTR expanded the scope of "conceptual and practical understanding of international criminal justice and the substantive law of war crimes, crimes against humanity and genocide as well as international criminal procedure").

[53] *See* O'Brien, *supra* note 38, at 640 (analyzing the role of the ICTY).

[54] *See id.* (explaining how the tribunal gained jurisdiction over the crimes in Yugoslavia when international humanitarian laws were violated, an event that "triggered the Council's mandatory authority under chapter VII of the UN Charter").

[55] *Id.* at 640 (describing how the perpetrators of these crimes often believe themselves to be acting in revenge against the victimized group).

"individually responsible" for humanitarian crimes, but eventually began to hold individuals, and not just parties, responsible.[56] When the Council began investigating human rights violations, it did so as the first "War Crimes Commission" since World War II.[57] In 1993, the UNSC passed a resolution allowing means to carry out punishment through the ICTY, with its location in The Hague.[58] Unlike the Nuremberg Charter, the ICTY's charter did not prevent the defendants from raising a challenge to its authority over them.[59] Furthermore, to facilitate the tribunal's jurisdiction, the UNSC passed resolutions to require states to cooperate with the ICTY by any means allowable under their respective national laws.[60]

a. *Further Development of the Definitions of Genocide, War Crimes, and Crimes Against Humanity*

The ICTY's statute gave it jurisdiction over crimes against humanity, genocide, and war crimes, but unlike the Nuremberg Charter, the ICTY did not include crimes against peace.[61] The charter held that war crimes include rape and "wanton destruction of cities" with no military goal, and also listed "grave breaches" of the Geneva Convention as including intentional killing, "torture," "taking civilians as hostages," and other crimes.[62] The ICTY's jurisdiction over war crimes gave it a broader ability to prosecute than if it solely had jurisdiction over genocide; this is because the tribunal would have needed to establish that the crime was "committed because of the victim's affiliation with a group" to prove that genocide occurred.[63] The crime of genocide was deemed a type of crime against humanity, with the added element of proving intent to "destroy a group," whereas a war crime could be targeted at an individual or a group.[64] Notably, unlike in the Nuremberg Charter, crimes against humanity no longer needed to be linked to armed conflict to be prosecuted.[65] States decided this in 1988 while negotiating the Rome Statute (which created the ICC), and it had the positive effect of allowing states to prosecute this crime whether it occurs in times of peace or war.[66]

---

[56] *Id.* at 641 (describing how the wide publicity covering the events in Yugoslavia was the first step the council took before electing to hold individual members responsible).

[57] *Id.* (The commission's creation was publicized and made known to the Serbian forces in Yugoslavia, which "may have deterred some violations."); *id.* at 642 (once the commission passed Resolution 780, it had power to investigate the violations itself).

[58] *See id.* at 642, 645 (explaining that thirty-one states were part of this resolution).

[59] *See id.* at 643, 651 (describing that the other provisions within the statute include the UN General Assembly's approval over its budget and the limit of the ICTY's "authority to issue mandatory orders" over "indicted individuals").

[60] *See id.* at 644 (Resolution 827).

[61] *See id.* at 645 (explaining that including crimes against peace would "require the tribunal to investigate the causes of the conflict itself" and would necessarily draw it into settling political questions).

[62] *Id.* at 645–46 (Article 2 of the ICTY Charter).

[63] *Id.* at 648 (distinguishing crimes against humanity from other crimes).

[64] *Id.*

[65] *See* McCormack, *supra* note 33, at 9 (describing how this helped get rid of a "negative legacy" left by the Nuremberg Tribunal and made it easier to prosecute crimes against humanity).

[66] 33 *Id.*

The ICTY Charter followed the Nuremberg Charter in listing what constituted a crime against humanity and required such crimes be targeted at civilians and "committed in armed conflict."[67] Furthermore, the ICTY did not require that a crime against humanity be committed internationally, but allowed for crimes that were "internal in character," thus permitting the tribunal to have jurisdiction over the crimes in Yugoslavia.[68] The ICTY Statute held that the maximum punishment was a life sentence, and did not provide for the death penalty.[69] The tribunal was also required to have regard for the sentencing regimes of the courts in Yugoslavia when determining a perpetrator's punishment.[70] This may explain why the ICTY's sentences were generally shorter than those handed out by the ICTR, as the former Yugoslavia recognized a twenty-year maximum sentence.[71] However, the former Yugoslavia itself did not include certain crimes over which the ICTY had jurisdiction, including crimes against humanity, and so the ICTY was not required to follow the criminal laws of Yugoslavia in prosecuting these crimes.[72] When it did dispense life sentences, the ICTY did not explain why it diverged from the former Yugoslavia, except for the fact that its charter allowed for a life sentence.[73]

b. Sentencing Considerations: The Gravity of the Offense

Like the IMT, the ICTY's sentencing provisions did not rank the crimes over which it had jurisdiction in order of their gravity.[74] By 2017, the average ICTY sentence for crimes in general was 15.9 years.[75] When a perpetrator was found guilty, the court assessed "the gravity of the offence" as well as "the individual circumstances of the convicted person."[76] The ICTY had the power and discretion to impose a life sentence on convicted persons, with no minimum requirement.[77] Furthermore, the ICTY accounted for "factors such as aggravating circumstances, mitigating circumstances such as co-operation

---

[67] UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA art. 5 (Sept. 2009) (listing the crimes as follows: "murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; [and] other inhumane acts").

[68] *Id.; see also* O'Brien, *supra* note 38, at 650 ("On its face, the Yugoslav statute requires only a connection between crimes against humanity and armed conflict, which is not itself a crime under the statute; it thus marks a modest advance over the Nuremberg Charter by expressly removing the requirement of connection to another crime under international law.").

[69] *See* Murphy, *supra* note 28, at 90 (describing the sentencing practice of the ICTY).

[70] *See id.* at 91 (providing the ICTY with the "schedule of penalties and the sentencing policy in Yugoslavia").

[71] *See* Margaret M. deGuzman, *Mixed Messages: The Sentencing Legacies of the Ad Hoc Tribunal*s, *in* THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW 277 (Milena Sterio & Michael P. Scharf eds., 2019) (However, "this rationale is generally not made explicit in the sentencing judgments.").

[72] *See* Murphy, *supra* note 28, at 91 (ICTY Statute).

[73] *See* deGuzman, *supra* note 71, at 277 ("The tribunals also at times adhered to national practice regarding aggravating and mitigating circumstances, and at other times diverged from it.").

[74] Hole, *supra* note 13, at 41.

[75] Suzannah Linton, *Between Disorder, Unpredictability, Inconsistency and Fragmentation, and Diversity and Plurality: Reviewing International Sentencing Practice*, 11 NJA L.J. 1, 2 (2017) (explaining how the average ICTR sentence is about five years longer than that of the ICTY).

[76] *Id.*

[77] *But see id.* at 42 (describing however, that the sentence cannot exceed a life sentence).

with the prosecution, general practice regarding sentencing in the Former Yugoslavia and the extent to which a penalty has already been imposed by a national court."[78] Along with imprisonment, if the perpetrator caused injuries to any victim, they could be required to compensate the victims.[79]

Further assessing mitigating and aggravating factors, the ICTY assessed mitigating factors on a "balance of probabilities," while aggravating factors were to be proven "beyond a reasonable doubt."[80] One express mitigating factor is that of cooperation with the prosecution.[81] Furthermore, criminals with a higher rank tended to receive higher sentences than those who did not hold high positions of power, but only if the crime was an abuse of their power.[82] The ICTY further held that duress constituted a mitigating factor, although it could not serve as a "complete defense" for a perpetrator who committed a war crime or crime against humanity.[83] This arose from a landmark decision in the *Erdemović* case where the judges assessed common law and civil law jurisdictions, ultimately deciding not to allow duress as a complete defense.[84]

One of the biggest concerns about the ICTY was that it would be difficult, if not impossible, to prosecute high-ranking officials who themselves enacted policies to carry out ethnic cleansing in Yugoslavia, as their high standing would make it difficult to extradite them.[85] However, Slobodan Milošević, who served as the President of Serbia and the Federal Republic of Yugoslavia, became the first head of state to be indicted by any international tribunal when he was tried before the ICTY.[86] His indictment showed that the ICTY was capable of ensuring heads of state could not escape punishment for their

[78] *Id.*

[79] *See id.* (compensating victims either through victims' assistance awards or under the specific state's compensation schemes).

[80] *Id.* ("This accords with the sentencing of many common law jurisdictions. The ICTR has followed this practice.").

[81] *See id.* at 42 ("There is, however, no precise qualification as to what the extent of any cooperation must be, other than that it must be 'substantial,' nor is there any guidance as to how the timing of any cooperation will be viewed").

[82] *See* Joseph W. Doherty & Richard H. Steinberg, *Punishment and Policy in International Criminal Sentencing: An Empirical Study*, AM. J. OF INT'L L. 49, 58 (2016) (explaining how higher-ranking individuals have "the potential to cause greater impact than those in lower positions" and "are expected both to maintain a higher moral standard than persons with a lower rank and to uphold the constitutions of their respective nations").

[83] *Id.*

[84] Jonathan Witmer-Rich, *The Defense of Duress to Killing Innocents: Assessing the Mixed Legacy of the ICTY and the ICTR*, *in* THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW 225–26 (Milena Sterio & Michael P. Scharf eds., 2019) ("Most civil law countries permit duress to serve as a defense to any crime, including the killing of innocents, albeit according to relatively strict proof requirements. In contrast, common law countries categorically limit the defense of duress to nonhomicide offenses."); *see also* Murphy, *supra* note 28, at 93 ("The majority found no rule of customary international law or general principle of law addressing this issue definitively. Instead, the conclusion was based on policy grounds—that to allow a defense of duress would undermine the aims and objectives of international humanitarian law.").

[85] *See* McCormack, *supra* note 33, at 11 (describing the mains concerns "that these tribunals were not feasible; would be too expensive; would only ever deal with the 'small fish', not those who were most responsible for the atrocities").

[86] *Id.* at 11 (describing how these individuals surrendered thanks to the tribunal's creation, creating "political and economic leverage").

crimes.[87] Thus, like the IMT, the ICTY further proved that international tribunals were capable of prosecuting individuals no matter their ranking, a concept which would also define the ICTR.

C. The International Criminal Tribunal for Rwanda: Constitution and Sentencing Guidelines

Founded in 1994 and located in Arusha, Tanzania, the ICTR served several purposes, including punishing past crimes and stopping future crimes from occurring, all while "reflecting local customs" and "building international law and jurisprudence."[88] Like the ICTY, the sentencing guidelines analyzed more factors than those of the IMT.[89] This was also because the ICTY's existence helped the ICTR form more efficiently, serving as its model.[90] The same judges and prosecutors who served in the ICTY Appeals Chamber also worked for the ICTR.[91] However, the two tribunals diverged regarding subject matter jurisdiction, as the ICTR Statute did not require crimes against humanity to have "a nexus with armed conflict."[92] Furthermore, what occurred in Rwanda was deemed not to be an international conflict, as it occurred internally; thus, the ICTR could not apply the 1949 Geneva Convention's section regarding grave Geneva Convention breaches, although the UNSC decided to broaden what it deemed applicable law.[93] The Rwandan government also fully assented to the ICTR's establishment, unlike the Serbian government under the ICTY's jurisdiction.[94] Like the ICTY, the ICTR contributed greatly to the realm of international criminal law, focusing especially on defining genocide.

a. The ICTR's Vast Contribution to the Development of the Definition and Prosecution of Genocide

---

[87] Jennifer Trahan, *Examining the Benchmarks by Which to Evaluate the ICTY's Legacy*, *in* THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW 29, 33 (Milena Sterio & Michael P. Scharf eds., 2019) (describing how "his trial was the first trial of a leader for crimes committed while the person was head of state").

[88] *The ICTR in Brief*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, https://unictr.irmct.org/en/tribunal (last visited Jan. 27, 2025); Doherty, *supra* note 82, at 49–50 (including "establishing a historical record of the events").

[89] *See* Doherty, *supra* note 82, at 51 (explaining how the ICTY and ICTR considered more factors in their analysis of the perpetrators' crimes).

[90] *See* Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L. L. 501, 502 (1996) ("[T]he Security Council adopted Resolution 955 whereby it established, as an enforcement measure, the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994.").

[91] *Id.* at 503 (setting forth these provisions in Article 12(2) and Article 15(3) of the Rwanda Statute respectively).

[92] *Id.* at 503 (requiring, however, "an additional link between the proscribed inhumane acts and discriminatory grounds").

[93] *Id.* at 503–04 (differing from the conflict in Yugoslavia which involved several nations).

[94] *See id.* at 504 ("Rwanda took the initiative in proposing the establishment of an international tribunal as early as September 1994, before any serious consideration was given to the matter by other states. This situation resulted in part from the military defeat of the party responsible for the genocide, so that the successor government (i.e., a coalition dominated by the victorious Rwandese Patriotic Front) stood to benefit from the punishment and political isolation of its predecessors.").

The ICTR contributed greatly to international criminal law by expanding the genocide definition and distinguishing it from other crimes.[95] In its charter, it adopted similar definitions as the ICTY for genocide and crimes against humanity, although it significantly clarified these crimes.[96] The crime of genocide differs from crimes against humanity "as it embodies a special intent, namely, to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such."[97] Related crimes also included rape and other forms of sexual violence as part of genocide, conspiracy to commit genocide, complicity in genocide, and direct and public incitement to commit genocide.[98] The ICTR emphasized the inclusion of "a broad and progressive definition of rape and sexual violence" so that these crimes committed against Tutsi women could be prosecuted.[99] The ICTR also defined public and direct incitement to commit genocide as showing "a definite causation between the act characterized as incitement or provocation, and a specific offense."[100] However, it held that such incitement could be punished as a separate crime even if the individual trying to incite violence did not succeed in doing so.[101]

Although the ICTR analyzed and refined the definition of genocide, it typically refused to accept a hierarchy of crimes.[102] However, the tribunal did occasionally accept that genocide, with its specific intent element, and crimes against humanity were more grave than other crimes.[103] This was because each of the crimes allowed for certain aggravating factors, such as the number of victims and the "sadistic perpetration of the crime" to be considered; thus, there was an unofficial rather than a "strict hierarchy," since these factors were more often present in the crime of genocide.[104] This codification of genocide aligned with the tribunal's sentencing purposes and focus on the victims of these heinous crimes.

---

[95] *See* Asoka De Z. Gunawaradana, *Contributions by the International Criminal Tribunal for Rwanda to Development of the Definition of Genocide*, 94 AM. SOC'Y INT'L L. ANNUAL PROC. 277, 277 (2000) (analyzing the ICTR's "expansive definition" of genocide).

[96] Hole, *supra* note 13, at 44; *see also* Gunawaradana, *supra* note 95, at 277.

[97] Gunawaradana, *supra* note 95, at 277 (Furthermore, the intent aspect of this crime must be supported by proof that the "victim [was] chosen, not because of individual identity, but rather on account of membership in the group.").

[98] *Id.* at 277–79 (By adding the crime of rape, the tribunal acknowledged that "sexual violence would constitute genocide…as long as [it was] committed with the specific intent to destroy, in whole or in part, a particular group."Incitement to genocide includes "provocation" and includes "public incitement" only in accordance with the Geneva Convention).

[99] *Id.* at 277–78 (describing the ability of the court to prosecute such crimes since including them under the definition of genocide gives the ICTR jurisdiction).

[100] *Id.* at 278 (not including private incitement).

[101] *See id.* at 279 (clarifying what falls under the crime of genocide so that the ICTR can properly prosecute both acts of and incitement of genocide).

[102] *See* Doherty, *supra* note 82, at 54 (describing how the court takes this approach, but in practice, judges often punish crimes such as genocide with harsher sentences).

[103] *See* Doherty, *supra* note 82, at 54-55 (analyzing how the court contended that, overall, all crimes can merit the same sentence).

[104] Doherty, *supra* note 82, at 55 ("While the Tribunals have rejected a hierarchy of crimes, partly because they have held that neither treaty nor customary law supports it, much of the debate over hierarchy recapitulates the problem of distinguishing between gravity and aggravation.").

b. *The ICTR's Sentencing Policy: Focus on the Victims*

The ICTR focused heavily on the victims, assessing the gravity of the crimes through this lens. Like the ICTY, the ICTR was required to punish those found guilty with imprisonment, accounting for the crime's gravity and the perpetrator's circumstances.[105] The ICTR considered the same mitigating factors as the ICTY and could also impose only up to a life sentence.[106] However, the ICTR handed out life sentences more freely than the ICTY did, as it had recourse to follow sentencing guidelines in Rwanda that also called for life imprisonment, thus appearing to value retribution as its preferred sentencing policy.[107] By 2017, the average ICTR sentence for crimes in general was 22.6 years.[108] Along with the IMT and the ICTY, the ICTR paved the way for the establishment of the ICC.

D. The International Criminal Court: Constitution and Sentencing Guidelines

The Rome Statute of the International Criminal Court established the ICC on July 17, 1998, making the ICC the first permanent court for the prosecution of international criminal conduct.[109] Every nation except for the United States, Israel, Qatar, Egypt, Libya, China, and Yemen have accepted the ICC's jurisdiction.[110] The Rome Statute gives the ICC the ability to "exercise its jurisdiction over people for the most serious international crimes" and serves a "complementary" purpose alongside national criminal courts.[111]

Due to its status as a complement to other courts, the ICC does not have universal jurisdiction over the four crimes enumerated under the Rome Statute.[112] The state must either be a party to the Rome Treaty, the perpetrator's nationality must be of a member state, or the state must accept the ICC's jurisdiction "on an *ad hoc* basis."[113] The only situation in which the ICC has jurisdiction over a state that does not accept its jurisdiction is when the five permanent Security Council members refer a case "to maintain and restore

---

[105] *See* Hole, *supra* note 13, at 45 ("Although, as stated, the ICTR is expressly limited to imprisonment as a sanction, the ICTR is empowered to order the forfeiture of property or proceeds derived by criminal conduct which will run alongside the sanction of imprisonment.").

[106] Hole, *supra* note 13, at 45, 54.

[107] *See* deGuzman, *supra* note 71, at 276 (contrasting this with the norm in Yugoslavia where a seeming "social norm that life imprisonment may actually be worse than death" led to fewer life sentences).

[108] *See* Linton, *supra* note 75, at 2.

[109] *See* ICC, UNDERSTANDING THE INT'L CRIM. CT., *supra* note 1 (explaining how the Rome Statute went into effect on July 1, 2002).

[110] *See* Sharf, *supra* note 39, at 68 (explaining how these countries may fear submitting the actions of their nationals to an international criminal court instead of their own national courts).

[111] *Id*. at 86 (describing how the Rome Statute limits the ICC's jurisdiction "unless the State is willing or unable to genuinely carry out the investigation or prosecution.").

[112] Philippe Kirsch, A*pplying the Principles of Nuremberg in the International Criminal Court*, 6 WASH. U. GLOB. STUD. L. REV. 501, 506 (2007) ("Its jurisdiction is limited to the territories and nationals of States Parties to the Rome Statute or states otherwise accepting its jurisdiction. The ICC is not imposed on states. States must affirmatively accept its jurisdiction."); *see also* Scharf, *supra* note 39, at 77 (the Rome Statute "adopted the consent regime as a limit to the exercise of the court's inherent jurisdiction as a politically expedient concession to the sovereignty of states in order to garner broad support for the statute.").

[113] Sadat, *supra* note 25, at 495 (describing the jurisdictional limits of the ICC).

international peace and security."[114] Furthermore, the ICC functions only as a "court of last resort," meaning that "it does not intervene if a domestic system is carrying out its responsibilities" or if the case is currently "being or has been investigated or prosecuted by a state with jurisdiction."[115] This is known as the "principle of complementarity," and shows that the ICC is merely an aid to domestic courts, not superior to them.[116]

a. Crimes Under the ICC's Jurisdiction

The ICC has jurisdiction over four crimes: "genocide, war crimes, crimes against humanity, and the crime of aggression."[117] First, the crime of genocide includes "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[118] Second, crimes against humanity refer to "acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[119] Third, war crimes "include grave breaches of the Geneva Convention and other serious violations of the laws and customs applicable in international armed conflict and in conflicts not of an international character" listed in the Rome Statute, when they are committed as part of a plan or policy or on a large scale."[120] Fourth, the crime of aggression includes "the planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another State."[121]

b. The ICC's Sentencing Guidelines: Policy Focus on Deterrence and Rehabilitation

[114] Kirsch, *supra* note 112, at 507; *Current Members*, U.N. SCOR https://main.un.org/securitycouncil/en/content/current-members (last visited Feb. 17, 2025) (The permanent five members of the USC are China, France, Russia, the United Kingdom, and the United States).

[115] *Id.* at 505 ("We must remember that Nuremberg came about, in part, because of the German judicial system's failure to provide accountability for serious crimes under the Third Reich. In fact, in one of the Nuremberg trials carried out by the U.S. Military Tribunal, *United States v. Altstoetter*, the court convicted several high officials for using the judicial system to commit Nazi crimes. Nuremberg was a court of last resort.").

[116] *Id.*

[117] Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90.

[118] *Id.* art. 6 (genocide includes the following: killing group members, inflicting serious physical or mental harm to group members, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," "imposing measures intended to prevent births" of group members, and "forcibly transferring children of the group to another group."); *id.* (the crime of genocide has also "attained the status of a *jus cogens* norm" and is an attack on "human diversity."); CRYER, *supra* note 8, at 205.

[119] *Id.* art. 7 (crimes against humanity include murder, enslavement, forcible transfer, torture, persecution, rape, apartheid, and "other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury.").

[120] *Id.* art. 8 (war crimes may include murder, torture, taking hostages, intentional attacks against civilians or buildings dedicated to religion or other purposes, pillaging, rape, and forcing children into the armed forces).

[121] *Id.* (crimes of aggression may include military occupation, invasion, or other activities that violate the United Nations Charter. This crime is also called a "crime against peace" and differs from the other crimes over which the ICC has jurisdiction as it is "inextricably linked to an unlawful act of a State against another State" and is committed by a "leader or policy-maker of a State."); CRYER, *supra* note 8, at 297.

The Charter for the ICC owes its comprehensive nature to over a half century's worth of international criminal law, including that of the IMT, the ICTY, and the ICTR.[122] Like at Nuremberg, the ICC Charter also holds that perpetrators cannot escape culpability due to their rank or use the defense of "acting under superior orders."[123]

Unlike domestic criminal law systems, the Rome Statute does not have a thorough sentencing guide, but instead lists the maximum sentence length and therefore effectively leaves each case's sentence in the hands of the presiding judges.[124] This is inconsistent with the drafters' desires to "define and delimit judicial discretion as much as possible."[125] The only guidance is that the ICC must follow certain articles enumerated in the Rome Statute when handing out a sentence as detailed in Article 21(1).[126] This article states that the court will first apply "this Statute, Elements of Crimes and its Rules of Procedure and Evidence," followed by "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict," and finally "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute."[127] The ICC will thus "apply Articles 23,[128] 76,[129] 77,[130] and 78,[131] and 81(2)(a)[132] of the Statute and Rules, and 143, 145,[133] and 146 of the Rules of Procedure and Evidence."[134] Most notably, the ICC Statute and Rules do not establish a requirement for the court to follow international criminal law precedent.[135] Both the ICTY and the ICTR

---

[122] Layla Nadya Sadat, *Judgment at Nuremberg: Foreword to the Symposium*, 6 WASH. U. GLOB. STUD. L. REV. 491, 495 (2007) ("The ICC has a more sophisticated charter than the IMT, responding to the sixty years of legal and procedural developments in the field, and more extensive provisions on substantive criminal law and procedure.").

[123] Kirsch, *supra* note 112, at 504–05 ("The ICC's ability to ensure accountability is reflected in a number of other provisions rooted in Nuremberg.").

[124] *See* SCHABAS, *supra* note 2, at 137 (unlike domestic law systems, the Rome Statute neglected to create guidelines where "each specific offense is accompanied by the applicable penalty.").

[125] *Id.*

[126] Prosecutor v. Dyilo, ICC-01/04-01/06, Decision on Sentence, ¶ 17 (July 10, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07409.PDF (on file with the Connecticut Journal of International Law).

[127] Rome Statute of the International Criminal Court art. 21(1)(a)–(c), July 17, 1998, 2187 U.N.T.S. 90.

[128] *See Prosecutor v. Dyilo, supra* note 126, ¶ 18 (describing a principle known as *nulla poena sine lege* where a defendant's punishment must be "in accordance with the Statute".).

[129] *See id.* ¶¶ 19–20 (describing how the ICC must assess the relevant evidence and submissions and, if requested, must hold sentencing hearings).

[130] *See id.* ¶ 21 (setting the maximum sentence of 30 years unless the crime is so extreme as to warrant a life sentence).

[131] *See id.* ¶¶ 23–24 (describing how the ICC must assess mitigating and aggravating factors as well as individual circumstances and the gravity of the crime, deducting any time served).

[132] *See id.* ¶ 26 (the ICC "must ensure that the sentence is in proportion to the crime.").

[133] *See id.* ¶ 21(setting the maximum sentence of 30 years unless the crime is so extreme as to warrant a life sentence); *id.* ¶ 25 (this section also requires that the "sentence must reflect the culpability of the convicted person, and the Chamber needs to balance all the relevant factors, including any mitigating and aggravating factors and taking into account the circumstances of the convicted person and the crime.").

[134] *Id.* ¶ 17.

[135] Hole, *supra* note 13, at 54.

were required to follow precedent (referring to the IMT), making this ICC provision a unique approach to international criminal law.[136]

This broad sentencing is due to the fact that states each had different policies on penalties and thus the Rome Statute was not able to distill anything beyond "general sentencing principles" that were already customary international law.[137] Several states strongly demanded that capital punishment be available in the ICC, while other states vehemently opposed the death penalty as well as life sentences.[138] Regarding the ICC's sentencing guidelines, the maximum sentence allowed is thirty years of imprisonment or a life sentence "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances."[139] Like the ICTR and the ICTY, the Rome Statute did away with the death penalty to reflect "developments in international human rights law," despite the protests of several states.[140]

c. Sentencing Policy of the ICC Affecting its Guidelines

Understandably, as the ICC has jurisdiction over the worst crimes know to humanity, it has confused scholars that a life sentence can only be doled out when the crime is grave, as all crimes that come before the tribunal are inherently grave.[141] Many states even opposed life imprisonment as an option for sentencing, holding this belief due to human rights concerns.[142] However, if the court is to follow proportionality, and the crimes over which the ICC has jurisdiction are by nature the most heinous, the Charter's clarity regarding the rarity of life sentences is questionable and confusing.[143]

The ICC's traditional sentencing guidelines include deterrence, incapacitation, retribution, rehabilitation, and various others as its purpose in choosing punishments.[144] However, neither the ICC Rules nor its Statute address purposes it considers when handing out sentences, although it does mention ending "impunity for the perpetrators."[145] This seems to hold deterrence as highly important when the ICC determines sentences, but nevertheless, the ICC is under no obligation to address a purpose for any one sentence, and thus it is difficult to determine the reasoning for each of the sentences it hands out.[146] The Rome Statute vaguely addresses the purpose which sentencing serves in its preamble, mainly emphasizing preventing crimes and ensuring that individuals will be accountable

---

136 *Id.* (noting that the ICC can choose to apply the same rules as its previous decisions).
137 CRYER, *supra* note 8, at 465.
138 *See* CRYER, *supra* note 8, at 466 (explaining how this led to difficulties in drafting the Rome Statute).
139 Hole, *supra* note 13, at 49–50 (quoting ICC Rules, r 145(3)).
140 SCHABAS, *supra* note 2, at 137, 140.
141 Hole, *supra* note 13, at 50 (describing how "it has been suggested that the inclusion of this requirement was a tacit signal for a degree of clemency in sentencing.").
142 *See* CRYER, *supra* note 8, at 466.
143 *Id.* ("[E]nsuring proportionate sentences matching the gravity of the crimes will pose special challenges.").
144 *See id.* at 467 (also including "social integration of the offender").
145 *See* Hole, *supra* note 13, at 54 (quoting ICC Statute, preamble para. 4).
146 *See id.* ("It seems likely that the ICC will adopt retributive and deterrent penal purposes in line with established international sentencing norms.").

for their actions.[147] This emphasis on deterrence poses some issues, as there is no proof that international criminal tribunals prevent such crimes by virtue of their existence alone.[148]

From the ICC Rules, life sentences are reserved for rare and extreme cases.[149] But unfortunately, the Rules do not suggest if longer sentences are more necessary when the perpetrator is likely to continue committing crimes or if the previous crimes were extreme in nature.[150] Although rehabilitation is not expressly addressed in the ICC Statute, it appears to be an implicitly powerful reason why the ICC hands out lighter sentences.[151] For determining the length of punishment, the ICC must assess the following factors: "the totality of any sentence must reflect the culpability of the offender;" "the extent of damage caused;" "the nature of the behaviour constituting the offence;" "the degree of participation and intent of the offender;" "the gravity of the offence; and "the circumstances of the offence and the age, history and background of the offender."[152] The ICC Rules further address mitigating[153] and aggravating[154] factors. However, there is no provision regarding what weight the court must give these factors.[155]

It is essential to acknowledge that the ICC's methods do not resemble those of any one country.[156] The ICC "faces great challenges in obtaining the cooperation of States with regard to the transfer of suspects and the accumulation of evidence" since it has no power to bring suspects into its custody.[157] Furthermore, the IMT established the importance of

[147] SCHABAS, *supra* note 2, at 39.

[148] *See* CRYER, *supra* note 8, at 468 (describing also how "aims such as rehabilitation and social reintegration may be questioned as too unrealistic for the tribunals to pursue.").

[149] *See* Hole, *supra* note 13, at 63 (describing how it the ICC Rules are written in a way to imply the rarity of life sentences by simply stating that "the individual circumstances of the convicted person" will determine if a life sentence is necessary).

[150] *See id.* ("It is somewhat anomalous for the most serious penalty available to the ICC to be constrained by such an ambiguous provision.").

[151] *See id.* at 61. (Some authors believe this omission means the ICC believes "offenders are both incapable of rehabilitation and unlikely to ever be released considering the seriousness of their offences."). As will be discussed in this paper, however, the light sentences received by these perpetrators of these crimes are not at all affected by the exclusion of rehabilitation in the ICC Statute and rehabilitation is most certainly valued by the judges of the court.

[152] *Id.* at 62 ("The general sentencing direction contained in the ICC Statute for the ICC is that when determining the appropriate sentence for an offender the ICC is required to 'take into account the evidence presented and submissions made during the trial that are relevant to the sentence.'" (quoting ICC Statute, art. 76(2))).

[153] *See id.* at 63 (including "substantially reduced mental capacity and duress falling short of constituting grounds for exclusion of criminal responsibility; and the conduct of the offender after the act, including cooperation and efforts to make restitution").

[154] *See id.* (including "prior convictions before the ICC or similar tribunal; whether the crime was an abuse of power or official capacity, whether the victim was defenceless; whether the commission of the crime involved particular cruelty or multiple victims; whether the motive for the crime involved discrimination; and any other circumstances similar to these factors").

[155] *Id.*

[156] Kirsch, *supra* note 112, at 505 ("In evaluating a court like the ICC or the Nuremberg Tribunal, we cannot expect it to exactly mirror our national experience. What we should expect is that it guarantees due process and a fair trial, which can be and is done in different ways in different countries. Understanding this point can be a challenge for lawyers.").

[157] *See* Hole, *supra* note 13, at 63.

the concept of a fair trial and the ICC continues to emphasize this concept as well.[158] Since it is an international court, it has "incorporated elements taken from different countries' legal systems."[159] Thus, one cannot require it to be identical to the criminal courts of any one state.[160] Despite this fact, the ICC has successfully taken international criminal law cases and continues to add to international law jurisprudence.

III. Current State of the Law

The ICC operates freely in determining the length of sentences, bound only by the "wide discretion" of the court and subject to no explicit guidelines.[161] This lack of guidelines, coupled with the fact that the court's rules do not require judges to defer to precedent, means the sentences chosen for perpetrators can be basically any length particular judges deem sufficient.[162] The only formal guidelines listed by the ICC Statute and Article 78(1) of the Rome Statute require the court to account for the gravity of the crime and the individual's circumstances.[163] The main purpose given to support the sentencing length that the ICC has given in certain cases include "deterrence, retribution, rehabilitation, and to a lesser extent, reconciliation," and the most often cited purposes as of 2020 were retribution, deterrence, and rehabilitation (in descending order).[164]

It appears that the court values rehabilitation of prisoners but has failed to provide a definition of what constitutes rehabilitation and how to determine when perpetrators have reached a state where they acknowledge their wrongs and would never repeat them.[165] Rehabilitation values allowing the convicted person to reenter society.[166] While this is a noble goal, it is important to assess whether it can be a reality, or if it is merely wishful thinking. No studies have shown that imprisoning those who commit crimes over which

---

[158] Kirsch, *supra* note 112, at 505 (describing the principle of a fair trial being strongly established in these international criminal courts).

[159] *Id.*

[160] *See id.* (describing how "an inevitable part of establishing an international tribunal that can be agreed to by several states" is that it is an amalgamation of different states).

[161] Edith Riegler, *Rehabilitating Enemies of Mankind: An Exploration of the Concept of Rehabilitation as a Sentencing Aim at the ICTY and the ICC*, 20 INT'L CRIM. L. REV. 701, 702 (2020) ("[T]hough a sentencing jurisprudence of international criminal law has been developing out of the legacy of the Nuremberg and Tokyo Tribunals, and more prominently, based on the decisions handed down by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) . . . a coherent international sentencing framework has not yet been established.").

[162] *See id.* ("It is striking that, while the prosecution and the trial phase are meticulously governed by various positive law instruments . . . the judgments, which often span several hundreds of pages, yet feature only cursory remarks that could elucidate the rationales behind the sentencing decisions.").

[163] *Id.* at 705.

[164] *Id.* at 702–03.

[165] *See id.* at 707 ("Modern conceptions of retribution emphasise the principle of proportionality, i.e. that the amount of punishment is proportional to the harm caused, however, proportionality becomes a problematic concept in the context of international crimes, since faced with perpetrators of grave atrocities it is nigh impossible to have any semblance of actual proportionality").

[166] *See id.* at 708 ("[H]ence it is in society's best interest to affect some change in the convicted person so that he or she will be less likely to commit any further offences.").

the ICC has jurisdiction are effectively rehabilitated upon release.[167] While it is important to understand that those who commit lesser crimes merit shorter sentences and are capable of rehabilitation, it is equally important to acknowledge when rehabilitation may be impossible.[168] Considering that the ICC has jurisdiction over the "most serious crimes of concern to the international community"[169] and humanity in general, it is worrisome to think that the sentencing guidelines, which are not formal in nature, address more concern for the perpetrators to be rehabilitated than on the seriousness of their crimes.[170] If the ICC does give out a life sentence, the Rome Statute requires that after twenty-five years of imprisonment, the perpetrator's sentence be subject to review to see if rehabilitation is possible and if the sentence can be diminished.[171] Thus, even if the court fears a life sentence does not allow for rehabilitation, there is a built in safeguard as all sentences will be reviewed after two-thirds of the sentence time lapses.[172] The court should thus not fear handing out longer sentences for heinous crimes, especially since it will be able to review the sentence's length on a case by case basis.[173]

There are no "pre-determined ranges of penalties" for sentences in the international law field, and thus the ICC is not bound by any range of years for handing out sentences.[174] In general, "at the ICTY, the sentences have ranged from two to forty-six years or life and at the ICTR, they have ranged from 'nine (ten) months' to forty five years or life."[175] By 2017, the average ICTY sentence for crimes in general was 15.9 years, while the average ICTR sentence was 22.6 years.[176] For those convicted of genocide, the median sentence length was thirty-five years across both tribunals[177] and for those who committed crimes against humanity, the average sentence was thirteen years across both tribunals.[178]

IV. Analysis

---

[167] *See id.* ("In domestic circumstances, it has not yet been established empirically that punishment can effectively achieve rehabilitation, which would be evidenced by lowered rates of re-offending. In the context of international criminal justice, the role of rehabilitation is, predictably, an even more vexed question.").

[168] *See id.* ("In the context of international criminal justice, the role of rehabilitation is, predictably, an even more vexed question and it is difficult to envision what rehabilitation should entail exactly and how it should be achieved.").

[169] *The Court Today*, INTERNATIONAL CRIMINAL COURT 1, https://www.icc-cpi.int/sites/default/files/2024-11/TheCourtToday-Eng.pdf (last visited Nov. 8, 2024).

[170] *See* Riegler, *supra* note 161, at 709 ("Perpetrators of international crimes are said to differ from 'ordinary' criminals in a myriad of ways, owing to the extraordinary aetiology of collective violence and mass atrocities, and often presented as non-deviant and well-adjusted citizens before the commission of crimes.").

[171] *See id.* at 711 (Rome Statute art. 110(3)).

[172] *See id.* (describing how the ICTY developed the "two-thirds rule" before the ICC eventually codified it in the Rome Statute).

[173] *See id.* (Rome Statute art. 110(3)).

[174] *See* Linton, *supra* note 75, at 5 ("Even so, at an institutional level, these bodies have resisted adopting formal guidelines on sentencing, and have been content to leave it to their judges, drawn from all over the world, to respond in the best way they see fit to incorporate meaning into vague notions such as gravity and individual circumstances.").

[175] *Id.* at 15.

[176] *See id.* at 2 (explaining how the average ICTR sentence is about five years longer than that of the ICTY).

[177] Doherty & Steinberg, *supra* note 82, at 70.

[178] *Id.*

The previous international criminal tribunals of the ICTY and the ICTR serve as "the twin pillars of moral outrage upon which the beginnings of a long-awaited international criminal jurisdiction can be discerned."[179] It is thus important to compare the sentencing guidelines of these tribunals (as well as the IMT) to those of the ICC to see where any divergence occurs.

A. Examples of Sentencing from the International Criminal Court

After establishing the different sentencing purposes set forth by the IMT, the ICTY, the ICTR, and the ICC, this section will assess the length of sentencing of each tribunal and how it may relate to each tribunal's sentencing purpose. As each tribunal has doled out shorter and shorter sentences, it may be because each court's implicit purpose for sentencing has effects on the length assigned.[180] This section assesses the ICC's sentences for its defendants and compares them to punishments handed out by the earlier tribunals to discern the sentencing purpose's effect on sentence length.

As mentioned previously, the Rome Statute's Preamble declares that the purpose of the International Criminal Court is "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[181] As the ICC's purpose is deterrence, it is important to assess whether the sentencing guidelines themselves actually prevent these crimes from occurring.[182]

The ICC, since it is not required to follow the precedent of previous international criminal courts in its sentencing guidelines, has been criticized as too lenient and inconsistent in this area.[183] This section gives several examples of defendant sentencing and compares it with the previous tribunals. In this way, one can see how the ICC differs from previous tribunals in determining sentence length for convicted persons.

a. Dominic Ongwen: Sentencing Aversion to Using "Revenge" as a Policy Consideration

The ICC successfully convicted Dominic Ongwen of sixty-one crimes that included war crimes and crimes against humanity, for which he received twenty-five years'

---

[179] *See* Akhavan, *supra* note 90, at 502 ("The establishment and interrelationship of these two Tribunals [was] a bold and unique experiment with far-reaching implications for the development of the international legal order.").

[180] CRYER ET AL., *supra* note 8, at 471 (The ICC's sentencing "is relatively low compared to the average sentencing outcomes at the ad hoc Tribunals.").

[181] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, INTERNATIONAL CRIMINAL COURT 1 (2021), https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf (The preamble also explains its purpose as "[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.").

[182] SCHABAS, *supra* note 2, at 139.

[183] *See* Ashley Joy Stein, *Reforming the Sentencing Regime for the Most Serious Crimes of Concern: The International Criminal Court through the Lens of the Lubanga Trial*, 39 BROOK. J. INT'L. L. 521, 522 (2014) ("[T]he ICC has unfortunately failed to consider penal theories and to set forth the appropriate penalty framework for those convicted of the most serious international crimes.").

imprisonment.[184] Ongwen was a member of the Lord's Resistance Army that has committed crimes against the Ugandan government and members of Internally Displaced Persons camps supported by the government.[185] In analyzing each crime, the ICC determined (without stating the reason) that the longest possible sentence was twenty years, with other crimes requiring an eight to fourteen year sentence.[186] The judges then imposed a joint sentence for a total of twenty-five years, which "adequately reflects the strongest condemnation by the international community of the crimes committed by Dominic Ongwen and acknowledges the great harm and suffering caused to the victims."[187] Upon reading the list of Ongwen's crimes, it is difficult to imagine how the tribunal did not apply the maximum length of the sentencing guidelines.[188] The majority chose a lesser punishment than the maximum thirty years, as Ongwen had himself been kidnapped by the Lord's Resistance Army and raised in the conditions that eventually led to his own crimes.[189] However, Ongwen tortured and murdered civilians, committed sexual crimes including forced marriage and rape, and conscripted children into the army.[190]

Not only is it difficult to understand how the ICC did not impose the maximum sentence in Dominic Onwen's case, but it is also difficult to imagine how thirty years could sufficiently punish the long list of crimes committed by the defendant. The ICC did consider giving Ongwen a life sentence due to his "numerous grave crimes."[191] The aggravating factors show the gravity of the crimes Ongwen committed, and the sheer number of crimes also led to a vast extent of "cumulative victimization":

> More than 130 people were killed during the attacks on IDP camps, and at least 25 others managed to survive only for reasons independent of the will of Dominic Ongwen—or LRA fighters under his control. Hundreds of civilians were abducted, tortured and enslaved during those same attacks. A large number of children were abducted, integrated into the Sinia brigade and used actively to participate in the hostilities. In addition to the seven women and girls who were forced to be Dominic Ongwen's so-called 'wives' and servants, there were over

---

[184] *See Dominic Ongwen sentenced to 25 years of imprisonment*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/news/dominic-ongwen-sentenced-25-years-imprisonment (last visited Nov. 11, 2024) (explaining that his detention time of six years will be deducted from his sentence).

[185] *See Dominic Ongwen declared guilty of war crimes and crimes against humanity committed in Uganda*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/news/dominic-ongwen-declared-guilty-war-crimes-and-crimes-against-humanity-committed-uganda (last visited Nov. 11, 2024) (explaining how the people in the camps were civilians).

[186] *See Dominic Ongwen sentenced to 25 years of imprisonment*, *supra* note 184. The court assessed aggravating circumstances, which included "cruelty, multiplicity of victims, the victims being particularly defenceless, and discrimination on political grounds and discrimination against women."

[187] *See id.* (explaining that one of the judges wrote a partial dissent in which he explained that Ongwen should have received the maximum imprisonment of thirty years).

[188] *Id.*

[189] *See id.* (describing how the ICC lessened his sentence due to these mitigating factors of his own personal history and hope for his rehabilitation and potential societal re-integration in the future).

[190] *See Ongwen*, *supra* note 185. Ongwen's additional crimes include pillaging, persecution, outrages upon personal dignity, enslavement, sexual slavery, forced pregnancy, and destruction of property.

[191] *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Sentence, 125 (May 6, 2021) ("The Chamber has considered the possibility of imposing life imprisonment as a single joint sentence for the numerous grave crimes committed by Dominic Ongwen, as also recommended by the legal representatives of the participating victims.").

> one hundred abducted women and girls in the Sinia brigade at the relevant time. Many of these victims—who were targeted for motives involving discrimination—were particularly defenceless. Particularly young boys and young girls were abducted and forced to be child soldiers or domestic servants. During the attacks, individuals who had been abducted, including children, elderly people and pregnant women, were then killed and tortured.[192]

The chamber goes on to say that "from the perspective of the extreme gravity of the crimes committed by Ongwen, including the degree of his culpable conduct, a joint sentence of life imprisonment would surely be in order in the present case."[193] However, considering "all relevant circumstances," the court decided against a life sentence.[194] Even despite all these aggravating factors, the court gave more weight to Ongwen's particular circumstances, mainly that he was abducted by the army at nine years old.[195] Thus, even though these circumstances would render even the full "ordinary" term of thirty years to be "relatively low" according to the chamber, the court ultimately rejects, not only a life sentence, but thirty years imprisonment in favor of twenty-seven years.[196] The chamber acknowledged "and [was] wholeheartedly sympathetic to the legitimate desire of the victims to receive justice, and comprehend[ed] that justice indeed demands that an adequate punishment be imposed on Dominic Ongwen."[197] The chamber stressed that in no way could "revenge" be its goal, but that "retribution and deterrence, as the primary purposes of sentencing, can only be achieved if all relevant circumstances are duly taken into account."[198] The chamber thus believed that this case differed in kind from any other case the ICC had tried due to Ongwen's own tragic backstory.[199]

After establishing that a life sentence would be inappropriate, the court then deemed the other maximum sentence of thirty years as excessive, holding that twenty-five years is sufficient.[200] Paying attention to proportionality and ensuring the sentence

---

[192] *Id.* at 126.

[193] *Id.* at 127 (describing how he also "he exercised an essential role in sustaining the methodical abduction and abuse of women and girls, reflected in the convictions for sexual and gender-based crimes, and of children under the age of 15 years, who were brutally integrated in large numbers and used to participate actively in hostilities.").

[194] *Id.* ("It is the presence of such extraordinary circumstances that renders what would otherwise be the 'ordinary' statutory limit of a term of imprisonment up to a period of 30 years disproportionately low in relation to the gravity of the crimes.").

[195] *Id.* ("The Chamber is confronted in the present case with a unique situation of a perpetrator who willfully and lucidly brought tremendous suffering upon his victims, but who himself had previously endured grave suffering at the hands of the group of which he later became a prominent member and leader.").

[196] Ongwen, *supra* note 191, at 127 ("It is the presence of such extraordinary circumstances that renders what would otherwise be the 'ordinary' statutory limit of a term of imprisonment up to a period of 30 years disproportionately low in relation to the gravity of the crimes.").

[197] *Id.* at 128.

[198] *Id.* ("By no means does Dominic Ongwen's personal background overshadow his culpable conduct and the suffering of the victims – the Chamber wishes to emphasise this point again in the strongest terms. Nevertheless, the specificity of his situation cannot be put aside in deciding whether he must be sentenced to life imprisonment for his crimes.").

[199] *Id.* ("As observed by the Prosecution, this is 'one circumstance [which] sets this case apart from others tried before the Court, and warrants some reduction in the sentence.'") (quoting Prosecution Brief, para. 2).

[200] *Id.* at 129 ("[R]ecalling that the determination of the joint sentence involves an exercise of discretion with the aim to impose a proportionate sentence that reflects Dominic Ongwen's total culpability").

"reflects Dominic Ongwen's total culpability," the court settled on twenty-five years without explaining why they shaved five years off the maximum.[201] The only reason for this specific number of years is that "no imprisonment for a period shorter than 25 years could constitute an adequate, proportionate and just joint sentence in light of all relevant circumstances of the present case."[202] It appears then, that the failure to impose thirty years or a life sentence was due to a fear that this would come across as "revenge" for his crimes.[203] The court affirmed that in no way does "Dominic Ongwen's personal background overshadow his culpable conduct and the suffering of the victims," but this reduction of five years seems to signify otherwise.[204] In fact, it appears that the court did weigh his personal experience more heavily despite the fact that he violated the rights to life, personal liberty, sexual integrity, and personal property.[205]

Furthermore, the chamber acknowledged, but did not include as an aggravating circumstance, that Ongwen showed no empathy for the victims or any regret over his actions.[206] Confusingly, the court denounced this lack of empathy and emphasized Ongwen's "constant focus on himself and his own suffering eclipsing that of anyone else."[207] Yet it is this "suffering" that the court took into account when mitigating his sentence by five years.[208] It thus appears that in choosing a sentence, the court valued "deterrence" over "retribution," as it may have deemed retribution as being too closely related to "revenge."[209] However, the court then acknowledged it valued his potential "social rehabilitation" and integration, perhaps viewing these as possible for a defendant who showed no remorse for his actions.[210]

b. *Thomas Lubanga: Proportionality Consideration for Policy of Sentencing*

[201] *Id.* at 130 ("The Majority of the Chamber considers a total term of 25 years of imprisonment to be proportionate to the crimes Dominic Ongwen committed, congruous to his specific individual circumstances arising from his abduction as a child, and suitably conforming to the fundamental purposes of retribution and deterrence underlying sentencing in the system of the Court").

[202] Ongwen, *supra* note 191, at 129 ("The Chamber also recalls, as emphasised above, that, despite the limited, partial overlap in conduct and/or consequences in the factual basis of some of the 61 crimes of which Dominic Ongwen was convicted, the different blameworthiness of several distinct criminal conducts shall be accounted for in the ultimate joint sentence imposed by the Chamber, and adequately reflected therein.").

[203] *Id.* at 128.

[204] *Id.* (describing how "the Chamber wishes to emphasise this point again in the strongest terms," that his history will not outweigh the aggravating circumstances).

[205] *Id.* at 129–30 (including "the right not to be subjected to cruel or degrading treatment to the right to consensually form a family").

[206] *Id.* at 130 (describing this apathy as "not an aggravating factor in and of itself or an element otherwise impinging as such on the length of the prison sentence to be imposed").

[207] *Id.* (describing how he seemed to show no "genuine remorse").

[208] Ongwen, *supra* note 191, at 130 (noting this sentence as "congruous to his specific individual circumstances arising from his abduction as a child").

[209] *Id.* at 128, 130 ("Indeed, it is of the view that this joint sentence adequately reflects the strongest condemnation by the international community of the crimes committed by Dominic Ongwen and acknowledges the great harm and suffering caused to the victims, as well as deterring others from committing similar crimes in the future and discouraging Dominic Ongwen's own recidivism").

[210] *Id.* at 130–31

The ICC also sentenced Thomas Lubanga to fourteen years imprisonment for having enlisted and conscripted children who were under fifteen years of age into the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC) in the Democratic Republic of the Congo.[211] Thomas Lubanga was the former president of the UPC/FPLC, and these acts were considered war crimes.[212] The sentencing decision affirmed that "the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21" of the Rome Statute, but that it looked to ad hoc tribunals as they were "in a comparable position to the Court in the context of sentencing."[213] However, the ICC found that the caselaw was limited, as "the only convictions by an international criminal tribunal for the recruitment or use of child soldiers" came from the Special Court for Sierra Leone (SCSL).[214]

In assessing aggravating factors, the ICC held that the war crime of child enlistment is included among "undoubtedly serious crimes that affect the international community as a whole."[215] This crime exposes children to the violence of war at a young age, causing them to suffer psychological trauma, separation from their families, and, ultimately, causing them to be targets in war.[216] The Court also accounted for the "large-scale and widespread nature of the crimes committed," even though the court did not accept the specific number provided by the defense that around 2,900 children were conscripted into the UPC/FPLC.[217] The ICC further assessed the "age, education, social and economic condition of the convicted person" as required by Rule 145(c) of the ICC Rules.[218] His age of forty-one years, his education in psychology, and his position as the president of UPC/FPLC showed his "level of awareness" of the heinous nature of his crimes.[219] However, the court decided that none of these constituted aggravating factors and thus a life sentence was too harsh.[220] When considering mitigating factors, the court took into account his cooperation with the ICC.[221] Thus, the court decided that fourteen years was sufficient.[222]

The court did not explicitly cite to the normal sentencing purposes of retribution or deterrence, but it did quote the Rome Statute's Preamble in holding that the sentence

[211] *Decision on Sentence Pursuant to Article 76 of the Statute*, ICC-01/04-01/06, ¶ 38.

[212] *Lubanga Case*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/drc/lubanga (last visited Feb. 11, 2025).

[213] *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/04-01/06, ¶ 7 ("There have been seven convictions at the SCSL in four cases for the crime of using child soldiers under the age of 15. In two of those cases, the Trial Chamber did not address each count separately in its sentencing decision, and accordingly it is impossible to determine the effect the conviction for the use of child soldiers had on the overall sentences.").

[214] *Id.* at 6–7.

[215] *Id.* at 15 (explaining how this crime is also "distinguished by the added element of compulsion").

[216] *Id.* at 15–16.

[217] *Id.* at 18–20.

[218] *Id.* at 22 (quoting ICC Rule 145(c)).

[219] *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/04-01/06, ¶ 22 (showing he "understood the seriousness of his crimes," which is an aggravating factor).

[220] *Id.* at 35.

[221] *Id.* at 33–34.

[222] *Id.* at 39.

should help "put an end to impunity" and "contribute to the prevention of such crimes."[223] It also reiterated that sentence length should be proportionate to the crimes committed and "reflect the culpability" of the defendant.[224] Thus, it is unclear which policy guided the chamber in its decision to choose a fourteen year sentence, but since the court referenced the Preamble and its emphasis on "prevention," deterrence was likely the main guiding policy.[225]

Perhaps the ICC should have used retribution as a policy consideration in determining Lubanga's sentence because in March 2025 he announced the formation of a new rebel group in East Congo.[226] His goal is to overthrow the government in the Ituri province—an area that has seen over two hundred civilian deaths and 100,000 people displaced since the beginning of 2025.[227] Thus, in only five years since his release from the ICC in 2020, he has demonstrated no regret over his crimes and is repeating the same offense for which he was sentenced.[228] This exact situation should cause the ICC to rethink the policy decisions behind criminal sentencing and see how deterrence alone was not sufficient to prevent Lubanga from committing the very same crimes for which he was first prosecuted.

B. Comparing the Sentences of the International Criminal Court with the International Criminal Tribunal for the Former Yugoslavia

The main purposes in sentencing for the ICTY, as stated by Judge McDonald, were to be "retribution and deterrence."[229] In another case before the tribunal, the court stressed the importance of punishment, rehabilitation, and "incapacitation of the dangerous."[230] The tribunal wanted to ensure that the sentence was proportional to the conduct of the perpetrator and emphasized that the gravity of the crime was the most important factor in determination of the sentence.[231] Thus, the ICTY's policies, including more than just deterrence, generally garnished harsher punishments than those of the ICC.[232] Comparing a selection of the ICC's sentences with those of the ICTY shows that the ICTY's sentences were generally longer than those of the ICC.

---

[223] *Decision on Sentence pursuant to Article 76 of the Statute*, ICC-01/04-01/06, ¶ 9 (quoting *Rome Statute of the International Criminal Court*, INTERNATIONAL CRIMINAL COURT pmbl. (2021), https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf).

[224] *Decision on Sentence pursuant to Article 76 of the Statute,* ICC-01/04-01/06, ¶ 15 (July 10, 2012) (referring to Rome Statute art. 81(2)(a); ICC R. 145(1)(a)).

[225] *Id.* at 36 (describing how "for having committed, jointly with other persons, the crime of using children under the age of 15 to participate actively in hostilities to 14 years' imprisonment").

[226] Sonia Rolley, Convicted War Criminal Lubanga Announces New Rebel Group in East Congo, REUTERS (Mar. 31, 2025, 3:59 PM), https://www.reuters.com/world/africa/convicted-war-criminal-lubanga-announces-new-rebel-group-east-congo-2025-03-31/.

[227] *Id.* ("Ituri has been rocked by violence by various armed groups for decades.").

[228] *Id.*

[229] SCHABAS, *supra* note 2, at 139 (quoting *Prosecutor v. Tadic* (Case No, IT-94-1-S), Sentencing Judgment, 14 July 1997, (1999) 112 ILR 286).

[230] *Id.*

[231] *See* CRYER, *supra* note 8, at 470 ("including the form and degree of the participation of the accused in the crimes").

[232] *See id.* at 471 (describing the "relatively low" sentences of the ICC compared to ad hoc tribunals).

a. Momir Nikolić: Retribution in Sentencing Policy

Momir Nikolić received a similar sentence to Ongwen for a length of twenty-seven years imprisonment.[233] Unlike Ongwen who was charged with sixty-one counts of war crimes and crimes against humanity,[234] Nikolić was charged with one crime against humanity, in the form of persecutions which included "the murder of thousands of Bosnian Muslim civilians" (including children), "cruel and inhumane treatment," terrorizing civilians, destroying personal property, and forcible transfer.[235] The sentences are thus comparable in length but not comparable in that Nikolić committed one crime and Ongwen committed sixty-one.

To understand how the ICTY arrived at this sentence, the tribunal emphasized the policy of "deterrence, retribution and rehabilitation" to determine the length of Momir Nikolić's punishment.[236] The crime of persecution requires "specific discriminatory intent" which adds to the gravity of the crime.[237] Nikolić was aware of and took part in the infamous crimes in the town of Srebrenica, where over 7,000 Bosnian Muslim men were executed by the Serbian army.[238] Furthermore, the defendant attended meetings where members of the army created the plan to forcibly transfer Muslim women and children and to execute Muslim men.[239] The court assessed how Nikolić not only raised no objections but also proposed sites to detain and execute the civilians.[240] Thus, even though he was only convicted of a single count of a crime against humanity, the ICTY found that a sentence longer than twenty years was "appropriate" due to the "gravity" of the crime.[241]

The court held that three aggravating factors included his position of authority, his role, the victims' vulnerability, and the gravity of the crimes.[242] Even though Nikolić was not in a commanding role, he did implement several of the provisions of the extermination plan and ensured that it could be carried out.[243] His own testimony shows that he wanted to have a "pro-active" role in the plan, and thus the court did not consider any mitigating

---

[233] *See Judgement in the Case the Prosecutor v. Momir Nikolić*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1 (2003), https://www.icty.org/x/cases/nikolic/tjug/en/031202_Nikoli_Momir_summary_en.pdf (describing how Nikolić was initially indicted for the crimes of genocide, extermination, and persecution).

[234] *See Dominic Ongwen sentenced to 25 years of imprisonment*, *supra* note 184.

[235] *Judgment, supra* note 233, at 2. These acts were committed against the civilians in Srebrenica after the Serbian army took control of the area. *Id.*

[236] *Id.* (describing how these principles were "derived from national systems," but also apply at the international level).

[237] *Id.* (analyzing this particular crime against humanity against the backdrop of the many crimes that occurred in the town of Srebrenica).

[238] *Id.* (analyzing the extreme "level of brutality and depravity" committed in this particular region).

[239] *See id.* There were three such meetings that occurred to create this plan regarding Muslim civilians.

[240] *See id.* (asserting that Nikolić coordinated similar actions in Potočari).

[241] *Judgement*, *supra* note 233, at 3 (explaining how Nikolić was also guilty of moving the executed victims' bodies to destroy evidence).

[242] *Id.* at 3 (the ICTY found that the depravity of the crimes was "subsumed in the overall gravity of the offence," although the other factors did weigh on the tribunal's sentencing decision).

[243] *Id.* at 3. The tribunal also considered the fact that the victims were all in particularly vulnerable states, and the court accepted this aggravating factor. *Id.*

factors when sentencing him to twenty-seven years' imprisonment.[244] In comparing Ongwen's sentence by the ICC and Nikolić's sentence by the ICTY, their similarity is remarkable despite the fact that Ongwen committed sixty-one counts of crimes against humanity and Nikolić committed one count; in fact, Nikolić's sentence is longer than Ongwen's sentence by two years.[245] Thus, the ICTY's emphasis on retribution seems to have played a role as it did not consider mitigating factors and noted that persecution was a specific intent crime.[246]

The ICTY acknowledged the direct suffering caused to Nikolić's victims and also emphasized the effect on the international community by saying, "retribution is better understood as the expression of condemnation and outrage of *the international community* at such grave violations of, and disregard for, fundamental human rights at a time that people may be at their most vulnerable, namely during armed conflict."[247] Thus, this sentence appears to have retribution as its main focus, unlike that of Ongwen or Lubanga which stressed deterrence and social reintegration.[248]

b. Drazen Erdemović and Anto Furundžija: Duress and Leadership Positions

Another one of the perpetrators in the war in Yugoslavia, Drazen Erdemović, committed war crimes in the city of Srebrenica, including killing seventy civilians.[249] However, he received only a five-year imprisonment, due to several mitigating factors: he was only twenty-three years old when he committed the crimes, he felt remorse, he was a husband and father, and he showed cooperation with the trial process.[250] Most importantly, the ICTY held that he was under duress and may have been executed by officials had he not followed orders.[251] Thus, unlike Ongwen and Lubanga, who were both in commanding positions, Erdemović's status as a soldier with no power to issue commands gave him greater sympathy from the tribunal.[252] Further, Erdemović not only emphasized the duress that he was under, but also showed remorse for his actions, being "the first person to openly admit to taking part in the Srebrenica massacre."[253]

---

[244] *Id.* at 3-5. The mitigating factors included Nikolić's guilty plea and personal circumstances. *Id.* Although the tribunal noted that a guilty plea is helpful to the saving of resources for the court, it held that the guilty plea did not outweigh the seriousness of the crimes enough to reduce his sentence. *Id.*

[245] *See id.* (setting Nikolić's sentence at twenty-seven years); *Dominic Ongwen sentenced to 25 years of imprisonment*, *supra* note 184 (twenty-five years).

[246] DeGuzman, *supra* note 71, at 274.

[247] *Id.* (quoting *Prosecutor v. Nikolić*, Case No. IT-02-60/1 Judgment, ¶ 86 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003)).

[248] Ongwen, *supra* note 191, ¶¶ 389, 391, 393-97 (describing the policy reasons of Ongwen's sentence); *Dyilo*, *supra* note 126, ¶¶ 37, 97 (referencing the Preamble of the Rome Statute for Lubanga's sentence).

[249] *See* Murphy, *supra* note 28, at 91 (explaining the sentencing for 1995 Srebrenica actions).

[250] *See id.* (quoting language about "both aggravating and mitigating factors").

[251] *See id.* (rejecting the seven-year sentence recommended by both defense and prosecution).

[252] Ongwen, *supra* note 191, ¶¶ 384-85 (describing Ongwen's control over LRA army); *Dyilo*, *supra* note 212 (describing Lubanga's role as president).

[253] Trahan, *supra* note 87, at 38 (describing how guilty pleas are "helpful to potentially combatting denial").

Although one of the main goals of the ICTY was deterrence of crimes, it is difficult to show that its creation in fact prevented any crimes.[254] Notably, the Srebrenica massacre, "the worst single atrocity of the war," took place in 1995, a few years after the ICTY was established.[255] Thus, it is likely that the ICTY's other goal of retribution played a larger role, and since Erdemović was forced to execute individuals, the court held that a lighter sentence was necessary to show just retribution for his crimes.[256] This contrasts with the sentences of Ongwen and Lubanga, where the ICC appears to value deterrence and prevention of crimes, thus leading to lighter sentences for defendants who abused their positions of power.[257]

Erdemović's sentence is contrasted with the sentencing of another perpetrator prosecuted before the ICTY, Anto Furundžija, who received a ten-year sentence despite the fact that he was also twenty-three years old, had a child, and had no record of any previous crimes.[258] Furundžija committed the crime of torture and the crime of rape as an outrage upon personal dignity, with aggravating factors being that the victim was a "civilian detainee" and he held a commanding position.[259] Just like Ongwen, Furundžija was in command and committed crimes against civilians.[260] Thus, the ICC here imposed a longer sentence for this aggravating circumstance than for Erdemović, who was under duress.[261] The ten years given to Furundžija is only four years shorter than that of Thomas Lubanga's sentence—showing the harshness of the ICTY's sentence compared to that of the ICC.[262] This shows that, in using deterrence as its guiding policy, the ICC hands out lighter sentences than those of the ICTY which often stressed retribution as of greater importance.[263]

C. Comparing the Sentences of the International Criminal Court with the International Criminal Tribunal for Rwanda

The ICTR's main sentencing purposes were to be retribution and deterrence.[264] Like the ICTY, it also emphasized proportionality of the sentence to the crime and assessed the gravity of the crime as the most important factor.[265] The ICTR handed out more life

---

[254] *Id.* at 47 ("[I]t was other events that brought the violations to a halt, not the ICTY's work.").

[255] *Id.* at 47 (describing how the massacre began on July 11, 1995).

[256] *See* Murphy, *supra* note 28, at 91 (discussing the mitigating factor of duress); *see also* SCHABAS, *supra* note 2, at 139 (describing retribution and deterrence as the ICTY's most important sentencing policies).

[257] Ongwen, *supra* note 191, ¶ 384 (describing Ongwen's control over the LRA army); Prosecutor v. Dyilo, *supra* note 212 (describing Lubanga's role as president).

[258] *Id.* ¶ 267 (imposing concurrent sentences of ten years and eight years).

[259] *Id.* (explaining that the "viciousness of the crimes" warranted more weight than the mitigating factors).

[260] *Id.*

[261] *See id.*; Murphy, *supra* note 28, at 91.

[262] *See* Murphy, *supra* note 28, at 91; Prosecutor v. Dyilo, *supra* note 126.

[263] *See* CRYER, *supra* note 8, at 471 (describing the ICTY life sentences with ICC sentences of nine to eighteen years as of 2019).

[264] *See* SCHABAS, *supra* note 2, at 164 (citing Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgment and Sentence, (Int'l Crim. Trib. For Rwanda Dec. 6, 1999)). The court hoped that deterrence would prevent future crimes by showing potential perpetrators that "the international community shall not tolerate the serious violations of international humanitarian law and human rights." *Id.*

[265] CRYER, *supra* note 8, at 470.

sentences than the ICTY for those who committed genocide, and on the whole, gave out longer sentences than those of the ICC.[266] This may be because the tribunal assessed the gravity of the crime due to the case's particular facts rather than assessing gravity as an abstract concept.[267] The facts that judges often accounted for included how much the perpetrator participated in the atrocities, the crime's scale, the amount of victims, and how much the victims suffered, showing that retribution was most often the guiding policy reason.[268]

a. Callixte Kalimanzira: Retribution as the Sentencing Policy

The ICTR convicted Callixte Kalimanzira of aiding and abetting genocide and sentenced him to twenty-five years' imprisonment.[269] He had encouraged Tutsis fleeing the genocide to gather in a place "where he knew that they would be attacked, and for then providing armed reinforcements to attackers."[270] Aggravating factors included his position of power in the Ministry and the fact that "he abused the public's trust that he, like other officials, would protect them."[271] Mitigating factors did not include the fact that he himself did not commit murder or that he had been a public servant for many years before the genocide.[272] The only mitigating factor considered was that he surrendered to the tribunal and cooperated with all requests.[273]

This is a similar length of sentence as the Ongwen case, but since Ongwen directed attacks, it is shocking that his sentence was not longer than that of Kalimanzira.[274] It is obvious that the ICTR felt that Kalimanzira's aiding of genocide and his authority position required a longer sentence, but the ICC did not feel like Ongwen, who himself committed the crimes and was also in a position of power, deserved a longer sentence.[275] The ICC also showed this same sentiment when sentencing Thomas Lubanga, holding that his position of power did enable him to understand the seriousness of the crime, but only giving him fourteen years.[276] The ICTR, emphasizing above all the number of victims and the extent of the suffering, thus felt that just retribution would be to give Kalimanzira a

[266] *Id.* at 471.

[267] Yvonne M. Dutton, *Sentencing Policies of the Ad Hoc Tribunals*, *in* THE LEGACY OF AD HOC TRIB. IN INT'L CRIM. L. 249, 251 (Milena Sterio & Michael P. Scharf eds., 2019).

[268] *See id.* at 251 (explaining that in some cases, the tribunal "include[ed] the number of victims in their gravity calculation, while some consider[ed] the number of victims as an aggravating factor," being careful to avoid double counting).

[269] *Kalimanzira*, CTR. FOR GLOB. L. AND JUST., https://ijrcenter.org/international-criminal-law/ictr/case-summaries/KALIMANZIRA/ (last visited Jan. 27, 2025).

[270] *Id.*

[271] *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgment, ¶ 750 (Int'l Crim. Trib. for Rwanda June 22, 2009) ("The Chamber notes Kalimanzira's prominence and high standing in Butare society as a former *sous-préfet* and the fact that he was one of only three people from his area and of his generation to have received a university education.").

[272] *Id.* ¶¶ 751-752.

[273] *Id.*

[274] Ongwen, *supra* note 260, ¶ 141.

[275] *Id.* ¶¶ 141-142.

[276] *Dyilo*, *supra* note 126, ¶¶ 97-98.

longer sentence, contrasted with the ICC's focus on deterrence that gave Ongwen a similar sentence even though he himself directed the commission of the crimes.[277]

D. Comparing the Sentences of the International Criminal Court with the International Military Tribunal at Nuremberg

The IMT's sentencing policies are visible from the tribunal's goals to prosecute individuals according to the evidence of their crimes, to create a record of the atrocities, and to create international law.[278] Aside from the fact that capital punishment was common at that time, the court handed out harsher sentences as an example to the world that individuals were responsible for crimes they committed on a state's behalf and must bear the punishment of their actions.[279]

a. Baldur von Schirach: The IMT's Focus on Individuals Bearing Punishments for Crimes Committed on Behalf of States

The tribunal indicted Baldur von Schirach, who was the head of Hitler youth organizations for the Nazi party starting in 1931.[280] By 1940, he assumed the position of Reichs Governor of the city of Vienna and received reports of the already ongoing deportation of Jewish citizens from the city.[281] These reports included the mass killing of Jews by the Einsatzgruppen and details about Jewish civilians sent to Vienna to do "essential war work."[282] For this knowledge, and only because he himself did not enact the policies, he received a twenty-year sentence for crimes against humanity rather than the death penalty.[283]

Von Schirach's sentence of twenty years is only five years shorter than that of Ongwen, although Von Schirach himself did not enact the policies, unlike Ongwen who participated directly in the crimes.[284] The ICC thus handed out a comparable sentence to Ongwen who himself conscripted children into the army and forced women into sexual

[277] Dutton, *supra* note 267, at 251; INT'L CRIM. CT., *supra* note 185.

[278] Wright, *supra* note 19, at 74-76 (describing how the United States had ensured that its armies did not destroy any documentation found and thus helped ensure that there would be a historical record).

[279] *See* SANDS, *supra* note 18, at 120 (Per Shawcross, "[i]ndividuals who acted on behalf of such a state were 'directly responsible' and should have punishments heaped upon them.").

[280] Ben S. Austin, *Nuremberg Trial Judgements: Baldur von Schirach*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/nuremberg-trial-judgements-baldur-von-schirach (last visited Jan. 27, 2025).

[281] *Id.*

[282] *Id.*

[283] *See id.* In this case, the "Tribunal produced powerful documentary evidence that he knew and approved the deportation of Jews from Vienna to the extermination camps. He also knew of the Einsatzgruppen's mobile van extermination of Jews in eastern Poland. This knowledge rendered invalid his claim that he supported the deportation of Reich Jews following Kristallnacht because he thought it was in the best interest of Jews."

[284] *Id.* ("The Tribunal finds that von Schirach, while he did not originate the policy of deporting Jews from Vienna, participated in this deportation after he had become Gauleiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the Ghettoes of the East. Bulletins describing the Jewish extermination were in his office."); *Prosecutor v. Ongwen*, ICC-02/04-01/15, Sentence, 53 (May 6, 2021) INTERNATIONAL CRIMINAL COURT 53, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_04230.PDF (last visited Jan. 27, 2025).

slavery.[285] This similarity is striking, considering Von Schirach received an almost equally harsh punishment even though he did not enact the policy that led to the deportation of Jews and only had knowledge of the atrocities occurring in Vienna.[286] This makes it even more apparent that the ICC's sentence appears to value rehabilitation over deterrence, as Ongwen's sentence takes into account the aggravating factors committed by Ongwen himself, but still reduces the sentence by five years.[287] The IMT handed out harsh sentences, not considering rehabilitation, but only retribution, thus highlighting how the ICC has grown lenient due to its focus on rehabilitation and deterrence instead of retribution.[288]

V. Impact

The ICC has seen thirty-two cases since its inception in 2002.[289] This stands in stark contrast to the previous international tribunals.[290] The IMT sentenced twenty-two individuals.[291] From 1996 until 2017, the ICTY sentenced sixty-two individuals.[292] The ICTR sentenced ninety-three individuals from 1995 until 2015.[293] The ICTR and the ICTY both functioned respectively for twenty years, which is about the same time frame as the ICC thus far.[294] Yet in this time span, the ICTY sentenced about two times as many defendants as the ICC, and the ICTR sentenced about three times as many.[295] Scholars have criticized the ICTY and the ICTR as being extremely inefficient and costly.[296]

Although the ICTR and the ICTY received criticism for handing out inconsistent sentences, recent studies showed that this was not actually the case, and the sentences were similar across the two tribunals.[297] Those who received longer sentences were often in positions of power, had committed a higher number of crimes, had committed genocide or crimes against humanity, or directly contributed to the completion of crimes rather than simply abetting them.[298]

---

[285] Ongwen, *supra,* note 207, at 126.

[286] Austin, *supra* note 280.

[287] Ongwen, *supra,* note 207, at 127 ("It is the presence of such extraordinary circumstances that renders what would otherwise be the 'ordinary' statutory limit of a term of imprisonment up to a period of 30 years disproportionately low in relation to the gravity of the crimes.").

[288] *See* SANDS, *supra* note 18, at 282 (Per Shawcross, "[i]ndividuals who acted on behalf of such a state were 'directly responsible' and should have punishments heaped upon them.").

[289] *The Court Today*, INT'L CRIM. CT. 1, https://www.icc-cpi.int/sites/default/files/2024-11/TheCourtToday-Eng.pdf (last visited Nov. 8, 2024).

[290] *Id.*

[291] *See* Austin, *supra* note 4.

[292] *Key Figures of the Cases*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/cases/key-figures-cases (last visited Jan. 27, 2025); *Judgement List*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, https://www.icty.org/en/cases/judgement-list (last visited Jan. 27, 2025).

[293] *See The ICTR in Brief*, *supra* note 88.

[294] *Judgement List*, *supra* note 292; *The ICTR in Brief*, *supra* note 88.

[295] *Id.*

[296] George S. Yacoubian, Jr., *Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law*, 165 World Aff. 133, at 139 (2003).

[297] CRYER, *supra* note 8, at 471.

[298] *See id.* (describing how war crimes received lesser punishments than genocide or crimes against humanity).

Many scholars and nations have criticized nations such as the United States for refusing to assent to the Rome Statute, often inferring that the reason is because non-parties do not want to submit to an international court's jurisdiction and allow their actions to be scrutinized by the court.[299] Non-parties are not required to furnish the ICC with evidence or to hand over any individuals who have been accused of the four crimes over which the ICC has jurisdiction.[300] The Rome Treaty has the power, however, to issue indictments over citizens of non-parties.[301] The ICC does not account for domestic laws of the country in which the atrocities took place, and this often prevents the indictment from having domestic significance or respect in that nation.[302] Even at the ICTR, which handed out more life sentences than the ICC, many Rwandan citizens viewed the ICTR as too lenient in its sentencing.[303] The national courts in Rwanda gave out longer sentences to "lower-level defendants" than ICTR gave to higher-level defendants under its jurisdiction.[304] Thus, the ICC's similar failure to account for the sentencing policies of national courts also calls into question its effectiveness, and its policy of deterrence.[305]

The ICC's history of handing out lighter sentences calls into question its effectiveness. The presence of the ICTY and the ICTR served as a test for the creation of an international criminal court.[306] To succeed, both tribunals relied on the "financial and political support of the international community," and thus it was necessary to ensure that the effort and resources of the supporting states are used efficiently and achieve meaningful solutions.[307] By 2003, the ICTR had spent $410 million and the ICTY had spent $471 million, amounting to $45.5 million per conviction and $22.5 million per conviction respectively.[308] At that time, there were still many perpetrators who had not yet been prosecuted, and thus these tribunals were deemed "as organizational nightmares and legal failures."[309] The ICC itself could thus be considered an even worse organizational failure if it does not effectively use resources by handing out sentences that are too lenient.

---

[299] *See* Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW AND CONTEMP. PROBS. 67, 68 (2001) (describing how the United States want to avoid an "international indictment and arrest warrant" for any of its actors).

[300] *Id.* at 69.

[301] *See* Rome Statute, *supra* note 181 at art. 12.

[302] *See* Nancy Amoury Combs, *Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing*, 41 YALE J. INT'L L. 1, 7–8 (2016) ("Incorporating domestic law into international sentencing will not magically silence domestic critics, but it will inject local norms into international prosecutions in a way that is particularly likely to enhance community buy-in and respect for those international criminal prosecutions.").

[303] *See* deGuzman, *supra* note 71, at 283 (describing the sentiment of Rwandan citizens).

[304] *Id.* ("Not only did lower-level defendants receive harsher punishments in national courts, including the death penalty as noted above, but the facilities in which they served their sentences were considered luxurious compared to Rwandan prisons, and even to the living conditions for most Rwandans.").

[305] Combs, *supra* note 302, at 7–8.

[306] *See* Akhavan, *supra* note 90, at 510 ("In view of the present deliberations on the establishment of a permanent international penal court, the stakes of this experiment are very high.").

[307] *Id.* ("[T]he ultimate success or failure of the Rwanda Tribunal depends on the financial and political support of the international community, which, in turn, depends on a firm resolve to vindicate the most elementary norms of humanity.").

[308] *See* Yacoubian, *supra* note 6, at 139 (describing the costs of the tribunals).

[309] *Id.* (describing the "inability of the ICTR and ICTY to prosecute expeditiously").

VI. Conclusion

The ICC is a noble endeavor, and its inception was a forward-thinking and excellent idea. The court was created to acknowledge and condemn the most heinous of crimes, and yet light sentencing seems to suggest that these crimes actually do not merit difficult sentences.[310] If the ICC wants to truly serve humanity well and condemn heinous crime, then it needs to seriously consider following previous international criminal courts' precedents and hand out sentences that actually fit the gravity of the crime. In this way, the ICC will continue to serve the best interests of the international community by holding onto the trust of its member states.

The matters over which the ICC has jurisdiction are of utmost importance to the affected nations, and handing out arbitrary sentences with no clear sentencing purpose may call into question the ICC's existence. States that have assented to the ICC's jurisdiction are looking to its expertise to help them prosecute individuals who have committed crimes such as genocide. The court must therefore be diligent to clarify the reasoning behind the various sentences it imposes to assure these nations that it chooses sentences in light of the horrendous nature of the crimes.

As seen in the cases that this Comment has analyzed, the ICC has often determined the length of a defendant's sentence in a seemingly arbitrary manner. This lack of clarity may call into question the court's effectiveness and why it often fails to punish such serious crimes with an equally serious sentence. The failure to clearly state a purpose that underlies the court's choice of punishment will continue to prevent the court from fully carrying out its goals of serving the international community through unclear guidelines and disproportionate sentences.

The ICC's sentencing guidelines make it difficult to merit a life sentence, but when the defendants have committed genocide, war crimes, crimes against humanity, or crimes of aggression, this sentiment seems misplaced.[311] Thus, its emphasis on deterrence and rehabilitation over retribution, while not explicitly stated, has often led it to hand out shorter and shorter sentences.[312] The ICC need not change its sentencing guidelines to accomplish this, but simply shift its purpose and mindset when declaring a defendant's sentence. The court must also make its purpose clear whenever it details the sentencing decision and must be more diligent to connect the length of the sentence with the various factors that characterize the crime. The IMT, ICTY, and ICTR are thus good examples of courts that emphasized retribution and should serve as models for the policy of the ICC's sentencing guidelines.[313]

The ICC will hand out longer but more merited sentences if it follows the examples of the IMT, the ICTY, and the ICTR by valuing retribution more than deterrence

---

[310] *Understanding the International Criminal Court*, *supra* note 1, at 23.

[311] *See* Hole, *supra* note 13, at 63 (describing how the ICC Rules are written in a way to imply the rarity of life sentences by simply stating that "the individual circumstances of the convicted person" will determine if a life sentence is necessary).

[312] CRYER, *supra* note 8, at 471 (The ICC's sentencing "is relatively low compared to the average sentencing outcomes at the ad hoc Tribunals.").

[313] CRYER, *supra* note 8, at 471.

and rehabilitation.[314] While the court may be hesitant to impose sentences that it deems harsh, it must stay aware that the crimes themselves are the harshest known to humanity. While it seems hesitant to value retribution as a sentencing purpose, it must do so to address the reality that the victims of these crimes live with every day and to assure its member nations that it takes this suffering seriously. The court must clarify its sentencing purpose within its decisions to maintain the trust of the international community. In this way, the ICC will be able to address the heinous nature of the crimes within its jurisdiction and give the defendants the sentence deserved by the atrocity of their actions.

[314] *See* CRYER, *supra* note 8, at 468 ("The ICTY, ICTR, and ICC emphasize retribution and general deterrence as primary purposes of punishment. These two goals were deemed to be of equal importance."); CASSESE, *supra* note 14, at 428 (noting that the ICTY considered also reprobation).

UNIVERSITY OF CONNECTICUT

1881

CONSUMER DEBT RELIEF IN BRAZIL AND THE UNITED STATES: A PARTIAL CONVERGENCE WITH BRAZIL'S CONSUMER OVER-INDEBTEDNESS LAW

Camila Ramos Rhoden & Stephen J. Ware[*]

Abstract

This article compares debt collection and consumer debt relief in the United States and Brazil. It is the first article to do that since the 2021 enactment of Brazil's Consumer Over-Indebtedness Law. This Article compares that Over-Indebtedness Law with its closest U.S. analog, Chapter 13 of the Bankruptcy Code, and does so in the broader context of each nation's debtor-creditor law. The United States has offered bankruptcy relief to consumers since 1898 and has since 1978 provided consumer debtors two relatively attractive Bankruptcy Code choices for discharging debt: Chapter 7 liquidation and a payment plan under Chapter 13. In contrast, Brazil has not developed a similarly effective system of consumer debt relief. Like other civil law (as distinct from common law) countries, Brazil has long offered bankruptcy to businesses but not to consumers. Brazil's longstanding Civil Insolvency law for consumers does not provide an immediate fresh start and quick discharge like Chapter 7 but instead delays the discharge for at least five years during which any property acquired by the debtor will be taken to pay creditors. These differences explain why Brazilian consumers rarely choose to enter civil insolvency while hundreds of thousands of U.S. consumers choose each year to file for Chapter 7. The differences between the U.S. and Brazil may be somewhat less stark with respect to payment plans because Brazil's enactment of the Consumer Over-Indebtedness Law gives it something roughly similar to Chapter 13. However, this Article shows that the Over-Indebtedness Law is harder on debtors than Chapter 13 with respect to their eligibility for the process, its treatment of secured and non-consumer unsecured debts, and the role of creditor consent in confirming a repayment plan. Moreover, a higher proportion of debtors using the Over-Indebtedness law may do so without a representation from a lawyer, compared to the low proportion of unrepresented debtors in Chapter 13. In sum, even with the Over-Indebtedness Law, Brazilian consumers continue to have far less ability than U.S. consumers to discharge debts through a court-confirmed repayment plan.

THE
CONNECTICUT JOURNAL
OF
INTERNATIONAL LAW

TABLE OF CONTENTS

I. Introduction

Brazil and the United States are the two most populous nations in the Western Hemisphere, and their histories of colonialism and slavery include many parallels. However, differences between the nations abound, including in their legal systems. While at least forty nine of the fifty United States have legal systems based on the English common law,[1] Brazil, like the rest of South America, Europe, and much of the rest of the world, uses a civil law system.[2]

Consumer bankruptcy and debt relief are among the areas of law profoundly different in Brazil and the United States, and this Article is the first to provide that comparison since

---

[1] Patrick S. Ottinger, *From the Courts to the Code: The Origin and Development of the Law of Louisiana on Mineral Rights*, 1 LSU J. ENERGY L. & RESOURCES 5, 11 (2012) ("[I]n contrast to all of the other forty-nine states, whose law is based on the common law of England, the essential private law of Louisiana is contained in a Civil Code based on French and Spanish authorities and precedents."); Santiago Legarre & Christopher R. Handy, *A Civil Law State in A Common Law Nation, A Civil Law Nation with A Common Law Touch: Judicial Review and Precedent in Louisiana and Argentina*, 95 TUL. L. REV. 445, 485 (2021) ("[W]hen placed on a spectrum between a pure common law system with maximum adherence to stare decisis and a pure civil law system with no recognition of precedent at all, the U.S. federal system and the systems of the other forty-nine states are representative of the pure common law system."); Helen Hershkoff & Adam Littlestone-Luria, *The Louisiana Constitution and the Courts of Westminster: Standing and the Civil Law Heritage*, 85 LA. L. REV. 523, 530–31 (2025) ("[T]oday, most scholars would characterize the Louisiana system as 'mixed' (another term, although less popular, is 'bijural').").

[2] *See, e.g.*, Wayne R. Barnes, *Contemplating A Civil Law Paradigm for A Future International Commercial Code*, 65 LA. L. REV. 677 (2005).

> Civil law (exclusive of any Common Law), whether in "pure" or "mixed" form, is utilized by some 115 nations, or 60.21% of all nations of the world. These nations account for 59.01% of the world's population. These aggregate numbers are derived by adding together yet another four combinations of nations: (1) Civil Law (most of Continental Europe, Asia, Central America, and South America, including Argentina, Belarus, Belgium, Brazil, Colombia, France, Germany, Greece, Italy, Mexico, Netherlands, Peru, Poland, Romania, Russia, Spain, Turkey, Ukraine, Venezuela, and Vietnam); (2) mixed systems of Civil Law and local Customary Law (including China, Congo, Ethiopia, Japan, North Korea, South Korea, Madagascar, and Niger); (3) mixed systems of Civil Law and Muslim Law (including Algeria, Egypt, Libya, Morocco, Syria, and Tunisia); and (4) mixed systems of Civil Law, Muslim Law, and local Customary Law (including Indonesia).
>
> Finally, it happens that there are a handful of jurisdictions which, in fact, have a legal system which is a mixture of Common Law and Civil Law. Such a Common Law-Civil Law blended legal system is utilized by some twenty-two nations, or 11.52% of all nations of the world. These nations account for 5.74% of the world's population. These aggregate numbers are derived by adding together the following four combinations of nations: (1) mixed systems of Civil Law and Common Law (including Philippines, South Africa, and Thailand);26 (2) mixed systems of Civil Law, Common Law, and Customary Law (including Cameroon, Sri Lanka, and Zimbabwe); (3) mixed systems of Civil Law, Common Law, and Muslim Law (including Iran, Jordan, Saudi Arabia, Somalia, and Yemen); and (4) mixed systems of Civil Law, Common Law, and Talmudic Law (including only Israel).

Id. at 684–85.

the 2021 enactment of Brazil's Consumer Over-Indebtedness Law,[3] (Law No. 14,181). This Article compares that Over-Indebtedness Law with its closest U.S. analog, Chapter 13 of the Bankruptcy Code, and does so in the broader context of each nation's debtor-creditor law.

Around the world, "bankruptcy" relief was historically only for business debtors. But in 1898, the United States began continuously offering bankruptcy relief to individual consumers and then, to a lesser degree, so did some other common law nations.[4] As late as the turn of the 21st century though, confining bankruptcy relief to business debtors persisted across civil law nations, perhaps especially in South America.[5] In 2003, José Reinaldo de Lima Lopes wrote that in Brazilian law, "as in most Roman law derived systems," bankruptcy "applies exclusively to comerciantes [merchants], either as individuals or incorporated legal entities."[6]

The contrast between the United States' consumer-as-well-business bankruptcy law and Brazil's business-only bankruptcy law is apparent in the broad structures of each nation's laws. The U.S. Bankruptcy Code is an integrated set of federal statutes governing the bankruptcies of both individuals (consumers) and business entities. When it was enacted in 1978 and for many years thereafter, the U.S. Bankruptcy Code was—from an international, comparative perspective—generous to both consumer and business debtors.[7] Many other nations have since moved in its debtor-friendly direction,[8] but few, if any, match the consumer debt relief of the Bankruptcy Code's Chapter 7, which permits individuals to quickly and cheaply discharge most or all of their debts.[9] Over 200,000 people in the U.S. file for Chapter 7 bankruptcy every year.[10]

In contrast, Brazilian law on business bankruptcy is entirely separate from Brazilian law on consumer debtors, and the latter provides relief to few people. With respect to businesses, the 2005 Brazilian Bankruptcy Act changed Brazilian business bankruptcy from "an obsolete system that provided no incentives for the rehabilitation of viable companies," to a system that, like Chapter 11 of the U.S. Bankruptcy Code, "foster[s] reorganization of viable businesses."[11] However, this 2005 Brazilian Bankruptcy Act did not expand relief for

---

[3] Lei No. 14.181, de julho de 2021 [Law No. 14,181 of July 2021], Código de Proteção e Defesa do Consumidor [C.D.C.] [Consumer Protection And Defense Code], (Law No. 14,181 (2021) (Braz.).

[4] Charles J. Tabb, *Lessons from the Globalization of Consumer Bankruptcy*, 30 LAW & SOC. INQUIRY 763, 2 (2005) (reviewing JOHANNA NIEMI-KIESILÄINEN, IAIN RAMSAY & WILLIAM WHITFORD, CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE (2003)).

[5] *Id.* (citing Efrat 2002).

[6] José Reinaldo de Lima Lopes, *Consumer Bankruptcy and Over-indebtedness in Brazil*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 91 (JOHANNA NIEMI-KIESILÄINEN, IAIN RAMSAY & WILLIAM WHITFORD 2003).

[7] Iain Ramsay, *Comparative Consumer Bankruptcy*, 2007 U. ILL. L. REV. 241(2006).

[8] The World Bank, *Working Group on the Treatment of the Insolvency of Natural Persons, Report on the Treatment of the Insolvency of Natural Persons* 121 (2013), https://documents1.worldbank.org/curated/en/668381468331807627/pdf/771700WP0WB0In00Box377289B00PUBLIC0.pdf.

[9] *See infra* notes 160–61 and accompanying text.

[10] U.S. Courts, *Bankruptcy Filings Rise 16.8 Percent*, (Jan. 26, 2024), https://www.uscourts.gov/news/2024/01/26/bankruptcy-filings-rise-168-percent.

[11] João Guilherme Thiesi da Silva, *Changes and Convergence of Bankruptcy Law: Recent Experience in Brazil* 24 (Oct. 2022) (LL.M Essay, Columbia Law School) (https://scholarship.law.columbia.edu/llm_essays_theses/8) (discussing Law No. 11,101/2005). In particular, the Brazilian Bankruptcy Act:

consumer debtors, leaving them under Brazil's archaic "civil insolvency" procedure, which delays the discharge for at least five years,[12] and is rarely used.[13]

Perhaps because it is so difficult for Brazilian consumers to discharge debt, as of 2020, the average Brazilian family devoted 30.2% of its income on debt payments.[14] The growth of increasingly indebted families in Brazil apparently created momentum for the development of a legal process to help families overcome their consumer debts. However, rather than go all the way to enacting a quick discharge like Chapter 7's, Brazil's Congress enacted 2021's Over-Indebtedness Law,[15] which follows a trend, particularly in civil law countries like France, of "encouraging parties to agree on a debt repayment plan and making the judiciary an active participant in dealing with consumer over-indebtedness."[16] Brazil's Over-Indebtedness Law in some ways resembles Chapter 13 of the U.S. Bankruptcy Code, as this Article will explain. However, as this Article also explains, the Brazilian law is harder on debtors than Chapter 13 with respect to their eligibility for the process, its treatment of

---

> adopted a kind of reorganization proceeding aimed at rescuing companies through a mechanism that shares similarities with the one found in U.S. Chapter 11. The Brazilian law provides for court-supervised rescue as well as expedited reorganizations with pre-packaged rescue plans. A special rescue proceeding for small companies is also present. A company which files for an in-court rescue—no creditor is entitled to file such a petition—has all enforcement actions against it stayed for 180 days upon the opening of such a proceeding. During this period, it may negotiate a repayment plan-similar to a Chapter 11 plan of reorganization-with its creditors while it generally remains in control of its own affairs. The plan is submitted for approval on a class-based vote carried out in a creditors' meeting. If the plan is approved by the required majorities and is confirmed by the court, the company is allowed to survive. Once confirmed by the court, the plan is mandatory as to all creditors, even the dissenting ones. Rejection of the plan, however, entails the liquidation of the debtor company, unless the court is able to apply the cram down provisions of the Bankruptcy Act and confirm the plan despite the disapproving vote of one class of creditors.

Paulo Fernando Campana Filho, *The Legal Framework for Cross-Border Insolvency in Brazil*, 32 HOUS. J. INT'L L. 97 (Fall 2009).

[12] Lei No. 5.869, de 11 de Janeiro de 1973, Código de Processo Civil [C.P.C.] [Law number 5,869] [Code of Civil Procedure] ch. VIII, art. 778 ("[C]onsideram-se extintas todas as obrigações do devedor, decorrido o prazo de 5 (cinco) anos, contados da data do encerramento do processo de insolvência.") ["[I]t shall be considered that all obligations of the debtor are extinguished upon the lapse of five (5) years from the date of the closure of the insolvency proceedings."] (Braz.). The former Civil Procedure Code of 1973 provides for civil insolvency, and this law was continued in Brazil's current Civil Procedure Code of 2015. *See* CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 1052 de 16 de mar. de 1973 [CIVIL PROCEDURE CODE art. 1052 of March 16, 1973] (Braz.) ("Art. 1.052. Até a edição de lei específica, as execuções contra devedor insolvente, em curso ou que venham a ser propostas, permanecem reguladas pelo Livro II, Título IV, da Lei nº 5.869, de 11 de janeiro de 1973 ") ["[U]ntil a specific law is enacted, executions against an insolvent debtor, both those that are pending and those that will be filed, shall continue to be regulated by Book II, Title IV, of Law No. 5.869, of 11 January 1973."]. (Braz.).

[13] Maurício Pereira Cabral, *Insolvência Civil: uma alternativa para a inadimplência crônica* [Civil Insolvency: an alternative to chronic default], Migalhas (July 28, 2020 at 03:00 PM), https://s.migalhas.com.br/S/886A0A.

[14] Gráfico 4. Percentual médio da renda comprometida com dívidas x tempo de comprometimento [Chart 4. Average percentage of income committed to debt vs. time of commitment] at 6 (2024), https://portal-bucket.azureedge.net/wp-content/2025/01/Analise_Peic_2024.pdf.

[15] Lei No. 14.181, de julho de 2021 [Law No. 14,181 of July 2021], Código de Proteçao e Defesa do Consumidor [C.D.C]. [Consumer Protection and Defence Code], (Law No. 14,181 (2021) (Braz.).

[16] Claudia Lima Marques & Káren Rick Danilevicz Bertoncello, *Consumer Credit and Over-Indebtedness in Brazil: the Response of the 2021 Reform of the 1990 Brazilian Consumer Code*, 10 J. OF INT'L & COMPAR. LAW 311, 314 (2023).

secured and non-consumer unsecured debts, and the role of creditor consent in confirming a repayment plan. Moreover, in contrast to the vast majority of Chapter 13 debtors who are represented by a lawyer, a greater proportion of Brazilian consumers may attempt to use the over-indebtedness procedure without the help of a lawyer. In sum, even with the Over-Indebtedness Law, Brazilian consumers continue to have far less ability than U.S. consumers to discharge debts through a court-confirmed repayment plan.

After this Introduction, Parts II and III of this Article compare how creditors collect consumer debts in Brazil and in the U.S. Part IV compares Brazil's "civil insolvency" with Chapter 7 and shows that only the latter provides much debt relief. Part V briefly compares Chapter 7 with the payment plans of Chapter 13 and Brazil's Over-Indebtedness Law. Then Part VI provides the first sustained comparison of the Over-Indebtedness Law with Chapter 13. Part VII briefly concludes.

II. Non-Judicial Debt Collection

a. Creditors' Words

When their consumer debtors' default, creditors in both the United States and Brazil often try to collect without involving courts. Such non-judicial collection efforts can be divided into those that merely involve words, and those that involve taking property from the debtor.

Non-judicial collection efforts typically begin with the creditor or its agent simply asking the debtor to pay. In the U.S., creditors or their lawyers, often send consumer debtors what are known as "dunning letters," which say that a debt is past due.[17] Similarly in Brazil, creditors may send an "Extrajudicial Notice" to the debtor,[18] which outlines the facts of the legal relationship between the parties and establishes a deadline for the debtor to cure the default. In addition, a creditor in Brazil may record the debtor's default by filing a "Protest

---

[17] Raymond H. Brescia, *Robots v. Predators: Can Generative Artificial Intelligence Help to Address the Justice Gap in Consumer Debt Litigation?* 51 FORDHAM URB. L.J. 1553, 1583 (2024) ("[B]efore a suit is even commenced, a creditor or collection agency tends to send so-called dunning letters, derived from the verb 'dun' meant to demand payment on a debt, and has its origins in Middle English.").

[18] Lei No. 13.105 [Law number 13, 105], de 16 de Março de 2015 [Translation], [C.P.C.] sec. II, art. 726 ("[Q]uem tiver interesse em manifestar formalmente sua vontade a outrem sobre assunto juridicamente relevante poderá notificar pessoas participantes da mesma relação jurídica para dar-lhes ciência de seu propósito.") ["[A]nyone who has an interest in formally expressing their will to another party on a legally relevant matter may notify individuals involved in the same legal relationship to make them aware of their intent."] (Braz.).

of a Title" in a public registry (notary office).[19] This public notice of the default can make it more difficult for the debtor to obtain bank credit and other contracts.[20]

In the U.S., creditors often hire third-party "debt collectors" who specialize in collecting consumer debts. The ways in which debt collectors ask consumer-debtors to pay are in the U.S. regulated by the Fair Debt Collections Practices Act,[21] as well as by generally applicable tort (delict) and criminal law. For example, the Fair Debt Collections Practices Act prohibits debt collectors from communicating with a debtor "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer,"[22] and requires the debt collector to cease communication with the consumer for most purposes upon written notice from the consumer that the consumer either refuses to pay the debt or simply that the consumer wishes the debt collector to cease all further communication.[23]

In the same vein, but less specifically, Brazil's Consumer's Protection Code states that "the creditor may not subject the consumer to embarrassment or to any form of public exposure regarding the debt, nor apply any degrading or humiliating practices."[24] For example, the São Paulo's Court of Justice has held as abusive the number of phone calls made by a bank to charge a debtor and ordered the bank to pay money damages to the consumer.[25]

---

[19] *See* Michelle B. Graham, *Planning for U.S. Persons With Foreign Assets*, SB009 ALI-CLE 435 (Nov. 14-15, 2019).

> Civil-law notaries undertake a drastically different role than their common-law counterparts, the notary public. Civil-law notaries are lawyers of non-contentious private civil law who draft, deliver, and record legal instruments for private parties; render legal advice; and are public officers vested with the authentication power of the State. Unlike common-law notary publics, civil-law notaries are highly trained and licensed practitioners providing a full range of regulated legal services. While they hold a public office, they nonetheless operate usually--but not always--in private practice and are paid on a fee-for-service basis. They often receive the same education as attorneys at civil law but without qualifications in advocacy, procedural law, or the law of evidence, somewhat comparable to solicitor in training in certain common-law countries.

Id. para. VII.C.

[20] Seresa Experian, *Protesto em cartório: o que é e como funciona*. [Protest in a Notary's Office: What It Is and How It Works] (Oct.17,2024), https://www.serasaexperian.com.br/blog-pme/protesto-em-cartorio/#:~:text=Dificuldade%20de%20acesso%20a%20cr%C3%A9dito,financiamentos%20e%20outros%20servi%C3%A7os%20financeiros.

[21] Debt Collection Practices, 15 U.S.C. §§ 1692–1692 (2025) (m). *Id*. § 1692(a)(6) (defining "debt collector" to include "[a]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another" and "[a]ny creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.").

[22] 15 U.S.C. § 1692c(a)(1).

[23] 15 U.S.C. § 1692c(c).

[24] Lei No. 8.078 de setembro de 1990 [Law number 8,708] sec. V, art. 42 (Braz.). ("[N]a cobrança de débitos, o consumidor inadimplente não será exposto a ridículo, nem será submetido a qualquer tipo de constrangimento ou ameaça.) ["In the collection of debts, the defaulting consumer shall not be exposed to ridicule, nor shall they be subjected to any type of embarrassment or threat."].

[25] Tribunal de Justiça de São Paulo [TJSP], Apelação Cível No. 1016872-33.2024.8.26.0196, Franca. Relator: Des. Júlio César Franco, 11/08/2024, Diário de Justiça Eletrônico, 11/08/2024 (Braz.) ("The quantity and frequency

In addition to communicating with the debtor, creditors in both the United States and Brazil may also report delinquent debtors to credit bureaus which rate consumers' creditworthiness, such as by credit scores, which affect lenders' willingness to lend to that consumer and the interest rate the lender will charge the consumer. Credit bureaus in Brazil include Serasa and SPC Brasil, while the three major consumer reporting agencies operating in the United States are Equifax, Experian, and TransUnion.

The consumer credit reporting system is in the U.S. regulated by the Fair Credit Reporting Act,[26] as well as by generally applicable law, such as the tort of defamation. The Fair Credit Reporting Act basically prohibits creditors from furnishing incorrect information to the credit bureaus,[27] and obligates a creditor who furnishes negative information to a credit bureau to provide a written notice to the consumer and to investigate claims of inaccuracy based on consumers' direct complaints.[28]

The consumer credit reporting system is regulated in Brazil by the Consumer Protection Code, which provides that creditors must notify debtors before including their names in credit protection records.[29] As in the U.S., Brazil establishes a maximum period during which a person's name can be maintained in record for a certain debt. However, while Brazil imposes a limit of 5 years per debt,[30] U.S. time limits vary, such as 10 years for bankruptcy and 7 years for a judgment debt.[31]

b. Creditors' Taking Property from Debtors

---

of the messages, which at times occurred more than twice a day, suggest an illicit conduct aimed at pressuring the debtor into settling or renegotiating the debt. (…) the consumer, even if in default, has the right to have their dignity preserved. Therefore, there are elements that point to the existence of an abuse of rights, as defined in Article 187 of the Civil Code.").

[26] 15 U.S.C. §§ 1681–1681(u).

[27] 15 U.S.C. § 1681s–2(a)(1)(A) & (D).

[28] 15 U.S.C. § 1681s–2(a)(7), (8).

[29] Lei No. 8.078 de setembro de 1990 [Law number 8,708] sec. VI, art. 43 (Braz). ("[A] abertura de cadastro, ficha, registro e dados pessoais e de consumo deverá ser comunicada por escrito ao consumidor, quando não solicitada por ele.") ["[T]he opening of a registry, file, record, and personal and consumption data must be communicated in writing to the consumer, when not requested by them."]; Supremo Tribunal Federal [S.T.F.][Supreme Federal Tribunal], Recurso Especial No. 2.056.285 [Case number 2.056.285], Realator: Min. Nancy Andrighi, 2023, 269, Revista do Superior Tribunal de Justiçia (R.S.T.J.) [Superior Court of Justice Magazine] 27/04/2023 ("…[n]otificação do consumidor sobre a sua inscrição em cadastro de inadimplentes não pode ser feita, exclusivamente, por e-mail ou por SMS.") ["…[t]he notification to the consumer regarding the registration of their name in a credit restriction registry requires the prior sending of correspondence to their address, and notification exclusively by email or text message (SMS) is prohibited."] (Braz.).

[30] *Id*. sec. VI, art. 43 ("[O]s cadastros e dados de consumidores devem ser objetivos, claros, verdadeiros e em linguagem de fácil compreensão, não podendo conter informações negativas referentes a período superior a cinco anos.") ["[C]onsumer records and data must be objective, clear, truthful, and in language that is easy to understand, and may not contain negative information referring to a period longer than five years.") The five-year period limitation is also confirmed by Ruling No. 323 of the Brazilian Superior Court of Justice ("The debtor's name may be maintained in credit protection services for a maximum period of five years, regardless of the expiration of the execution.") (Braz.).

[31] 15 U.S.C. § 1681c(a).

i. Goods (Movables)

Non-judicial collection efforts by some creditors in the United States may lawfully go beyond words to the taking of property from the debtor. Creditors so empowered are most commonly those whose contracts with their debtors include a "security interest" under Uniform Commercial Code (UCC) Article 9, which has been adopted by all fifty states. A security interest is a consensual lien in a particular piece or pieces of the debtor's personal property, such as a car, boat, refrigerator, or sofa, which by contract becomes the creditor's "collateral."[32]

Perhaps the biggest category of consumer collateral is the automobile, as millions of Americans have paid for their vehicles with money borrowed from a lender to which the borrower granted a security interest in the vehicle.[33] If the borrower defaults, the secured creditor may take possession of the vehicle,[34] and then sell the vehicle at what is known as a foreclosure sale.[35] "Foreclosure is a process that operates on the ownership of collateral. It transfers ownership from the debtor to the purchaser at the foreclosure sale and cuts off the debtor's right to redeem [buy back] the collateral."[36] The foreclosing creditor may generally choose whether to auction the collateral to the highest bidder or sell in some other "commercially reasonable" manner. The foreclosing creditor keeps the proceeds of the foreclosure sale up to the amount of the debt, providing any surplus to the debtor.[37] If the foreclosure sale price is lower than the amount of the debt, the debtor remains liable for the deficiency,[38] unless non-uniform state law says otherwise.[39] And if the repossessing creditor gets the debtor's consent, the creditor does not need to have a foreclosure sale, but can instead retain the vehicle or other collateral in satisfaction of the debt.[40]

Significantly, this process of taking the car or other collateral from the debtor, (which is called "repossession" even though the creditor likely has not previously possessed the collateral,) is often conducted entirely by the private-sector creditor and its agents, without involving courts or other government actors. If the creditor can repossess the collateral from the debtor without a breach of the peace,[41] then the creditor is legally allowed to use such "self-help," which has long been routine throughout the United States. Not only does creditors' repossession of collateral typically occur without government involvement, so do creditors' foreclosure sales.[42] While government involvement in repossession and

---

[32] U.C.C. § 9-102(a)(12).

[33] *See* Consumer Financial Protection Bureau (CFPB), *Negative Equity in Auto Lending* (June 2024), https://files.consumerfinance.gov/f/documents/cfpb_negative-equity-in-auto-lending-report_2024-06.pdf ("[A]mericans owed more than $1.6 trillion on auto loans through the fourth quarter of 2023, with more than 100 million active auto finance accounts.").

[34] U.C.C. § 9-609(b)(2).

[35] U.C.C. § 9-610.

[36] LYNN M. LOPUCKI ET AL., SECURED TRANSACTIONS: A SYSTEMS APPROACH 34 (10th ed. 2024).

[37] U.C.C. § 9-615.

[38] U.C.C. § 9-615(d).

[39] *See, e.g.*, Kan. Stat. § 16a-5-103.

[40] U.C.C. § 9-620.

[41] U.C.C. § 9-609.

[42] U.C.C. § 9-610.

foreclosure is available to creditors with security interests,[43] self-help repossession and foreclosure are common, including for consumers' vehicles.

In contrast to the prevalence of long-established self-help repossession and foreclosure of moveable assets in the U.S., Brazil only recently moved in the direction of self-help repossession,[44] and even under this 2023 law, repossession still requires approval of a public registry, if not a court. If a creditor has in the debtor's signed contract[45] obtained the sort of "fiduciary guarantee" most analogous to a security interest,[46] upon default the creditor will ask the clerk of a public registry[47] to summon the debtor to cure missed payments in twenty days.[48] If the debtor fails to do so, the clerk will register the consolidation of the asset's ownership in favor of the creditor,[49] which entitles the creditor to possession of the asset (the

---

[43] *See infra* Section III.A.

[44] Lei No. 14.711, de 30 de outubro de 2023 [Law No. 14,711 of Oct. 30, 2023] cap. XXI, art. 8-C ([C]onsolidada a propriedade, o credor poderá vender o bem na forma do art. 2º deste Decreto-Lei.) [[O]nce ownership is consolidated, the creditor may sell the property in accordance with Article 2 of this Decree-Law] (Braz.).

[45] Lei No. 14.711, de 30 de outubro de 2023 [Law No. 14,711 of Oct. 30, 2023] cap. XXI, art. 8-B ("[D]esde que haja previsão expressa no contrato em cláusula em destaque e após comprovação da mora na forma do § 2º do art. 2º deste Decreto-Lei, é facultado ao credor promover a consolidação da propriedade perante o competente cartório de registro de títulos e documentos no lugar do procedimento judicial a que se referem os arts. 3º, 4º, 5º e 6º deste Decreto-Lei.) ["[P]rovided that there is an express provision in the contract in a highlighted clause and after proof of default in accordance with § 2 of art. 2 of this Decree-Law, the creditor is allowed to promote the consolidation of ownership before the competent registry office of titles and documents in place of the judicial proceeding referred to in arts. 3, 4, 5, and 6 of this Decree-Law."] (Braz.).

[46] Brazil's closest analog to the security interest above described is the so-called "real guarantee" that, in the words of Fábio Ulhoa Coelho, can be defined as the type of guarantee constituted when a piece, or pieces, of the debtor's patrimony (property) is bound to the satisfaction of a debt; *See* FÁBIO COELHO, CAPÍTULO 49. DIREITOS REAIS DE GARANTIA E DIREITOS REAIS EM GARANTIA [Chapter 49: Real security rights and real security rights], *in* DIREITO CIVIL [Civil Law] (4th ed. 2012). In his book named "Civil Law," Coelho assents that this type of guarantee can be subdivided into two smaller groups: real right of guarantee and real right in guarantee. The biggest difference between these two smaller groups is that in the first one the debtor will remain as the owner of the asset given in guarantee meanwhile in the second one the creditor will become what is called in the Brazilian system as a resolvable owner, meaning that there will be the transfer of the ownership of that piece of property until the debtor complies with all his obligations. This second group is the most popular type of guarantee in Brazil because of the security that it brings to creditors as they will become the owner of the asset until the debt is paid, having as its biggest representant the so-called "fiduciary guarantee." Thus, for example, when someone offers a vehicle in fiduciary guarantee of a contract, the debtor will keep the possession over it, but the creditor will be its owner until the debt is fully satisfied.

[47] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct. 1, 1969], art. 8-B, § 1 ([É] competente o cartório de registro de títulos e documentos do domicílio do devedor ou da localização do bem da celebração do contrato.") [**"[**T]he competent registry office for titles and documents is the one located in the debtor's domicile or the location of the asset where the contract was executed."] (Braz.).

[48] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct. 1, 1969], art. 8-B, § 2 (I), ("[V]encida e não paga a dívida, o oficial de registro de títulos e documentos, a requerimento do credor fiduciário acompanhado da comprovação da mora na forma do § 2º do art. 2º deste Decreto-Lei, notificará o devedor fiduciário para: (I) pagar voluntariamente a dívida no prazo de 20 (vinte) dias, sob pena de consolidação da propriedade; (II) apresentar, se for o caso, documentos comprobatórios de que a cobrança é total ou parcialmente indevida.") ["[I]f the debt is due and unpaid, the official registry of titles and documents, at the request of the fiduciary creditor accompanied by proof of default in the form of § 2 of art. 2 of this Decree-Law, shall notify the fiduciary debtor to: (I) voluntarily pay the debt within 20 (twenty) days, under penalty of consolidation of ownership.") (Braz.).

[49] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct. 1, 1969], art. 8-B, § 9 ("[N]ão paga a dívida, o oficial averbará a consolidação da propriedade fiduciária ou, no caso de bens cuja

collateral). If the debtor still does not deliver the asset to the creditor,[50] the creditor may ask the public registry to issue a search and seizure mandate which authorizes a government official to take possession of the asset from the debtor and deliver it to the creditor.[51] Only after all those steps, may the creditor sell the asset and keep the proceeds in satisfaction of the debt,[52] paying any surplus to the debtor.[53]

In Brazil, as in the U.S., if the sale proceeds are not enough to satisfy the debt, the creditor will still have the right to demand the payment of the remaining balance.[54] Also similar to the U.S., the creditor may choose to sell through an auction or directly to a third party in a reasonable way, with no need of any judicial or extrajudicial order.[55]

---

alienação fiduciária tenha sido registrada apenas em outro órgão, o oficial comunicará a este para a devida averbação.") ["[I]f the debt is not paid, the officer will record the consolidation of fiduciary ownership or, in the case of assets whose fiduciary alienation has been registered only with another body, the officer will notify this body for due recording."] (Braz.).

[50] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct. 1, 1969], art. 8-C, § 1 ("[C]aso o bem não tenha sido entregue ou disponibilizado voluntariamente no prazo legal, o credor poderá requerer ao oficial de registro de títulos e documentos a busca e apreensão extrajudicial, com apresentação do valor atualizado da dívida e da planilha prevista no inciso III do § 13 do art. 8º-B deste Decreto-Lei.")["[I]f the asset has not been delivered or made available voluntarily within the legal term, the creditor may request the title and document registry officer to carry out an extrajudicial search and seizure, presenting the updated amount of the and the spreadsheet provided in item III of § 13 of art. 8-B of this Decree-Law."] (Braz.).

[51] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct. 1, 1969], art. 8-C, § 7, ("[A]preendido o bem pelo oficial da serventia extrajudicial, o credor poderá promover a venda de que trata o caput deste artigo e deverá comunicá-la ao oficial de cartório de registro de títulos e documentos, o qual adotará as seguintes providências:…") ["[O]nce the property has been seized by the officer of the extrajudicial service, the creditor may promote the sale referred to in the caput of this article and must communicate it to the registry office of titles and documents, who will adopt the following measures. . . ."] (Braz.).

[52] Código Civil (C.C.) [Civil Code] arts. 1,365, 1,428 (Braz.).

[53] ARNOLDO WALD, ET AL., CAPÍTULO 22. DIREITOS REAIS DE GARANTIA. NOÇÕES GERAIS [Chapter 22: Real Guarantee Rights: General Concepts] *in* DIREITO DAS COISAS [Law of Things] (2023 ed.). ("Regarding the enforcement of the guarantee, in the event of default on the principal obligation, domestic law prohibits the object given as collateral from becoming the property of the creditor." . . . "The asset given as collateral must be sold at public auction, and the proceeds used to pay the creditor . . . If the sale price exceeds the amount of the debt, the surplus must be returned to the owner of the asset.")

[54] ARNOLDO WALD, ET AL., CAPÍTULO 22. DIREITOS REAIS DE GARANTIA. NOÇÕES GERAIS [Chapter 22: Real Guarantee Rights: General Concepts] *in* DIREITO DAS COISAS [Law of Things] (2023 ed.) ("A coisa dada em garantia deverá ser vendida em hasta pública para com seu preço ser pago o credor. . . . Se o preço obtido for igual ao débito, ficará o dinheiro recebido como pagamento da dívida. Se o preço for superior ao débito, o que exceder deverá reverter ao proprietário do bem. Se for inferior, o credor poderá acionar, pelo meio processual próprio, o devedor, para receber o saldo.") ["The pledged item must be sold at public auction to pay the creditor. . . . If the price obtained is equal to the debt, the excess amount will revert to the owner of the item. If it is lower, the creditor may sue the debtor through the appropriate legal means to recover the balance."]

[55] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct. 1, 1969] art. 2 ("[N]o caso de inadimplemento ou mora nas obrigações contratuais garantidas mediante alienação fiduciária, o proprietário fiduciário ou credor poderá vender a coisa a terceiros, independentemente de leilão, hasta pública, avaliação prévia ou qualquer outra medida judicial ou extrajudicial, salvo disposição expressa em contrário prevista no contrato, devendo aplicar o preço da venda no pagamento de seu crédito e das despesas decorrentes e entregar ao devedor o saldo apurado, se houver, com a devida prestação de contas") ["[I]n the event of non-performance or delay in the contractual obligations secured by means of fiduciary transfer, the fiduciary owner or creditor may sell the asset to third parties, regardless of auction, public auction, prior appraisal, or any other judicial or extrajudicial measure, unless expressly provided otherwise in the contract, and must apply the sale price to the payment of the debt and any resulting expenses and deliver to the debtor the balance determined, if any, with due accounting."] (Braz.).

ii. Houses and Other Real Property (Immovables)

Similar to the private repossession and foreclosure of vehicles and other goods under the UCC, in most U.S. states, a private (non-governmental) collection process is available to enforce a home mortgage—the consensual lien in residential real property. Millions of Americans have paid for their homes with money borrowed from a lender to which the borrower granted a mortgage (the real property version of a security interest) on the home.

> About 29 states permit the mortgage lender and borrower to opt for a quick[], simple[] method of foreclosure against real property. The lender and borrower do so by including in the security agreement a power of sale. In some of these states, the security agreement will be in the traditional form of a mortgage; in others, including California, it will be in the form of a deed of trust. The deed of trust states in essence that the collateral will be held in trust by the creditor or a third party such as a bank or title company. The borrower agrees that in the event of default, the trustee can sell the property and pay the loan from the proceeds of sale. Because the purpose of this arrangement is to secure payment of the loan, the law regards it not as an actual trust but as simply another form of security interest.[56]

When the creditor has a power-of-sale, the creditor can foreclose through a procedure that does not involve a court.

> For example, under California law, upon default under a mortgage or deed of trust containing a power of sale, the creditor can file in the public records a notice setting forth the nature of the debtor's default and the creditor's election to sell the property. If the debtor does not cure the default within 90 days, the creditor can set a time and place for sale, advertise it for 20 days, and then sell the property at auction. Pursuant to the power of sale contained in the deed of trust, the trustee conveys title to the purchaser at auction.[57]

The buyer then records its deed in the registry of deeds, which completes the transfer of title from the debtor to the buyer through a forced sale effected by a private creditor.

In Brazil, the most common types of liens used over immovables assets are fiduciary guarantees. In contrast to the newness of Brazil's law permitting non-judicial seizure and sale of movable goods, Brazil has long had an extrajudicial procedure for the execution of real estate (immovable assets) in which the debtor has by contract given a fiduciary

---

[56] LYNN LOPUCKI ET AL., SECURED TRANSACTIONS: A SYSTEMS APPROACH 37-38 (10th ed. 2024).
[57] *Id.*

guarantee.[58] In this procedure, the creditor will notify the competent Real Estate registry,[59] about the debtor's default and the registry will summon the debtor to cure the missed payments in fifteen days.[60] If the debtor fails to do so, the official of the Real Estate registry will consolidate the property of the asset (piece of real estate) in favor of the creditor by writing it in the assets registration, which permits the creditor to sell it through a public auction in the sixty following days, keeping the amount needed to satisfy the defaulted debt.[61]

In addition to fiduciary guarantees over an immovable asset, Brazil also has mortgages, the extrajudicial execution of which was enacted in 1966. However, some Brazilian local courts found extrajudicial execution "violate[d] the constitutional principles of ample defense and due process of law by delegating judicial functions to one of the parties in the process — notably, the one with greater economic power."[62] This objection was overcome in 2023, when Law No. 14,711 established a detailed procedure for the extrajudicial execution of mortgages. This statute established a very similar procedure to the one covering the fiduciary guarantees as, here, under the creditor's request, the competent Real Estate registry will summon the debtor to cure the missed payments in fifteen days[63] and, if the

---

[58] Lei No. 9.514 de 20 de novembro de 1997 [Law No. 9,514 of Nov. 20, 1997] ("[D]ispõe sobre o Sistema de Financiamento Imobiliário, institui a alienação fiduciária de coisa imóvel e dá outras providências.") [Statute that "[P]rovides for the real estate financing system, establishes fiduciary alienation of real estate, and provides other measures."] (Braz.).

[59] The Real Estate registry is a public regional organ destined to storage the official documents of real estate properties in Brazil.

[60] Lei No. 9.514 de 20 de novembro de 1997 [Law number 9,514 of November 20, 1997] Ch. II, art. 26 § 7, ("[D]ecorrido o prazo de que trata o § 1º sem a purgação da mora, o oficial do competente Registro de Imóveis, certificando esse fato, promoverá a averbação, na matrícula do imóvel, da consolidação da propriedade em nome do fiduciário, à vista da prova do pagamento por este, do imposto de transmissão inter vivos e, se for o caso, do laudêmio.") ["[A]fter the period referred to in § 1 has elapsed without the default being cleared, the official of the competent Real Estate Registry, certifying this fact, shall promote the endorsement, in the property registration, of the consolidation of ownership in the name of the fiduciary, upon proof of payment by the latter of the inter vivos transfer tax and, if applicable, the laudêmio."] (Braz.).

[61] Lei No. 9.514 de 20 de novembro de 1997 [Law No 9,514 of Nov. 20, 1997] Ch. II, art. 27 ("[C]onsolidada a propriedade em seu nome, o fiduciário promoverá leilão público para a alienação do imóvel, no prazo de 60 (sessenta) dias, contado da data do registro de que trata o § 7º do art. 26 desta Lei.") ["[O]nce the property is consolidated in its name, the trustee shall promote a public auction for the sale of the property, within 60 (sixty) days, counting from the date of registration referred to in § 7 of art. 26 of this Law."] (Braz.).

[62] T.J.S.C. Agravo de Instrumento No. 31181 SC 2004.003118-1 Florianópolis, Relator: Des. Fernando Carioni, 05.06.2004, Diário de Justiça Eletrônico, 05/06/2004 (Braz.) ("On the other hand, the extrajudicial execution of assets provided for in Decree Law No. 70/1966 cannot be adopted due to the ineffectiveness of the normative statute, as it is not accepted by the new constitutional order. Its rules violate the constitutional principles of full defense and due process by delegating jurisdictional functions to one of the parties to the proceedings, incidentally the one with better economic conditions.")

[63] Lei No. 14.711 de 30 de outubro de 2023 [Law No. 14,711 of Oct. 30, 2023] Ch. III, art. 9 § 1, ("[V]encida e não paga a dívida hipotecária, no todo ou em parte, o devedor e, se for o caso, o terceiro hipotecante ou seus representantes legais ou procuradores regularmente constituídos serão intimados pessoalmente, a requerimento do credor ou do seu cessionário, pelo oficial do registro de imóveis da situação do imóvel hipotecado, para purgação da mora no prazo de 15 (quinze) dias, observado o disposto no art. 26 da Lei nº 9.514, de 20 de novembro de 1997, no que couber.") [[I]f the mortgage debt is due and unpaid, in whole or in part, the debtor and, if applicable, the third-party mortgagee or his legal representatives or duly appointed attorneys will be personally summoned, at the request of the creditor or his assignee, by the real estate registry officer of the location of the mortgaged property, to purge the default within a 15 (fifteen) days, in compliance with the provisions of art. 26 of Law No. 9.514, of November 20, 1997, where applicable."] (Braz.).

debtor fails to do so, the registry will consolidate the immoveable asset's property in favor of the creditor, who will have to sell it in the following sixty days through a public auction.[64] This process, however, is not available to mortgages originated in financing operations linked to rural activities.[65]

III. Creditors' Use of Courts to Collect Debts

In addition to the non-judicial methods of debt collection discussed above, creditors in the United States and Brazil often use courts to help collect consumer debts. This generally involves the creditor suing the debtor and winning a judgment. Judgments for creditors can be divided into (1) judgments enforcing the creditor's property interest, and (2) money judgments against the debtor.

a. Judgments Enforcing Creditors' Interests in the Debtor's Property

i. Goods (Movables)

Judgments enforcing the creditor's property interest are often won by creditors with a consensual lien (United States) or real guarantee (Brazil) in a particular piece of the consumer's property. In the U.S., for example, a creditor with a security interest in a vehicle may choose, instead of self-help repossession, to assert in court a claim for replevin, which basically alleges that the plaintiff is entitled to possess goods (moveables) currently in possession of the defendant.[66] If the court rules for the creditor-plaintiff, the clerk of the court will issue a writ of replevin instructing the sheriff to take the vehicle from the debtor and transfer possession of it to the secured creditor, who will then hold a foreclosure sale as discussed above.[67] Pre-judgment replevin on an expedited basis is common if the creditor posts a bond and the debtor does not answer the complaint, resulting in a default judgment.[68]

Similarly in Brazil, if the defaulted debtor of a creditor with a fiduciary guarantee over a vehicle does not voluntarily transfer possession of the vehicle to the creditor and the creditor's extrajudicial collection efforts are not successful, the creditor will commonly bring

---

[64] Lei No. 14.711 de 30 de outubro de 2023 [Law No. 14,711 of Oct. 30, 2023] Ch. III, art. 9 § 3, ("[N]o prazo de 60 (sessenta) dias, contado da averbação de que trata o § 2º deste artigo, o credor promoverá leilão público do imóvel hipotecado, que poderá ser realizado por meio eletrônico.") ("Within 60 (sixty) days, counting from the endorsement referred to in § 2 of this article, the creditor shall hold a public auction of the mortgaged property, which may be carried out electronically.") (Braz.).

[65] Lei No. 14.711 de 30 de outubro de 2023 [Law No. 14,711 of Oct. 30, 2023] Ch. III, art. 9 § 13, ("[A] execução extrajudicial prevista no caput deste artigo não se aplica às operações de financiamento da atividade agropecuária.") ("[T]he extrajudicial enforcement provided for in the heading of this article does not apply to financing operations for agricultural activities.") (Braz.).

[66] U.C.C. § 9-609(b)(1).

[67] U.C.C. §§ 9-609, 9-610. LoPucki et al., *supra* note 36, at 44 ("The secured creditor can file a replevin action against the debtor, obtain judicial recognition of its right to possession and send the sheriff out to take the car.").

[68] LOPUCKI ET AL., *supra* note 36, at 42 ("Issuance of [a writ of replevin] is usually conditioned on the creditor's posting a bond . . . . Once the writ has been issued[,] . . . most debtors have no reason to defend the replevin action. Judgment is entered by default.").

a so-called Search and Seizure action in court to gain possession of the vehicle.[69] The creditor must show that it previously sent a notification of default letter to the debtor.[70] Once the creditor's request is approved by the judge, the debtor will have five days to pay the debt[71] and, if the debtor fails to do so, the judge will consolidate the property of the asset in favor of the creditor by instructing the competent registry to record the creditor's definite ownership over the good and by ordering the clerk of the court to seize the good and deliver possession of it to the creditor.[72] After the asset is under the creditor's possession, the creditor will then sell it in its preferred manner, unless something different is stipulated in the contract signed by the parties.[73]

---

[69] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oc.1, 1969] art. 3

> ([O] proprietário fiduciário ou credor poderá, desde que comprovada a mora, na forma estabelecida pelo § 2º do art. 2º, ou o inadimplemento, requerer contra o devedor ou terceiro a busca e apreensão do bem alienado fiduciariamente, a qual será concedida liminarmente, podendo ser apreciada em plantão judiciário.)
>
> ([T]he fiduciary owner or creditor may, upon proof of default, as established by § 2 of Article 2, or non-performance, request the search and seizure of the fiduciarily alienated asset against the debtor or third party, which shall be granted on an emergency basis, and may be reviewed during judicial duty hours. (Braz.).

[70] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct. 1, 1969] art. 2, § 2 ("[A] mora decorrerá do simples vencimento do prazo para pagamento e poderá ser comprovada por carta registrada com aviso de recebimento, não se exigindo que a assinatura constante do referido aviso seja a do próprio destinatário") ["[D]efault will occur from the mere expiration of the payment deadline and may be proven by registered mail with acknowledgment of receipt, without requiring that the signature on the acknowledgment be that of the recipient themselves." (Braz.).

[71] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct. 1, 1969] art. 3 § 1

> ("[C]inco dias após executada a liminar mencionada no caput, consolidar-se-ão a propriedade e a posse plena e exclusiva do bem no patrimônio do credor fiduciário, cabendo às repartições competentes, quando for o caso, expedir novo certificado de registro de propriedade em nome do credor, ou de terceiro por ele indicado, livre do ônus da propriedade fiduciária.")
>
> ["five days after the execution of the injunction mentioned in the heading"—that is, the judge's authorization for the apprehension of the asset— "the full and exclusive ownership and possession of the asset will be consolidated in the fiduciary creditor's patrimony, and the competent authorities, when applicable, shall issue a new property ownership certificate in the name of the creditor or a third party designated by them, free from the encumbrance of fiduciary ownership."].

(Braz.); *id.* § 2º ("[N]o prazo do § 1º, o devedor fiduciante poderá pagar a integralidade da dívida pendente, segundo os valores apresentados pelo credor fiduciário na inicial, hipótese na qual o bem lhe será restituído livre do ônus.") ["[W]ithin the period of § 1, the fiduciary debtor may pay the full amount of the outstanding debt, according to the amounts presented by the fiduciary creditor in the initial petition in which case the asset will be returned to them free of encumbrance."] (Braz.).

[72] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct. 1, 1969] art. 3 § 1 ("[C]inco dias após executada a liminar mencionada no caput, consolidar-se-ão a propriedade e a posse plena e exclusiva do bem no patrimônio do credor fiduciário, cabendo às repartições competentes, quando for o caso, expedir novo certificado de registro de propriedade em nome do credor, ou de terceiro por ele indicado, livre do ônus da propriedade fiduciária.") ["[F]ive days after the execution of the injunction mentioned in the main clause, the full and exclusive ownership and possession of the asset will be consolidated in the fiduciary creditor's estate, and the competent authorities, when applicable, shall issue a new property registration certificate in the name of the creditor or a third party indicated by them, free from the encumbrance of fiduciary ownership."] (Braz.).

[73] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct. 1, 1969] art. 2 ("[N]o caso de inadimplemento ou mora nas obrigações contratuais garantidas mediante alienação fiduciária, o proprietário fiduciário ou credor poderá vender a coisa a terceiros, independentemente de leilão, hasta pública, avaliação prévia ou qualquer outra medida judicial ou extrajudicial, salvo disposição expressa em contrário prevista no contrato, devendo aplicar o preço da venda no pagamento de seu crédito e das despesas decorrentes e entregar ao devedor o

If the asset the debtor gave in guarantee is not found or if it is no longer under the debtor's possession, the creditor may ask for the conversion of the Search and Seizure Action into an Execution of an Extrajudicial Title action,[74] discussed below in Part III.B. In the case of vehicles, the judge may issue an order of apprehension in a Search and Seizure Action on the car's registry through an electronic system called "RENAJUD".[75] This will prevent the debtor from selling the vehicle.[76]

ii. Houses and Other Real Property (Immovables)

Judgments enforcing the creditor's property interest in a home are common in both the United States and Brazil. In the United States, as suggested in Part II, states vary in whether the creditor's property interest in the home is technically a mortgage or a deed of trust, but either way, the creditor may after default assert in court a claim for foreclosure.[77] If the court rules for the creditor, the clerk of the court will issue a writ of foreclosure instructing the sheriff to hold a foreclosure sale (public auction) of the home and give the proceeds to the creditor up to the amount of the debt.[78] If the debtor does not then vacate the home, the clerk

saldo apurado, se houver, com a devida prestação de contas.") ["[I]n the case of non-performance or default on contractual obligations secured by fiduciary alienation the fiduciary owner or creditor may sell the property to third parties, independently of auction public sale, prior evaluation or any other judicial or extrajudicial measure, unless expressly stated otherwise in the contract. The sale proceeds must be applied to pay their credit and the associated expenses, and any remaining balance, if applicable, must be delivered to the debtor, along with a proper accounting."] (Braz.).

[74] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of Oct.1, 1969] art. 4 ("[S]e o bem alienado fiduciariamente não for encontrado ou não se achar na posse do devedor, fica facultado ao credor requerer, nos mesmos autos, a conversão do pedido de busca e apreensão em ação executiva, na forma prevista no Capítulo II do Livro II da Lei nº 5.869, de 11 de janeiro de 1973 - Código de Processo Civil.") ["[I]f the fiduciarily alienated asset is not found or is not in the possession of the debtor, the creditor may request, in the same proceedings, the conversion of the request for search and seizure into an enforcement action as provided in Chapter II of Book II of Law No. 5,869, of January 11, 1973 - Code of Civil Procedure."]. (Braz.).

[75] RENAJUD is an electronic system used to write down restrictions over vehicles that may vary from prohibition to transfer to prohibition to circulation and was developed based on the text of art. 837 of the Brazilian 2015 Civil Procedure Code ("Following the security standards established under uniform criteria by the National Justice Council, the attachment of money and the registration of liens on real and personal property may be carried out electronically.") Its use and functioning can be found at the Brazilian National Justice Council's website: https://www.cnj.jus.br/.

[76] Decreto-Lei No. 911/1969 de 1 de outubro de 1969 [Decree-Law No. 911/1969 of October 1, 1969] art. 3, § 9 ("Ao decretar a busca e apreensão de veículo, o juiz, caso tenha acesso à base de dados do Registro Nacional de Veículos Automotores - RENAVAM, inserirá diretamente a restrição judicial na base de dados do Renavam, bem como retirará tal restrição após a apreensão") ["[W]hen ordering the search and seizure of a vehicle, the judge, if having access to the National Vehicle Registry Database - RENAVAM, shall directly enter the judicial restriction into the RENAVAM database, as well as remove such restriction after the seizure."] (Braz.).

[77] LoPucki et al., *supra* note 36, at 34 ("Procedures by which secured creditors can sue for judicial foreclosure orders are available in every state. In a judicial foreclosure, a creditor holding a mortgage or security interest typically files a civil action against the debtor. In the complaint, the creditor details the terms of the loan and the nature of the default").

[78] *Id*. (When the court is persuaded "the plaintiff has established that it is entitled to foreclose, the court will enter a final judgment of foreclosure."); *Id*. at 34-35 ("As part of the judgment, the court usually sets a date for the foreclosure sale . . . The sheriff sells the collateral, collects the proceeds of sale, and holds them until the foreclosing creditor obtains an order confirming the sale. In most states, that order extinguishes the equity of redemption and authorizes the sheriff to disburse the proceeds.")

of the court will issue a writ of assistance or eviction instructing the sheriff to remove the defaulted debtor from the home.[79]

The process for mortgage foreclosure in Brazil is similar, although, as previously mentioned, the mortgage is less common than the fiduciary guarantee, which is typically enforced non-judicially, roughly like the deed of trust in the U.S. After a debtor defaults on a mortgage in Brazil, the debtor will have twenty-four hours after summons to pay the debt.[80] If the debtor fails to do so, the judge will order the sale of the land (immovable asset) at a public auction[81] and will give the debtor 30 days to vacate the premises.[82] If the land is occupied by (asset is possessed by) a third party, the judge will issue a writ of eviction giving that third party ten days to vacate the premises.[83]

b. Money Judgments

i. A Variety of Claims, Courts, and Procedures -- All Leading to One Result: Money Judgment

While only creditors with an interest in the debtor's property can successfully bring in court the claims discussed above, any creditor may win a claim for a money judgment.[84] Indeed, a workable definition of the word "creditor" is a party entitled to a money judgment for the debtor's breach.[85] Numerous areas of law in both the U.S. and Brazil may lead to a money judgment against a consumer debtor. These range from breach of contract for an

---

[79] *Id*. at 35 ("Ordinarily, the debtor will remain in possession of the collateral until the sale has been confirmed by the court. The purchaser is then entitled to possession. If the debtor will not surrender the premises, the purchaser is entitled to a writ of assistance, which in some states is known as a writ of possession. The writ of assistance directs the sheriff to put the purchaser in possession.")

[80] Lei No. 5,741/71, de 1 de dezembro de 1971 [Law No. 5,741/71 of December 1, 1971] art. 3 ("[O] devedor será citado para pagar o valor do crédito reclamado ou depositá-lo em juízo no prazo de vinte e quatro horas, sob pena de lhe ser penhorado o imóvel hipotecado.") ["[T]he debtor shall be summoned to pay the claimed credit amount or deposit it in court within twenty-four hours, under penalty of having the mortgaged property seized."] (Braz.).

[81] *Id*. at art. 6 ("[R]ejeitados os embargos referidos no caput do artigo anterior, o juiz ordenará a venda do imóvel hipotecado em praça pública por preço não inferior do saldo devedor expedindo-se edital pelo prazo de 10 (dez) dias.") ["[I]f the objections referred to in the heading of the previous article are rejected, the judge shall order the sale of the mortgaged property in a public auction for a price not lower than the outstanding debt, with a notice to be issued for a period of 10 (ten) days."] (Braz.).

[82] *Id*. at art. 4, § 2 ("[S]e o executado estiver na posse direta do imóvel, o juiz ordenará que o desocupe no prazo de 30 (trinta) dias, entregando-o ao exeqüente.") ["[I]f the defendant is in direct possession of the property, the judge shall order that it be vacated within 30 (thirty) days and delivered to the creditor."] (Braz.).

[83] *Id*. at art. 4, § 1 ("[S]e o executado não estiver na posse direta do imóvel, o juiz ordenará a expedição de mandado de desocupação contra a pessoa que o estiver ocupando, para entregá-lo ao exeqüente no prazo de 10 (dez) dias.") ["[I]f the defendant is not in direct possession of the property, the judge shall order the issuance of a writ of eviction against the person occupying it, to deliver it to the creditor within 10 (ten) days."] (Braz.).

[84] In addition or instead, some creditors may win other types of judgments that lead the court to issue an injunction against the defendant-debtor or an order that the debtor perform some act like providing the creditor what the debtor promised to provide. In the U.S., this latter remedy is called specific performance.

[85] *See, e.g.*, 11 U.S.C. § 101(10) (defining "creditor" as an "entity that has a claim") and *id*. § 101(5)(A) (defining "claim" as the "right to payment").

unpaid loan and being the guarantor on someone else's unpaid loan to a tort (delict) arising out of an auto accident or a family law claim for alimony or child support.

Some creditor-plaintiffs win money judgments on their claims quickly and easily. For instance, in the U.S. a consumer-defendant who signed but did not pay a promissory note or who has failed to pay their credit card bill may not even contest the creditor's collection case, so the creditor quickly wins a default judgment without even having to provide any evidence to the court.[86] And if the debtor does answer the complaint, the creditor may still easily win summary judgment by simply introducing into evidence the note or contract, account statements, and payment records showing the debtor's insufficient payments.[87] In contrast, other creditor-plaintiffs, such as the plaintiff in an auto accident where the defendant denies liability, only win money judgments after years of costly litigation culminating in a trial.

Similarly, in Brazil, a creditor who before suit got the debtor's signed promissory note, check, or similar document listed in Brazil's Civil Procedure Code's "extrajudicial titles"[88]

---

[86] Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1708-09 (2022) (overviewing the results of a study finding that one-fifth to one-third of all state court civil cases are filed by ten private companies typically against people without legal representation and that these cases end in companies' favor "with little or no analysis" and judgments issued "against the absent defendants"); PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS, at 13-15 (May 2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf (noting that in debt collection actions, defendants rarely have legal representation and that most end in default judgments, evidencing that people do not respond to the lawsuits).

[87] Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L. J. 627, 676 (2012) ("Summary judgment was initially designed as a tool for plaintiff creditors to obtain a judgment upon which they could begin to pursue payment without the delay of trial in cases where the liability of the debtor and the amount were uncontested."); 10 Bus. & Com. Litig. Fed. Cts. § 112:31 (5th ed.) ("An early motion for summary judgment is particularly warranted where the documents giving rise to the obligation are unambiguous. For example, if a plaintiff files suit to collect on an obligation evidenced by a written instrument such as a note or contract, and the defendant does not dispute the meaning or intent of the document, the court may be willing to enter summary judgment, even if only on the question of liability. The motion should be accompanied by an affidavit from the client specifying the nature of the debt [i.e., the written instrument] and the amounts due, including principal, interest, and [if applicable] attorneys' fees. It is also important to include any acknowledgment by the debtor that some amount is due and payable, such as a letter, interrogatory response, admissions during a deposition, or even a response to a request for admission that the written obligation in question is a true and correct copy of the parties' agreement.").

[88] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No 13,105/2015 of March 2015] Book II, Title I, Ch. IV, art. 784 ("[S]ão títulos executivos extrajudiciais: I - a letra de câmbio, a nota promissória, a duplicata, a debênture e o cheque; II - a escritura pública ou outro documento público assinado pelo devedor; III - o documento particular assinado pelo devedor e por 2 (duas) testemunhas; IV - o instrumento de transação referendado pelo Ministério Público, pela Defensoria Pública, pela Advocacia Pública, pelos advogados dos transatores ou por conciliador ou mediador credenciado por tribunal; V - o contrato garantido por hipoteca, penhor, anticrese ou outro direito real de garantia e aquele garantido por caução; VI - o contrato de seguro de vida em caso de morte; VII - o crédito decorrente de foro e laudêmio; VIII - o crédito, documentalmente comprovado, decorrente de aluguel de imóvel, bem como de encargos acessórios, tais como taxas e despesas de condomínio; IX - a certidão de dívida ativa da Fazenda Pública da União, dos Estados, do Distrito Federal e dos Municípios, correspondente aos créditos inscritos na forma da lei; X - o crédito referente às contribuições ordinárias ou extraordinárias de condomínio edilício, previstas na respectiva convenção ou aprovadas em assembleia geral, desde que documentalmente comprovadas; XI - a certidão expedida por serventia notarial ou de registro relativa a valores de emolumentos e demais despesas devidas pelos atos por ela praticados, fixados nas tabelas estabelecidas em lei; XI-A - o contrato de contragarantia ou qualquer outro instrumento que materialize o direito de ressarcimento da seguradora contra tomadores de seguro-garantia e seus garantidores; XII - todos os demais títulos aos quais, por disposição expressa, a lei atribuir força executiva.") ["[T]he following are extrajudicial enforcement titles: I - the bill of exchange,

may use a judicial procedure that typically permits the creditor-plaintiff to more quickly and easily win a money judgment. These documents presumptively prove the validity of the debt, so the creditor in a suit for the so-called Execution of Extrajudicial Title does not need to introduce any other evidence; the burden is on the debtor-defendant to show a forgery or other defect in the document, or prove that the debtor has already paid the debt.[89] If the debtor does not present any defense, the judge will recognize the creditor's right to receive a certain amount of money and will summon the debtor to pay that amount in three days.[90] To this summons, the judge will add a writ of attachment[91] that authorizes the clerk official to seize as much of the debtor's property as necessary to satisfy the debt if the debtor does not pay the amount in the mentioned three day period.[92]

If a creditor lacks an extrajudicial title but has a written document evidencing the debt, the creditor can easily win a money judgment in a so-called "Monitory Action."[93] If the court rules for the creditor, this ruling automatically constitutes a judicial title,[94] leading the court to order the debtor to pay the judgment amount in fifteen days, starting the phase of the

promissory note, duplicate, debenture, and check; II - the public deed or other public document signed by the debtor; III - the private document signed by the debtor and two (2) witnesses; IV - the transaction instrument endorsed by the Public Prosecutor, Public Defender, Public Advocacy, the attorneys of the parties, or by a conciliator or mediator accredited by the court; V - the contract secured by mortgage, pledge, antichresis, or another real right of guarantee, and that secured by collateral; VI - the life insurance contract in case of death; VII - the credit resulting from land lease and laudêmio; VIII - the credit, documented, arising from rental of property, as well as ancillary charges such as taxes and condominium fees; IX - the certificate of active debt from the Public Treasury of the Union States, Federal District, and Municipalities, corresponding to credits registered according to the law; X - the credit related to ordinary or extraordinary condominium contributions, provided for in the respective agreement or approved in the general assembly, as long as documented; XI - the certificate issued by notarial or registry services relating to fees and other expenses due for acts performed by them, fixed in the tables established by law; XI-A - the counter-guarantee contract or any other instrument that materializes the insurer's right of indemnification against the policyholders and their guarantors; XII - all other titles to which, by express provision the law grants enforcement power."] (Braz.).

[89] Luiz Marinoni, Sérgio Arenhardt, Daniel Mitidiero, *Curso de Processo Civil* [*Civil Procedure Course*] ("1. O Processo de Execução de Títulos Extrajudiciais") ["The Enforcement of Extrajudicial Titles"]) (2023).

[90] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No 13,105/2015 of March 16, 2015, Civil Procedure Code] Book II, Title II, Ch. IV, art. 784 ("[O] executado será citado para pagar a dívida no prazo de 3 (três) dias, contado da citação.") ["[T]he defendant shall be summoned to pay the debt within 3 (three) days, counted from the summons."] (Braz.).

[91] *Id*. at art. 829, § 1 ("[D]o mandado de citação constarão, também, a ordem de penhora e a avaliação a serem cumpridas pelo oficial de justiça tão logo verificado o não pagamento no prazo assinalado, de tudo lavrando-se auto, com intimação do executado.") ["[T]he citation order shall also include the seizure order and the evaluation to be carried out by the court officer as soon as non-payment is verified within the specified deadline, with a record being made and the defendant being notified."] (Braz.).

[92] *Id*. at art. 830 ("[S]e o oficial de justiça não encontrar o executado, arrestar-lhe-á tantos bens quantos bastem para garantir a execução.") ["[I]f the court officer cannot find the defendant, they shall seize as many assets as necessary to secure the execution."] (Braz.).

[93] Código de Processo Civil [C.P.C.] [Civil Procedure Code] art. 700-702 ("Ação Monitória") (Braz.).

[94] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No 13,105/2015 of March 16, 2015] Book I, Title II, Ch. I, art. 515, I ("[S]ão títulos executivos judiciais, cujo cumprimento dar-se-á de acordo com os artigos previstos neste Título: I - as decisões proferidas no processo civil que reconheçam a exigibilidade de obrigação de pagar quantia, de fazer, de não fazer ou de entregar coisa. . . .") ["[T]he following are judicial enforcement titles, the enforcement of which will proceed in accordance with the provisions of the articles in this Title: I - decisions rendered in civil proceedings that recognize the enforceability of an obligation to pay an amount, to do, not to do, or to deliver something. . . ."] (Braz.).

procedure called "Enforcement of Sentence."[95] If the debtor fails to pay, the court will add a fine and issue a writ of attachment for the clerk official to seize the assets needed to satisfy the debt.[96]

However, if the creditor's claim is not based on an extrajudicial title or on any written evidence, the creditor will need to make use of a "Debt Collection Action"[97] to win a money judgement. Due to the lack of documentary and written evidence, this procedure can be slow as the creditor`s right to get paid will have to be proven through hearings considering evidence, all while ensuring the principles of adversarial proceedings and the right to a full defense are upheld.[98] Ultimately, if the judge is convinced of the creditor's claim, the judge will recognize it in a judgement that just like the one issued in the Monitory Action will constitute a "judicial title" to be enforced through the same Enforcement of Sentence procedure.[99]

The courts in which creditors bring claims for money judgment may vary. For example, some courts in both Brazil and the U.S. have jurisdiction only of small claims below a particular monetary amount.[100] But regardless of the court, and the process for winning the claim, if the law permits the plaintiff to win money from the defendant, then the plaintiff's claim in court may, if successful, lead to the court's judgment that the defendant owes a particular sum of money to the creditor—a money judgment.

ii. Enforcing Money Judgments

---

[95] Lei No. 5.869, de 11 de Janeiro de 1973, C.P.C. [Law No 5,869/73 of January 1973] [Civil Procedure Code] Book I, Title II, Ch. III, art. 523 ("[N]o caso de condenação em quantia certa, ou já fixada em liquidação, e no caso de decisão sobre parcela incontroversa, o cumprimento definitivo da sentença far-se-á a requerimento do exequente, sem do o executado intimado para pagar o débito, no prazo de 15 (quinze) dias, acrescido de custas, se houver.") ["[I]n the case of a judgment for a specific amount, or already determined in liquidation and in the case of a decision on an undisputed portion the definitive enforcement of the judgment will be carried out at the request of the creditor, with the defendant being notified to pay the debt within 15 (fifteen) days, plus costs, if applicable."].

[96] *Id*.

[97] Lei No. 10,406, de 10 de Janeiro de 2002, Código Civil [C.C.] [Law number 10,406 of the 10 of January of 2002] [Civil Code] Book I, Title VI, Ch. I, art. 526 ("[V]erificada a mora do comprador, poderá o vendedor mover contra ele a competente ação de cobrança das prestações vencidas e vincendas e o mais que lhe for devido; ou poderá recuperar a posse da coisa vendida.") ["[I]f the buyer is in default, the seller may file the appropriate action to collect the overdue and future installments, and any other amount owed; or they may recover possession of the sold item."] (Braz.).

[98] Nelson Júnior & Rosa Nery, Código Civil Comentado ("Título V") [Annotated Civil Code ("Title V")] (2019).

[99] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No 13,105/2015 of March 2015] Book I, Title II, Ch. I, art. 515, I ("[S]ão títulos executivos judiciais, cujo cumprimento dar-se-á de acordo com os artigos previstos neste Título: I - as decisões proferidas no processo civil que reconheçam a exigibilidade de obrigação de pagar quantia, de fazer, de não fazer ou de entregar coisa;") [**"[**T]he judicial enforcement titles, whose compliance will occur in accordance with the articles provided in this Title, are: I - the decisions rendered in civil proceedings that recognize the enforceability of an obligation to pay a sum of money, to do, not to do, or to deliver something."] (Braz.).

[100] In Brazil there are the Special Civil Courts destined to judge cases that do not surpass 40 minimum wages (art. 3, I, of Law No. 9,099/95 – "[T]he Special Civil Court has jurisdiction for conciliation, processing, and judgment of civil cases of lesser complexity, as defined below: I - cases where the value does not exceed forty times the minimum wage") (Braz.).

Once a creditor-plaintiff wins a money judgment, the creditor may be called a judgment creditor or, in Brazil, an enforcing creditor (exequente). After judgment, the defendant is a judgment debtor (executado).

1. Debtor's Exam and Turnover Orders

In both Brazil and the United States, a judgment creditor may compel the judgment debtor to identify pieces of property to be seized to satisfy the judgment debt. In the U.S., this can happen through the so-called "debtor's examination" procedure, in which the judgment debtor is required to answer questions regarding his or her employment, bank accounts, and other assets, enabling the judgment creditor to learn about the judgment debtor's property and sources of income.[101] Sometimes the judgment creditor will persuade the court to order the judgment debtor to turnover particular pieces of property to the judgment creditor.[102] A judgment debtor who disobeys such an order (or a court's order to submit to questioning) may be held in contempt of court.

In Brazil, the procedure is a little different as the Civil Procedure Code establishes that, when possible, the judgment creditor should already before suing have identified particular assets of the debtor's property to be seized if the debtor does not pay the judgment debt.[103] If the creditor is not able to identify any assets to be seized and the debtor fails to do so as well, the Brazilian Judiciary helps the creditor by making available databases that help locate, for example, bank accounts (SISBAJUD) and vehicles (RENAJUD) in the name of the debtor.[104] Notwithstanding, the Civil Procedure Code also allows the judgment debtor to

---

[101] Fed. R. Civ. P. 69(a)(2) ("In aid of the judgment or execution the judgment creditor . . . may obtain discovery from any person—including the judgment debtor—as provided in [the Federal Rules] or by the procedure of the state where the court is located.").

[102] These procedures vary by state, as referenced in Fed. R. Civ. P. 69(a)(2). *See, e.g.*, KAN. STAT. ANN. § 60-2419 ("At a hearing in aid of execution when the existence of any nonexempt property of the judgment debtor is disclosed, the court shall order the debtor to deliver the property to the sheriff.").

[103] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No 13,105/2015 of March 2015] Book I, Title II, Ch. III, art. 524, VII ("[O] requerimento previsto no art. 523 será instruído com demonstrativo discriminado e atualizado do crédito, devendo a petição conter: (…) VII - indicação dos bens passíveis de penhora, sempre que possível.") ["[T]he petition . . . must include: VII – an indication of assets subject to attachment, whenever possible.")] and art. 829, § 2, of the Brazilian 2015 Civil Procedure Code ["[T]he attachment shall be imposed on the assets indicated by the judgment creditor, unless other assets are indicated by the judgment debtor and accepted by the judge, upon demonstration that the proposed seizure would be less burdensome for the debtor and would not cause prejudice to the creditor."] (Braz.).

[104] SISBAJUD is an electronic system that makes unavailable financial assets of the debtor's propriety. Not only is his development based on art. 834 of the Brazilian 2015 Civil Procedure Code, like RENAJUD'S, but also on art. 854 of this same statute ("To enable the attachment of money in deposits or financial investments, the judge, upon the request of the creditor, without prior notice to the debtor, shall order financial institutions, through an electronic system managed by the authority supervising the national financial system, to make unavailable financial assets held in the name of the debtor, limiting the unavailability to the amount specified in the execution."). Its use and functioning, just like the already mentioned RENAJUD's, can be found at the Brazilian National Justice Council's website: https://www.cnj.jus.br/. Both of them are electronic systems, but, while RENAJUD is used to write down restrictions over vehicles that may vary from prohibition to transfer to prohibition to circulation, SISBAJUD connects the judiciary with financial institutions and is used to locate, freeze, and transfer financial assets held by judgment debtors.

substitute other assets if the debtor shows that such modification will be less onerous to the debtor and will not jeopardize the creditor.[105]

2. Taking Tangible Property from the Debtor

In both Brazil and the United States, a judgment creditor can get a government official to enforce the judgment by taking property from the debtor. In the U.S., if the judgment debtor owns land or goods the judgment creditor can generally get the clerk of the court to issue a writ (typically called a writ of execution) instructing the sheriff to levy on (seize) the debtor's property and sell it.[106] The proceeds of the sheriff's sale are generally paid first to reimburse the sheriff's expenses and then to the judgment creditor.[107] This process can continue until the judgment debt is paid in full.

Similarly in Brazil, the judgment creditor can get a court order to seize property of the judgment debtor, either based on the assets identified by the creditor at the filing of the petition or found through the above mentioned judicial mechanisms (SISBAJUD, RENAJUD), in a process called "penhora." Once the asset to be seized is identified, the judge's decision will attach a lien to it (with the same strength of a "writ of attachment")[108] and issue an order similar to a writ of execution instructing a clerk official to levy on (seize) that asset from the debtor. In contrast to the U.S. where sheriff sells the property seized to satisfy a money judgment, and to the above mentioned fiduciary guarantee that forbids the creditor from keeping the asset given in guarantee,[109] "penhoras" in Brazil allow the judgment creditor to keep the seized property.[110] If the asset's value is higher than the judgment debt, the creditor will deposit the difference in court for the debtor;[111] if the asset's

[105] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No 13,105/2015 of March 2015] Book II, Title II, Ch. IV, art. 847 ("[A] execução por quantia certa realiza-se pela expropriação de bens do executado, ressalvadas as execuções especiais.") [[T]he defendant may, within 10 (ten) days from the notification of the seizure, request the substitution of the seized asset, provided that they prove it will be less burdensome and will not cause harm to the creditor."] (Braz.).

[106] DAVID G. EPSTEIN, BANKRUPTCY IN A NUTSHELL 9-10 (10th ed. 2021).

[107] *Id*.

[108] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No. 13.105/2015 of the 16 of March of 2015] Book II, Title II, Ch. IV, art. 847 ["[T]he defendant may, within 10 (ten) days from the notification of the seizure, request the substitution of the seized asset, provided that they prove it will be less burdensome and will not cause harm to the creditor."] (Braz.).

[109] Lei No. 10.406, de 10 de Janeiro de 2002, C.C. [Law No. 10.406 of the 10 of January of 2002] [Civil Code] Book III, Title III, Ch. VIII, art. 1.365 ("[É] nula a cláusula que autoriza o proprietário fiduciário a ficar com a coisa alienada em garantia, se a dívida não for paga no vencimento.") ["[T]he clause that authorizes the fiduciary owner to keep the property given as collateral if the debt is not paid upon maturity is null and void."] (Braz.).

[110] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No 13.105/2015 of the 16 of March of 2015] Book II, Title II, Ch. IV, art. 876 ("[É] lícito ao exequente, oferecendo preço não inferior ao da avaliação, requerer que lhe sejam adjudicados os bens penhorados.") [[I]t is lawful for the creditor, by offering a price no lower than the valuation to request that the seized assets be awarded to them."].

[111] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No. 13.105/2015 of the 16 of March of 2015] Book II, Title II, Ch. IV, art. 876, § 4, I ("[S]e o valor do crédito for: I - inferior ao dos bens, o requerente da adjudicação depositará de imediato a diferença, que ficará à disposição do executado.") ["[I]f the value of the credit is: I - lower than the value of the assets, the requester of the adjudication shall immediately deposit the difference, which will be made available to the defendant."]. (Braz.).

value if lower than the judgment debt, the creditor will continue looking for property of the debtor until the judgment debt is satisfied.[112]

If the judgment creditor does not want to keep the seized asset, the creditor can ask for the asset to be sold with the proceeds going to the creditor.[113] This selling procedure can be done directly by the creditor or through an accredited broker or public auctioneer when it is finished it will be formalized by a term signed by the judge.[114] The judge will sign an order transferring the asset from the debtor to the buyer at the sale.[115]

3. Exempt Property

Law in both the U.S. and Brazil permits the debtor to keep some property exempt from seizure to enforce a money judgment. Exemption laws among the fifty United States generally include a reasonable amount of furniture, household goods, clothing, and so forth, but states vary sharply with respect to the home. In Missouri, for example, the judgment debtor's home is exempt but only up to $15,000.[116] So, if the debtor owns a $100,000 home subject to no other liens, the sheriff will sell it, pay $15,000 to the judgment debtor and whatever is left of the remaining $85,000 after sheriff's expenses to the judgment creditor. By contrast, in Kansas and a few other states, the homestead exemption has no dollar cap.[117] In these states, a judgment debtor with even a million-dollar home would keep the home; it would not be sold, and the judgment creditor would be unable to reach any of its value.

Brazil similarly exempts some property from seizure such as "furniture, belongings, and household items that furnish the debtor's residence, except those of high value or exceeding common needs corresponding to a medium standard of living."[118] Brazilian statutes place no

---

[112] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No. 13.105/2015 of the 16 of March of 2015] Book II, Title II, Ch. IV, art. 876, § 4, II ("[S]e o valor do crédito for. . . . superior ao dos bens, a execução prosseguirá pelo saldo remanescente.") ["[I]f the value of the credit is. . . . higher than the value of the assets, the execution will continue for the remaining balance."]. (Braz.).

[113] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No. 13.105/2015 of the 16 of March of 2015] Book II, Title II, Ch. IV, art. 880 ("[N]ão efetivada a adjudicação, o exequente poderá requerer a alienação por sua própria iniciativa ou por intermédio de corretor ou leiloeiro público credenciado perante o órgão judiciário.") ["[I]f the adjudication is not carried out, the creditor may request the sale on their own initiative or through a broker or accredited auctioneer before the judicial authority."] (Braz.).

[114] *Id.*

[115] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No 13,105/2015 of the 16 of March of 2015] Book II, Title II, Ch. IV, art. 880, § 2 ("[A] alienação será formalizada por termo nos autos, com a assinatura do juiz, do exequente, do adquirente e, se estiver presente, do executado, expedindo-se . . . a carta de alienação e o mandado de imissão na posse, quando se tratar de bem imóvel . . . [ou] a ordem de entrega ao adquirente, quando se tratar de bem móvel. ") ["[T]he transfer will be formalized by a statement in the case file, with the signature of the judge, the creditor, the buyer, and, if present, the defendant, issuing . . . the deed of transfer and the order for possession when it concerns real property . . . [or] the order for delivery to the buyer, when it concerns movable property."] (Braz.).

[116] MO. REV. STAT. § 513.475 (2003).

[117] KAN. STAT. ANN. § 60-2301 (2011).

[118] Lei No. 13.105, de 16 de Março de 2015, C.P.C. [Law No. 13.105/2015 of the 16 of March of 2015] Book II, Title II, Ch. IV, art. 833("[S]ão impenhoráveis: I - os bens inalienáveis e os declarados, por ato voluntário, não sujeitos à execução; II - os móveis, os pertences e as utilidades domésticas que guarnecem a residência do executado, salvo os de elevado valor ou os que ultrapassem as necessidades comuns correspondentes a um médio padrão de vida; III - os vestuários, bem como os pertences de uso pessoal do executado, salvo se de elevado valor; IV - os

value cap on the exemption for the family home,[119] but case law does. For example, the State Court of São Paulo forced the sale of a luxurious family home and ordered that a third of the proceeds go to the judgment creditor.[120]

Importantly, in the U.S. and likely Brazil, debtors' exemptions do not work against secured creditors, that is, creditors with a property interest in the particular piece of the debtor's property. While in the U.S. this limitation is well-established in both statutes and

vencimentos, os subsídios, os soldos, os salários, as remunerações, os proventos de aposentadoria, as pensões, os pecúlios e os montepios, bem como as quantias recebidas por liberalidade de terceiro e destinadas ao sustento do devedor e de sua família, os ganhos de trabalhador autônomo e os honorários de profissional liberal, ressalvado o § 2º ; V - os livros, as máquinas, as ferramentas, os utensílios, os instrumentos ou outros bens móveis necessários ou úteis ao exercício da profissão do executado; VI - o seguro de vida; VII - os materiais necessários para obras em andamento, salvo se essas forem penhoradas; VIII - a pequena propriedade rural, assim definida em lei, desde que trabalhada pela família; IX - os recursos públicos recebidos por instituições privadas para aplicação compulsória em educação, saúde ou assistência social; X - a quantia depositada em caderneta de poupança, até o limite de 40 (quarenta) salários-mínimos; XI - os recursos públicos do fundo partidário recebidos por partido político, nos termos da lei; XII - os créditos oriundos de alienação de unidades imobiliárias, sob regime de incorporação imobiliária, vinculados à execução da obra. ") ["[T]he following are exempt from attachment: I - assets that are inalienable and those declared, by voluntary act, not subject to execution; II - furniture, personal belongings, and household goods that furnish the residence of the debtor, except for those of high value or those that exceed the common needs corresponding to a medium standard of living; III - clothing, as well as personal belongings of the debtor, unless of high value; IV - wages, subsidies, salaries, remunerations, retirement benefits, pensions, savings, and annuities, as well as amounts received by the debtor as a gift from a third party for the support of the debtor and their family, earnings from self-employment, and fees from freelance professionals, except as provided in § 2; V - books, machines, tools, utensils, instruments, or other movable goods necessary or useful for the exercise of the debtor's profession; VI - life insurance; VII - materials necessary for ongoing construction works, unless the works have been attached; VIII - small rural property, as defined by law, as long as it is worked by the family; IX - public funds received by private institutions for compulsory application in education, health, or social assistance; X - the amount deposited in a savings account, up to the limit of 40 (forty) minimum wages; XI - public resources from the party fund received by a political party, as provided by law; XII - credits arising from the sale of real estate units under a real estate development regime, linked to the execution of the project."] (Braz.).

[119] Lei No. 8.009/90 de 29 de Março de 1990 [Law No. 8.009/90 of the 29 of March of 1990] art. 5 ("[P]ara os efeitos de impenhorabilidade, de que trata esta lei, considera-se residência um único imóvel utilizado pelo casal ou pela entidade familiar para moradia permanente.") ["[F]or the purposes of non-seizability, as provided in this law, a residence is considered to be a single property used by the couple or the family entity for permanent dwelling."] (Braz.).

[120] TJSP; Agravo de Instrumento No. 2011061-57.2019.8.26.0000 São Paulo, Relatora: Desa. Sandra Galhardo Esteves, 05.22.2019, Diário de Justiça Eletrônico [D.J.e], 05.23.2019 (Braz.). ("The letter of the law, general and broad, establishes that the family property is unattachable. Its intention is to ensure the effective exercise of the right to dignified housing. However, in the eyes of the law's applicator, the situation in this case reveals an exception; the judge realizes that the cold application of the law to the concrete case results in injustice; and this is not what the law's applicator seeks, nor what the litigant expects, but rather the just regulation of the concrete case in all things, but especially in law, equity must be considered (*in omnibus quidem, maxime tamen, in jure, aequitas spectanda* sit). It is not reasonable that such a property is invested in this single and luxurious property, benefited by the un-seizability, when its owner is insolvent and in debt. The constitutionally guaranteed right is to dignified housing, not to the ownership of a property of the insolvent debtor's choosing.").

case law,[121] in Brazil it is less clear as it has only been acknowledged by case law so far.[122] Homestead exemptions in the U.S. also often do not apply to contractors who worked on the home.[123] Similarly, the Brazilian Superior Court of Justice has recognized that the homestead exemption does not apply to creditors who repaired the debtor's house.[124]

4. Garnishment

An important tool available to judgment creditors in both Brazil and the U.S. is wage garnishment. The Brazilian Civil Procedure Code exempts wages from seizure by non-alimony creditors, except insofar as the wages surpass 50 times minimum wages per month.[125] The minimum wage is, as of this 2025 writing, R$ 1,518 per month (roughly $268 USD),[126] so this law ostensibly protects from non-alimony creditors wages below fifty times that, which is R$ 75,900 per month, while a 2024 study by the Brazilian Institute of Geography and Statistics found that 90% of Brazilians earn less than R$ 3,500 per month.[127] However, Brazilian courts frequently ignore this statute and permit non-alimony creditors to garnish wages below the statutory minimum, provided that the debtor's family subsistence is safeguarded.[128] For example, one Superior Court of Justice decision said, "any amount

---

[121] *See*, *e.g.*, Moyer v. Int'l State Bank, 404 N.W.2d 274 (Minn. 1987) (exemption "statute does not forbid a debtor to mortgage protected property and to create a lien against identified property which can be foreclosed despite the property's exempt status"); WIS. STAT. § 815.20 (2019) ("An exempt homestead as defined in s. 990.01 (14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment, and from liability for the debts of the owner to the amount of $75,000, except mortgages, laborers', mechanics', and purchase money liens and taxes and except as otherwise provided.").

[122] S.T.J. Recurso Especial No. 1.560.562 Santa Catarina, Relatora: Min. Nancy Andrighi, 04.02.2019, Diário de Justiça Eletrônico [D.J.e], 04.04.2019 (Braz.) ("The debtor cannot offer a property as collateral that is known to be a family residence and then later claim that such collateral lacks legal support, advocating for its exclusion. . . .").

[123] *Id.*

[124] S.T.J. Recurso Especial No. 2082860 Rio Grande do Sul, Relatora: Min. Nancy Andrighi, 02.06.2024, Diário de Justiça Eletrônico, [D.J.e], 02.27.2024 (Braz.) ("The rules that establish hypotheses of unseizability are not absolute. Article 3 of Law No. 8.009/90 itself provides a series of exceptions to unseizability, one of which is the case where the action is filed to collect a credit arising from financing intended for the construction or acquisition of the property, within the limits of the credits and increases constituted under the respective contract (paragraph II). From the interpretation of the provision in Article 3, II, of Law No. 8.009/90, it is clear that the purpose of the rule was to prevent the debtor from using the unseizability of the family property to block the collection of a debt incurred for the acquisition, construction, or renovation of the property itself, that is, for a debt arising from a legal transaction involving the property. Therefore, the debt related to residential renovation services falls under this exception.").

[125] Brazilian Civil Procedure Code [C.P.C.] art. 833 (Braz.) ("The provision[] in items IV – wages do[es] not apply in the case of seizure for the payment of alimony, regardless of its origin as well as to amounts exceeding 50 (fifty) minimum monthly wages").

[126] *Id.*

[127] PIESB, *Confira onde você se encaixa na pirâmide salarial brasileira*, G1 Economia (Oct. 24, 2024), https://g1.globo.com/sp/sao-carlos-regiao/especial-publicitario/piesb/noticia/2024/10/24/confira-onde-voce-se-encaixa-na-piramide-salarial-brasileira.ghtml.

[128] S.T.J. Embargos De Divergência Em Recurso Especial No. 1874222 Distrito Federal, Relator: Min. João Otávio de Noronha, 04.19.2023, Diário de Justiça Eletrônico [D.J.e], 05.24.2023 (Braz.) ("I believe that the establishment of this 50 minimum wage limit deserves criticism, as it is very inconsistent with the Brazilian reality, rendering the provision almost ineffective, in addition to not reflecting the true scope of exemption from seizure, which is to ensure a dignified reserve for the support of the debtor and their family . . . It is important to emphasize, however, that this relativization is of an exceptional nature and should only be used when other enforcement

exceeding the minimum existential from salaries, wages, earnings, pensions, and military pay may be subject to judicial attachment for the fulfillment of the debts incurred by the debtor."[129]

This "minimum existential" parameter used by the Superior Court of Justice is an important concept in Brazilian consumer law lacking any analog in U.S. law. The minimum existential is defined by various Brazilians as what's necessary for dignified survival,[130] a dignified life,[131] or expenses such as costs related to water, light, food, health, hygiene, education and transportation,[132] taking into account "the consumer's family situation, housing, and minimum food and clothing needs, in the specific case."[133] The Brazilian Consumer Protection Code says the "basic rights of the consumer" include "the preservation of the existential minimum, according to the regulations, in debt renegotiation and the granting of credit."[134]

---

measures that guarantee the effectiveness of the execution have been rendered unfeasible, and, once again, provided that the impact of the seizure on the debtor's income is concretely assessed."); S.T.J, Recurso Especial No. 1990183 Goiás, Relator: Min. Ricardo Villas Bôas Cueva, 04.19.2022, Diário de Justiça Eletrônico [D.J.e], 05.05.2022 (Braz.) ("On the other hand, for the satisfaction of non-food credits, the relativization of the rule of exemption from seizure of earnings is allowed in exceptional situations, in order to reach part of the debtor's remuneration, while ensuring, in any case, that enough is preserved to guarantee the debtor's and their family's dignified livelihood.").

[129] S.T.J. Recurso Especial No. 1514931 Distrito Federal, Relator: Min. Paulo de Tarso Sanseverino, 10.25.2016, Diário de Justiça Eletrônico [D.J.e], 12.06.2016 (Braz.) ("It is along these lines that I advocate for the interpretation of item IV of Article 649 of the CPC/73, meaning that any amount exceeding the minimum existential from salaries, wages, earnings, pensions, and military pay may be subject to judicial attachment for the fulfillment of the debts incurred by the debtor."); TJDF. Agravo de Instrumento No. 0730087-91.2021.8.07.0000, Brasília, Relator: Hector Valverde Santanna, 07.27.2022, Diário de Justiça Eletrônica [D.J.e], 08.18.2022 (Braz.) ("It is therefore necessary to balance the debtor's right to dignity with the creditor's right to dignity. The principle of maximum effectiveness requires that the constitutional norm be interpreted in a way that grants it the greatest possible efficacy. In this context, this can only be understood as the possibility of reasonably limiting enforcement measures to ensure the debtor's minimum existential is preserved, without imposing undue restrictions on the creditor's dignity. (…) The case records indicate that the appellant's net salary amounts to R$5,504.14 (five thousand, five hundred and four reais and fourteen centavos) and that the appellant has monthly expenses that consume almost the entire amount received. This is because payments have been proven for rent in the amount of R$1,200.00 (one thousand two hundred reais), R$703.90 (seven hundred and three reais and ninety centavos) for health insurance, psychological treatment for his daughter, and a loan with a direct debit deduction of R$2,399.05 (two thousand, three hundred and ninety-nine reais and five centavos), in addition to other daily expenses. It is evident that the garnishment of any percentage of the appellant's salary would affect his existential minimum and jeopardize his dignified subsistence, which is not permitted under our legal system.").

[130] Ricardo Lobo Torres, *O mínimo existencial e os direitos fundamentais*, 177 REVISTA DE DIREITO ADMINISTRATIVO 29, 49 (1989).

[131] *Id*.

[132] CLAUDIA MARQUES ET AL., Capítulo VI-A, *Da Prevenção e do Tratamento do Superendividamento* [On the Prevention and Treatment of Over-Indebtedness], *in* CLAUDIA MARQUES ET AL., *Comentários ao Código de Defesa do Consumidor* [Commentaries on the Consumer Protection Code] (2022).

[133] CLAUDIA MARQUES ET AL., *25. Lei No. 14.181, LGPD e o Crédito Responsável, in* Claudia Marques et al., 0061, 5 anos de LGPD (2024).

[134] Lei No. 8.078, de Setembro de 1990 (Código de Defesa do Consumidor) [Law No. 8.708 of September 1990] [Consumer's Protection Code], arts. 6 (xi) and (xii) ("[S]ão direitos básicos do consumidor: XI - a garantia de práticas de crédito responsável, de educação financeira e de prevenção e tratamento de situações de superendividamento, preservado o mínimo existencial, nos termos da regulamentação, por meio da revisão e da repactuação da dívida, entre outras medidas; a preservação do mínimo existencial, nos termos da regulamentação, na repactuação de dívidas e na concessão de crédito.") ["[T]he basic rights of the consumer are: (…) XI - the guarantee of responsible credit practices, financial education, and the prevention and treatment of over-indebtedness

The Brazilian Consumer Protection Code does not specify a method for objectively calculating the existential minimum, so Presidential Decree No. 11.150/2022 defined the minimum existential as 25% of the minimum wage in the country, which was R$ 1,212 per month at the time. In the following year, however, Presidential Decree No. 11.567/2023 raised the "minimum existential" to R$ 600.00 per month, and it has not been further changed, as of this writing. So Brazilian courts generally permit garnishment of wages above about R$ 600.00 per month, which is now about $105 US per month.[135]

Similarly, federal law in the United States protects some amount of wages from garnishment,[136] and permits family support creditors to garnish a higher portion of the debtor's wages than other creditors may garnish.[137] Federal law permits U.S. states to further regulate wage garnishment and a few states confine it to creditors whose claims arise out of domestic support obligations like alimony and child support.[138] But in most states, credit card issuers and other general unsecured creditors who win judgments routinely enforce those judgments by garnishing the debtor's wages.[139] The judgment creditor can get the clerk of the court that awarded the judgment to issue a writ of garnishment to the debtor's employer.[140] This writ basically instructs the employer to pay a portion of the judgment

situations, preserving the existential minimum, in accordance with the regulations, through debt review and renegotiation, among other measures; XII - the preservation of the existential minimum, according to the regulations, in debt renegotiation and the granting of credit."] (Braz.).

[135] *Id.*

[136] 15 U.S.C. § 1673(a) (1978) ("[T]he maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed (1) 25 per centum of his disposable earnings for that week, or (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage . . . in effect at the time the earnings are payable, whichever is less."); Brazilian Civil Procedure Code, Art. 833 (this article establishes as unseizable "(…) wages, salaries, retirement benefits, pensions, remittances of funds," but its first paragraph establishes that this exemption does not apply "apply to the case of seizure for the payment of alimony, regardless of its origin, as well as to amounts exceeding 50 (fifty) minimum monthly wages.").

[137] 15 U.S.C. § 1673(b)(1) (1978) ("The restrictions of subsection (a) do not apply in the case of (A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review."); *id.* § 1673(b)(2) ("The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and (B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week. . . .").

[138] TEX. CONST. art. 16, § 28 (1999).

[139] Anthony A. DeFusco et al., *Wage Garnishment in the United States: New Facts from Administrative Payroll Records*, 6 AM. ECON. REV.: INSIGHTS 38, 39 ("As of 2019, over 1 in every 100 workers was being garnished for delinquent debt. The average garnished worker experiences garnishment for five months, during which approximately 11 percent of gross earnings is remitted to their creditor(s).").

[140] ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS 40 (8th ed. 2021) ("A garnishment writ is typically used to attach debts owed to the debtor for the benefit of the debtor's judgment creditor. A creditor may garnish a debtor's wages by obtaining a writ directing the employer to pay the wages to the creditor rather than to the employee.").

debtor's future wages to the judgment creditor.[141] The service of such a writ typically gives the creditor a lien on the debtor's future wages for a period of time.[142]

Garnishing a debtor's right to collect money other than wages is generally permitted in Brazil as well as the United States. For example, debtors' bank accounts are often garnished, and in Brazil bank garnishment is facilitated by the already mentioned "SISBAJUD" (Sistema de Busca de Ativos do Poder Judiciário).[143]

IV. Brazil's Civil Insolvency Contrasted with Chapter 7 for Consumers

a. Overview of Bankruptcy in Brazil and the United States

As noted in the Introduction, Brazil continues the civil law tradition of confining bankruptcy relief to business debtors. Brazil's 2005 Bankruptcy Act provides business debtors both bankruptcy and judicial reorganization, which are analogs to Chapter 7 and Chapter 11 of the U.S. Bankruptcy Code, respectively.[144] Brazil's 2005 Bankruptcy Act does so not just for corporations and other business entities but also for sole proprietors and registered farmers.[145] So, the distinction in Brazil's law is not between legal persons and humans, but between business debtors (whether legal or human) and non-business debtors. Only business debtors received the benefits of modern bankruptcy law in Brazil's 2005 Bankruptcy Act.

In contrast—and this may be the biggest difference between Brazil and the United States with respect to debtor-creditor law—Brazil makes it very difficult for consumers to discharge debts without paying them. While Chapter 7 enables hundreds of thousands of U.S. consumers each year to discharge most unsecured debts at a low cost and within just a few

---

[141] *Id*. ("The garnishment writ has two parts: (1) a set of questions designed to determine whether the party served with the writ—the 'garnishee,' e.g., the employer or the bank—owes any money to the debtor or has any property belonging to the debtor, and (2) a command to the garnishee to withhold payment or return of the debtor's property pending further order of the court.").

[142] *Id*. at 41 ("While garnishment procedures vary widely, in most states the garnishing creditor gets a temporal 'net'—the time between service of the garnishment writ and the garnishee's answer—during which the creditor gets to 'catch' obligations arising in favor of the debtor. Thus garnishment of a bank account will let a creditor obtain not only the amount on deposit on the date the writ was served, but also funds deposited thereafter up until the time that the answer to the garnishment writ is due. By contrast, a few states use a 'spear' approach, where a writ only catches whatever is available at the moment of service.").

[143] *See* discussion *supra* Part 3.B(2a) (stating that SISBAJUD is an electronic system developed by the Brazilian National Justice Council that makes financial assets of the debtor's propriety unavailable by connecting the judiciary with financial institutions.).

[144] Lei No. 11.101/2005 de 9 de Fevereiro de 2005 [Law No. 11.101/2005 of the 9 of February of 2005] ("[E]sta Lei disciplina a recuperação judicial, a recuperação extrajudicial e a falência do empresário e da sociedade empresária, doravante referidos simplesmente como devedor.") ["[T]his Law governs judicial recovery, extrajudicial recovery, and bankruptcy of the entrepreneur and the business corporation hereinafter simply referred to as the debtor."]. (Braz.).

[145] CÓDIGO CIVIL [C.C.] art. 971 de 2018, [CIVIL CODE Law No. 13.777, art. 971 of 2018] (Braz.) (foresees that farmers need to be registered in the Business Public Registrar in order to be compared to an entrepreneur to all effects).

months, Brazil's archaic "Civil Insolvency" procedure delays the discharge for at least five years,[146] and is rarely used.[147]

b. Civil Insolvency Contrasted with Chapter 7 for Consumers

Civil Insolvency in Brazil bears some similarities to Chapter 7 for individuals. By filing either sort of case,[148] which requires the debtor to disclose all their debts, creditors, and property,[149] a debtor may stay many creditors' suits and other collection efforts.[150] Both

[146] CÓDIGO DE PROCESSO CIVIL [C.P.C.] Lei No. 5.869, art. 778, de 11 de jan. de 1973, [CODE OF CIVIL PROCEDURE Law No. 5.869 art. 778 of January 1973] (Braz.) ("[C]onsideram-se extintas todas as obrigações do devedor, decorrido o prazo de 5 (cinco) anos, contados da data do encerramento do processo de insolvência.") ["[I]t shall be considered that all obligations of the debtor are extinguished upon the lapse of five (5) years from the date of the closure of the insolvency proceedings."] (Braz.). The former Civil Procedure Code of 1973 provides for civil insolvency, and this law was continued in Brazil's current Civil Procedure Code of 2015. *See* CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 1052 de 16 de mar. de 1973 [CIVIL PROCEDURE CODE art. 1052 of March 16, 1973] (Braz.) ("Art. 1.052. Até a edição de lei específica, as execuções contra devedor insolvente, em curso ou que venham a ser propostas, permanecem reguladas pelo Livro II, Título IV, da Lei nº 5.869, de 11 de janeiro de 1973.") ["[U]ntil a specific law is enacted, executions against an insolvent debtor, both those that are pending and those that will be filed, shall continue to be regulated by Book II, Title IV, of Law No. 5.869, of 11 January 1973."]. (Braz.).

[147] José Reinaldo de Lima Lopes, *Consumer Bankruptcy and Over-indebtedness in Brazil*, *in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 93 (Johanna Niemi-Kiesiläinen, et al. 2003) (even when it is used, its gaps lead judges to supplement it with provisions of the Brazilian Bankruptcy Code, which by its terms applies only to business debtors). T.J.R.S, Agravo de Instrumento No. 70077335644 Rio Grande do Sul, Relator: Giovanni Conti, 28/06/2018, Diário da Justiça [D.J.], 03/07/2018) (Braz.) (applying Bankruptcy Code's inflation adjustments and stating, "The Bankruptcy Law is applied by analogy to the Civil Insolvency procedure in cases where the civil procedural law is silent**."**). However, courts have not supplemented Civil Insolvency with provisions of the Bankruptcy Code that would help consumer debtors discharge debt.

[148] 11 U.S.C. § 301 (voluntary petition by debtor); 11 U.S.C. § 303 (requiring three creditors and other requirements for involuntary petition); CÓDIGO DE PROCESSO CIVIL [C.P.C.] Lei No. 5.869, art. 753 de 11 de Janeiro de 1973 [CODE OF CIVIL PROCEDURE Law No. 5.869, art. 753 of January 1973] (Braz.) ("The declaration of insolvency may be requested: I - by any unsecured creditor; II - by the debtor; III - by the administrator of the debtor's estate.").

[149] Both Civil Insolvency and Chapter 7 require the debtor to disclose all of the debtor's debts, creditors, and property. CÓDIGO DE PROCESSO CIVIL [C.P.C.] Lei No. 5.869, art. 753 de 11 de jan. de 1973 [CODE OF CIVIL PROCEDURE Law No. 5.869, art. 760 of Jan. 11, 1973] (Braz.) ("[A] petição, dirigida ao juiz da comarca em que o devedor tem o seu domicílio, conterá: I - a relação nominal de todos os credores, com a indicação do domicílio de cada um, bem como da importância e da natureza dos respectivos créditos; II - a individuação de todos os bens, com a estimativa do valor de cada um; III - o relatório do estado patrimonial, com a exposição das causas que determinaram a insolvência.") ["[T]he petition addressed to the judge of the district where the debtor resides, shall contain: I - the nominal list of all creditors, indicating the domicile of each one, as well as the amount and nature of their respective credits; II - the identification of all assets, with an estimate of the value of each one; III - the report on the financial conditions with an explanation of the causes that led to the insolvency."]; 11 U.S.C. §§ 301, 303, 521. 11 U.S.C. § 521; CHARLES JORDAN TABB, KARA J. BRUCE & LAURA NAPOLI COORDES, LAW OF BANKRUPTCY 141 (W. Acad. Publ'g ed., 6th ed. 2024) ("The debtor must file numerous lists, schedules, and statements.").

[150] The U.S. Bankruptcy Code's automatic stay is quite clear in prohibiting "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy] case." 11 U.S.C. § 362(a) (a bankruptcy petition "operates as a stay, applicable to all entities, of- (1) the commencement or continuation including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title ... (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title").

Brazil's Civil Insolvency law lacks a clear a statutory prohibition but presumes that the declaration of insolvency gathers preexisting executions. CÓDIGO DE PROCESSO CIVIL [C.P.C.] Lei No. 5.869, art. 751 de 11 de jan. de 1973 [CODE OF CIVIL PROCEDURE Law No. 5.869, art. 751 of Jan. 11, 1973] (Braz.) ("[A] declaração de insolvência do devedor produz: (...) III - a execução por concurso universal dos seus credores.") ["[T]he declaration of the debtor's insolvency produces: ... III - the execution by universal competition of their creditors."] (Braz.) and CÓDIGO DE PROCESSO CIVIL [C.P.C.] Lei No. 5.869, art. 762 de 11 de jan. de 1973 [CODE OF CIVIL PROCEDURE Law No. 5.869, art. 762 of Jan. 11, 1973] (Braz.). ("[A]s execuções movidas por credores individuais serão remetidas ao juízo da insolvência.") ["[E]xecutions filed by individual creditors will be referred to the insolvency court."] Araken de Assis, *Lineamentos da Insolvência Civil* [*Guidelines of Civil Insolvency*], MANUAL DA EXECUÇÃO [EXECUTION MANUAL] (Editora Revista dos Tribunais ed., 2024) ("All acts carried out in contravention to the universality of the insolvency judgment are deemed ineffective. The estate has the right to declare such acts ineffective and, in the mentioned example, to recover the currency received in violation of the fundamental rule of equality (par conditio creditorum). If, after the insolvency, an unwitting creditor files an individual execution against the insolvent, following the common procedure for expropriation, the judge will dismiss the case for lack of the necessary conditions for its effective progression."). Civil Insolvency also apparently says creditors' private, self-help collection efforts, such as simply asking the debtor to pay. HUMBERTO THEODORO JÚNIOR, A INSOLVÊNCIA CIVIL: EXECUÇÃO POR QUANTIA CERTA CONTRA DEVEDOR INSOLVENTE [CIVIL INSOLVENCY: EXECUTION FOR A SPECIFIED AMOUNT AGAINST AN INSOLVENT DEBTOR] 257-260 (Forense ed., 6th ed. 2009) ("The suspension of individual enforcement proceedings aims to ensure that all creditors join the collective enforcement procedure and submit to the recognition of their claims against the estate through the 'credit verification' process, a fundamental stage of the insolvency proceedings. (…) Thus, all individual executions are indiscriminately suspended so that creditors, who are deprived of the individual right of action, must undergo the mandatory 'verification' process in the insolvency court, regardless of whether they have real guarantees over the debtor's assets or whether the debtor's assets have been seized in a judicial procedure moved by the creditor. (…) [O]nce the universal insolvency proceeding is initiated, all individual executions against the insolvent debtor are suspended, and creditors must file their claims in the universal proceeding if they still wish to enforce the debtor's assets."). Both bankruptcy and civil insolvency have exceptions to the stay. 11 U.S.C. § 362(b); THEODORO JÚNIOR, *supra* at 378, ("The universal insolvency proceeding does not bind the Public Treasury, which, even after the declaration of insolvency, may continue its previously initiated individual enforcement against the insolvent debtor or commence it if it has not yet done so.").

Chapter 7 and Brazil's Civil Insolvency provide a trustee or administrator[151] who, while protecting the property interests of secured creditors,[152] sells the debtor's non-exempt[153] property and uses the proceeds to pay priority creditors,[154] and then, in proportion to their claims, nonpriority creditors.[155] Both Chapter 7 and Civil Insolvency exclude some debts from discharge, such as many tax and family debts.[156] Finally, while some Chapter 7 debtors

---

[151] In the U.S., this is a trustee appointed indirectly by the Attorney General of the United States. 28 U.S.C. § 581(a). 11 U.S.C. § 701; 11 U.S.C. § 521; TABB ET AL., *supra* note 149, at 89. ("[United States] trustees are a part of the Department of Justice. . . . [A]mong the duties given to U.S. trustees are: to establish panels of private trustees that can serve in bankruptcy cases [and to] appoint those trustees."). In Brazil, the judge will choose an administrator from among the debtor's biggest creditors–Art. 761 of the Brazilian 1973 Civil Procedure Code ("Na sentença, que declarar a insolvência, o juiz: I - nomeará, dentre os maiores credores, um administrador da massa;") ["[I]n the judgment declaring insolvency, the judge: I - will appoint, from among the largest creditors, an administrator for the estate;"] (Braz.). Or, due to the common subsidiary application of the Brazilian Bankruptcy Act to Civil Insolvency cases, a professional among those who usually act in such a position in Bankruptcy and Judicial Recovery cases. *See, e.g.*, the Civil Insolvency case of Daniela Franciosi (No 5000408-27.2013.8.21.0021 under the Court of Rio Grande do Sul), in which the Court of Justice of the State of Rio Grande do Sul chose a third party specialized in Judicial Recovery and Bankruptcy to administer the insolvent's assets.

[152] Chapter 7 protects secured creditors in several ways, all generally resting on the fact that bankruptcy only discharges the creditor's claim against the debtor, 11 U.S.C. § 727, not the creditor's lien in the debtor's property, which survives bankruptcy if it is not paid during the bankruptcy case. 11 U.S.C. § 506(d) (negative implication). In Brazil's Civil Insolvency procedure, the creditors with real guarantees (such as mortgages and fiduciary guarantees) will continue to have the right to execute their guarantees extrajudicially. THEODORO JÚNIOR, *supra* note 150, at 374-375 ("Brazilian positive law recognizes . . . cases of real guarantees in which the creditor is granted the power to sell the collateral extrajudicially . . . these special powers are not affected by the debtor's insolvency.") Or if the collateral (asset given by the debtor in guarantee) is sold inside of the Civil Insolvency procedure, the proceeds first pay the secured creditor. CÓDIGO CIVIL[C.C.] art. 1.422 (Braz.) ("[O] credor hipotecário e o pignoratício têm o direito de excutir a coisa hipotecada ou empenhada, e preferir, no pagamento, a outros credores, observada, quanto à hipoteca, a prioridade no registro.") ["[T]he mortgagee and the pledgee have the right to enforce the mortgaged or pledged asset and to be preferred in payment over other creditors, subject to the priority of registration in the case of a mortgage."]. (Braz.).

[153] 11 U.S.C. § 522 CÓDIGO DE PROCESSO CIVIL [C.P.C.] Lei No. 5.869, art. 775 de 11 de jan. de 1973 [CODE OF CIVIL PROCEDURE Law No. 5.869, art. 775 of Jan. 11, 1973] (Braz.) ("[P]elo pagamento dos saldos respondem os bens penhoráveis que o devedor adquirir, até que se Ihe declare a extinção das obrigações.") ["[T]he non-exempt assets that the debtor acquires are liable for the payment of the balances, until the extinction of the obligations is declared."]. (Braz.).

[154] 11 U.S.C. § 507; THEODORO JÚNIOR, *supra* note 150, at 374-75 ("We will arrive at a general framework of obligations to be satisfied from the proceeds of asset liquidation, structured as follows in accordance with legal priority: I - Labor claims; II - Insolvency proceeding costs and other estate debts; III - Claims arising from work-related accidents; IV - Federal tax claims; V - State tax claims; VI - Municipal tax claims; VII - Secured claims; VIII - Claims with special privilege; IX - Claims with general privilege; X - Unsecured claims."). Although Theodoro Junior puts federal taxes ahead of state taxes, that was deemed unconstitutional by a decision of Brazil's constitutional court. Action Against a Violation of a Constitutional Fundamental Right No. 357. So federal and state taxes are the same level of priority. STF, ADPF 357 No 357 DF. Relator: Min. Carmen Lúcia, 06.24.2021, Diário de Justiça Eletrônico, 10.07.2021 (Braz.).

[155] 11 U.S.C. § 726; CÓDIGO CIVIL [C.C.] Lei. No. 10.4061 de 10 janeiro de 2002 [CIVIL CODE Law No. 10.4061 Jan. 10, 2002] (Braz.) ("[Q]uando concorrerem aos mesmos bens, e por título igual, dois ou mais credores da mesma classe especialmente privilegiados, haverá entre eles rateio proporcional ao valor dos respectivos créditos, se o produto não bastar para o pagamento integral de todos.") ["[W]hen two or more creditors of the same class, with the same priority title, claim the same assets, there shall be a proportional distribution among them based on the value of their respective credits, if the proceeds are insufficient to fully pay all."] (Braz.).

[156] 11 U.S.C § 523(a); THEODORO JÚNIOR, *supra* note 150, at 239 ("Actions for alimony, as well as those for legal separation or divorce, whether in favor of or against the insolvent party, are not affected by bankruptcy proceedings."); CÓDIGO TRIBUTÁRIO NACIONAL [C.T.N.] Lei. No. 5.172, art. 187 de 25 de out. 1996 [NATIONAL

navigate the process without a lawyer,[157] debtors under both laws typically need the help of a lawyer,[158] which may require the debtor to pay the lawyer more money than the debtor has.[159]

Notwithstanding these similarities, Civil Insolvency provides debtors much less relief than Chapter 7. Most significantly, filing a Chapter 7 petition gives the debtor an immediate "fresh start" toward acquiring post-petition property,[160] which the debtor keeps free of pre-petition creditors' claims, even while typically paying nothing to discharge them.[161] And the Chapter 7 debtor typically receives that discharge just a few months after the case commenced.

In contrast, Civil Insolvency delays the fresh start and discharge for at least five years,[162] during which any non-exempt property the debtor acquires above the existential minimum may be seized by the administrator for payment to pre-bankruptcy creditors.[163] During this five-or-more-year period, José Reinaldo de Lima Lopes explains, "the consumer will be practically excluded from some everyday transactions; he would be unable to have a credit card and he would be unable to make all the uses ordinarily made by others of their chequing

---

TAX CODE Law No. 5.172, art. 187 of Oct. 25, 1996] (Braz.) ("[A] cobrança judicial do crédito tributário não é sujeita a concurso de credores ou habilitação em falência, recuperação judicial, concordata, inventário ou arrolamento")["[T]he judicial collection of tax credits is not subject to creditors' concourse or to registration in bankruptcy, judicial recovery, composition with creditors, probate, or estate inventory proceedings"] (Braz.).

[157] *See, e.g.*, *In re* Roberts, 659 B.R. 271, 274 (Bankr. W.D. Pa. 2024) ("Roberts initiated this Chapter 7 bankruptcy case on March 18, 2021. She filed her bankruptcy petition and prosecuted this case *pro se* (that is, without the assistance of counsel), which is not a simple task by someone without legal experience or legal education.").

[158] Ed Flynn, *The Changing Profile of Chapter 7 Filers*, AM. BANKR. INST. L. J., Sept. 2018 at 36, 74 ("The pro se rate among joint filers has stayed fairly constant at around 4 percent each year. However, the pro se rate among solo filers has risen from about 7 percent to approximately 11 percent.").

[159] José Reinaldo de Lima Lopes, *Consumer Bankruptcy and Over-indebtedness in Brazil*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 94 (Johanna Niemi-Kiesiläinen, et al. 2003).

[160] 11 U.S.C. § 541(a) (making property of the estate, which is basically the only property that may be liquidated in bankruptcy to pay creditors, only "interests of the debtor in property as of the commencement of the case").

[161] Most Chapter 7s are "no asset" cases in which the trustee administers no property and disburses no money to creditors. Pamela Foohey, Robert M. Lawless, Katherine M. Porter & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. Cal. L. Rev. 1055 (2017).

[162] CÓDIGO DE PROCESSO CIVIL [C.P.C.] Lei No. 5.869, art. 778 de 11 de Janeiro de 1973 [CODE OF CIVIL PROCEDURE Law No. 5.869 art. 778 of January 1973] (Braz.)

("[C]onsideram-se extintas todas as obrigações do devedor, decorrido o prazo de 5 (cinco) anos, contados da data do encerramento do processo de insolvência")["[A]ll obligations of the debtor are considered extinguished after the period of 5 (five) years, counted from the date of the closure of the insolvency process."] (Braz.).

[163] CÓDIGO DE PROCESSO CIVIL [C.P.C.] Lei No. 5.869, art. 775 de 11 de Janeiro de 1973 [CODE OF CIVIL PROCEDURE Law No. 5.869 art. 775 of January 1973] (Braz.) ("[P]elo pagamento dos saldos respondem os bens penhoráveis que o devedor adquirir, até que se Ihe declare a extinção das obrigações.")["[T]he non-exempt assets that the debtor acquires are liable for the payment of the balances, until the extinction of the obligations is declared."] (Braz.). However, during those five years, if the estate is able, it may pay an allowance to the debtor "who has fallen into a state of insolvency without fault on their part." CÓDIGO DE PROCESSO CIVIL [C.P.C.] Lei No. 5.869, art. 785 de 11 de Janeiro de 1973 [CODE OF CIVIL PROCEDURE Law No. 5.869, art. 785 of January 1973] (Braz.) ("[O] devedor, que caiu em estado de insolvência sem culpa sua, pode requerer ao juiz, se a massa o comportar, que Ihe arbitre uma pensão, até a alienação dos bens. Ouvidos os credores, o juiz decidirá") ["[T]he debtor, who has fallen into a state of insolvency without fault on their part, may request the judge, if the estate allows, to grant them an allowance until the assets are sold. After hearing the creditors, the judge will decide.")]. (Braz.).

accounts."[164] Lopes declares it "clear that the debtor will lose more than she will gain by filing her own civil insolvency suit."[165] "Civil Insolvency can mean that for a long time all of one's living expenses will be under the scrutiny, if not under the direct administration, of a trustee. This seems too long a period for one to be considered, and to consider himself, a 'minor.'"[166]

The enormous differences between the rarely used Brazilian Civil Insolvency Procedure and the widely used U.S. Chapter 7 puts Brazil's 2021 Consumer Over-Indebtedness Law in a very different context from Chapter 13. Chapter 7 is the easiest way for most U.S. consumers to discharge debt, and Chapter 13 is second easiest. In contrast, Brazil's Civil Insolvency Procedure is so difficult for consumer debtors that the Over-Indebtedness Law—even though it is much harder on debtors than Chapter 13—has potential to become the easiest way for Brazil's consumers to discharge debt.

V. Payments Plans of Chapter 13 and the Over-Indebtedness Law Contrasted with Chapter 7

Part IV explains that Chapter 7 gives the debtor an immediate fresh start toward acquiring new property and usually enables the debtor quickly to discharge all unsecured debts, while giving up only the debtor's pre-petition non-exempt property, which is often nothing. In contrast, as this Part V shows, the debtor in Chapter 13 and Brazil's Over-Indebtedness Law discharges debt through a court-confirmed plan to pay some pre-bankruptcy debt with income the debtor earns after filing—what in the U.S. is called post-petition income. This use of post-petition income to pay pre-petition creditors is what generally enables the debtor in both Chapter 13 and Brazil's Over-Indebtedness Law to keep all their pre-petition property, even if non-exempt.

Generally, a payment plan under Chapter 13 or the Over-Indebtedness Law reduces the debtor's required payments on pre-petition debts. For example, a plan might promise that the debtor will pay each unsecured creditor 60% of the amount the debtor was previously obligated to pay. This sort of reduction lowers the debtor's obligations compared to before the plan but does not lower them as much as Chapter 7 does for a debtor who has no non-exempt property to give up in exchange for the discharge. That is because the Chapter 7 discharge lowers to zero the debtor's obligations to creditors holding dischargeable claims. However, to prevent such debtors from "abusing" Chapter 7, Congress in 2005 enacted the "means test." This test excludes some debtors from the Chapter 7 discharge, so if these debtors want debt relief, their only option to get it is a reorganization bankruptcy (typically Chapter 13) with a payment plan.

The "means test" only denies the Chapter 7 discharge to a portion of the small portion of bankruptcy debtors with incomes above the median income in their state.[167] The first step

---

[164] José Reinaldo de Lima Lopes, *Consumer Bankruptcy and Over-indebtedness in Brazil*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 94 (Johanna Niemi-Kiesiläinen, et al. 2003).

[165] *Id.*

[166] *Id.*

[167] 11 U.S.C. § 707(b).

in the means test is to compare the debtor's income to the median income for households of the same size, and in the same state, as the debtor's.[168] If the debtor's income is below median, the debtor has passed the means test and is allowed to discharge debt in Chapter 7.[169] If the debtor is above-median income, the test permits the debtor to deduct from income living expenses (pursuant to detailed guidelines) and secured debt payments. If the resulting "disposable income" is more than about $250 per month, the debtor has failed the means test and does not receive a Chapter 7 discharge.[170]

If the means test bars a debtor from the Chapter 7 discharge, the debtor's most promising option is often Chapter 13 bankruptcy, as Chapter 11's complexities are typically not worth incurring when little money is involved,[171] and Chapter 12 is limited to family farmers and fisherman.[172] In sum, the basic idea of the means test is that debtors who receive enough income to pay a significant portion of their unsecured debt should do so in a reorganization bankruptcy, rather than discharging it in Chapter 7.[173]

VI. Brazil's Consumer Over-Indebtedness Law Compared with Chapter 13

a. Overview

As noted above, Brazil's 2021 Consumer Over-Indebtedness Law,[174] in some ways resembles Chapter 13. Nevertheless, as the following pages show, the Over-Indebtedness Law is harder on debtors than Chapter 13 with respect to their eligibility for the process, its treatment of secured and non-consumer unsecured debts, and the role of creditor consent in confirming a repayment plan. Moreover, a higher proportion of debtors using the Over-Indebtedness law may do so without a representation from a lawyer, compared to the low proportion of unrepresented debtors in Chapter 13. In sum, even with the Over-Indebtedness Law, Brazilian consumers continue to have far less ability than U.S. consumers to discharge debts through a court-confirmed repayment plan

[168] 11 U.S.C. § 707(b)(6)-(7).
[169] *Id.*
[170] 11 U.S.C. § 707(b)(2)(A)(i)(I)-(II), (ii)(II).
[171] Richard M. Hynes, Anne Lawton & Margaret Howard, *National Study of Individual Chapter 11 Bankruptcies*, 25 AM. BANKR. INST. L. REV., Mar. 2017 at 61, 94. ("Individual Chapter 11 debtors have significantly higher incomes, own more real property, and have more complex cases than typical Chapter 13 debtors.").
[172] 11 U.S.C. § 109(f).
[173] TABB ET AL., *supra* note 149, at 10. ("[I]n 2005, in the Bankruptcy Abuse Prevention and Consumer Protection Act, Congress decided that if an individual consumer debtor has a sufficient projected future repayment capacity, such a debtor should be barred entirely from proceeding under Chapter 7. The mechanism for removing such a debtor from Chapter 7 is the 'abuse' test of § 707(b), which utilizes a complicated 'means test' to ascertain presumptive abuse."); *id.* ("That test seeks to calculate a debtor's excess future income over allowable expenses, and if a debtor appears to be a so-called 'can pay' debtor, with too much projected excess income, he is kicked out of Chapter 7 unless he can demonstrate 'special circumstances.'"); *id.* ("[I]f a debtor fails the means test of § 707(b) and thus is disqualified from proceeding under Chapter 7, if that debtor desires bankruptcy relief, "voluntarily" converting to Chapter 13 is that debtor's only viable option.").
[174] CÓDIGO DE PROTEÇAO E DEFESA DO CONSUMIDOR [C.D.C.] Lei No. 14.181, de 11 de jul. de 2021 [CONSUMER PROTECTION CODE Law No. 14.181 of July 11, 2021] (Braz.).

b. Eligibility

A sharp contrast between Chapter 13 and Brazil's Over-Indebtedness Law is that Chapter 13 is open to far more debtors.[175] The Over-Indebtedness Law is only available to debtors for whom it would be a "manifest impossibility" to pay all the debtor's consumer debts without compromising the debtor's existential minimum.[176] In contrast, Chapter 13's "good faith" requirement, although imprecise, is applied by courts much more leniently than requiring debtors to prove the impossibility of paying their debts in full.[177]

c. Creditors with Property Interests

Although both Chapter 13 and the Over-Indebtedness Law are based on payment plans, only Chapter 13 enables a debtor to address secured debts in a plan. The Over-Indebtedness Law does not enable the debtor to address analogous debts because the Over-Indebtedness Law does not encompass debts with "real guarantee," claims related with real estate

[175] 11 U.S.C. § 109(e).

[176] CÓDIGO DE PROTEÇAO E DEFESA DO CONSUMIDOR [C.D.C.] Lei No. 14.181, art 54-A de 11 de jul. de 2021 [CONSUMER PROTECTION CODE Law No. 14.181, art. 54-A of July 11, 2021] (Braz.) ("[E]ntende-se por superendividamento a impossibilidade manifesta de o consumidor pessoa natural, de boa-fé, pagar a totalidade de suas dívidas de consumo, exigíveis e vincendas, sem comprometer seu mínimo existencial, nos termos da regulamentação.")["[T]he Over-indebtedness is understood as the manifest impossibility of a natural person consumer, acting in good faith, to pay the entirety of their due and outstanding consumer debts without compromising their existential minimum, in accordance with the regulations."] (Braz.). This "manifest impossibility" is defined by doctrine as an easily perceived lack of resources of paying the debts on their due date. Claudia Marques, Antonio Bejamin & Bruno Miragem, *Da Prevenção e do Tratamento do Superendividamento [On the Prevention and Treatment of Over Indebtedness]*, *in* COMENTÁRIOS AO CÓDIGO DE DEFESA DO CONSUMIDOR [COMMENTS ON THE CONSUMER PROTECTION CODE] (São Paulo, Revista dos Tribunais eds., 2022).

The use of the procedures introduced by the Over Indebtedness Law have already been denied due to the debtor's failure to probe its situation of over indebtedness. See T.J.S.P, Apelação Cível No.1000232-94.2023.8.26.0646, Urânia, Relatora: Léa Duarte, 08/19/2024, Diário da Justiça [D.J.], 08/19/2024 (Braz.) ("In cases of over-indebtedness, the presence of subjective elements related to the consumer, objective elements concerning the debts, and compliance with the existential minimum are required. Over-indebtedness of the debtor was not proven (…). Considering that the plaintiff has a net income of R$3,544.11, and after deducting personal loan installments of R$602.94, the remaining amount would be R$2,941.17—almost five times the R$600.00 amount considered the existential minimum under Decree No. 11.150/22, as amended by Decree No. 11.567/2023. It should be noted that over-indebtedness, arising from consumer relations as established by Art. 54-A, §2, of the Consumer Protection Code (CDC), is characterized by the demonstrated inability of the debtor to meet all their obligations without compromising their livelihood. This measure aims to ensure that individuals can reorganize their financial situation by renegotiating debts, whether through agreement or compulsory means. In this context, it is the consumer's responsibility to demonstrate the impossibility of repaying debts incurred due to an extraordinary personal need resulting from misfortunes or unforeseen events. Outside these circumstances, it constitutes mere personal financial mismanagement, which is not covered by the over-indebtedness theory. Thus, even if the plaintiff seeks to limit deductions related to payroll loans linked to her pension benefits, debt renegotiation is not the appropriate means for this purpose. Therefore, since the legal requirements for judicial intervention in private relations are not met, and no nullity or violation of the legal system has been found, contractual relations must prevail, respecting the principle of freedom of contract and legal certainty.").

[177] TABB ET AL., *supra* note 149, at 1278. (The most common debtors "to trigger protestations of bad faith by creditors" are using Chapter 13 in an attempt to discharge debts that would not be dischargeable in Chapter 7, and "proposing to pay unsecured creditors nothing at all in the Chapter 13 plan, or only a very minimal dividend.").

financing, and credits related with rural contracts.[178] Consequently, the Over-Indebtedness Law does not protect the debtor who has defaulted to a creditor with a property interest, such as a fiduciary guarantee in her home or vehicle. The Over-Indebtedness Law lacks provisions staying this creditor from continuing the legal process of taking the home or vehicle from the debtor.[179]

In contrast, Chapter 13 in several ways helps debtors who have defaulted on their secured debts. First, like Chapter 7, Chapter 13 automatically stays secured creditors' collection efforts.[180] For instance, if the debtor's mortgage creditor has already won a judgment of foreclosure, but the sheriff has not yet held the foreclosure sale by the time the debtor files for Chapter 13, the bankruptcy filing stops the foreclosure sale.[181] If the debtor's car lender has already repossessed the debtor's car, but not yet held a foreclosure sale of it by the time the debtor files for Chapter 13, the bankruptcy filing stops the foreclosure sale and the debtor gets possession of the car back from the creditor.[182]

Second, Chapter 13 permits the debtor to cure secured-debt defaults, even where the creditor has already rightfully accelerated an installment debt—that is, declared the entire balance immediately due and owing after the debtor's default. If this has occurred with, for example, the Chapter 13 debtor's home mortgage or car loan, the debtor may "de-accelerate," cure the missed payments over time, and reinstate the original contract's schedule for payments.[183] For these reasons, Chapter 13 is often used by debtors seeking to keep possession of their homes and vehicles, despite having defaulted to those creditors.[184]

---

[178] CÓDIGO DE PROTEÇAO E DEFESA DO CONSUMIDOR [C.D.C.] Lei No. 14.181, art. 104-A de 11 de jul. de 2021 [CONSUMER PROTECTION CODE Law No. 14.181, art. 104-A of July 11, 2021] (Braz.) ("[E]xcluem-se do processo de repactuaço as dívidas, ainda que decorrentes de relações de consumo, oriundas de contratos celebrados dolosamente sem o propósito de realizar pagamento, bem como as dívidas provenientes de contratos de crédito com garantia real, de financiamentos imobiliários e de crédito rural") ["[E]xcluded from the renegotiation process are debts, even if arising from consumer relationships, originating from contracts entered into fraudulently with no intention of making payment, as well as debts from credit contracts with real security, mortgage financing, and rural credit."] (Braz.).

[179] This leads Cláudia Lima Marques to express concern that the Over Indebtedness Law not only continues to privilege some creditors over others but also jeopardizes the consumer's economic rehabilitation when the consumer's income is totally absorbed by the secured debts. Claudia Marques et al., Clarissa Costa de Lima & Sophia Martini Vial, *Da Cultura do Pagamento: Tratamento e Conciliação em Bloco em Caso de Superendividamento do Consumidor* [*From the Culture of Payment: Block Treatment and Conciliation in Case of Consumer Over-Indebtedness*], *in* COMENTÁRIOS À LEI 14.181/2021: A ATUALIZAÇÃO DO CDC EM MATÉRIA DE SUPERENDIVIDAMENTO [COMMENTS ON LAW 14,181/2021: THE CDC UPDATE ON OVER-INDEBTEDNESS] (Claudia Lima Marques, Antonio Herman de Vasconcellos and Benjamin, Clarissa Costa de Lima & Sophia Martini Vial eds., 2022) ("Therefore, the conciliation should cover all debts, including those with real guarantee, if the creditors agree to it.").

[180] 11 U.S.C. § 362(a)(3)-(5), (d).

[181] TABB ET AL., *supra* note 149, at 264 ("[O]ne of the most common reasons for a bankruptcy filing is to stop an impending foreclosure.").

[182] *Tidewater Fin. Co. v. Moffett* (*In re* Moffett), 356 F.3d 518 (4th Cir. 2004).

[183] 11 U.S.C. § 1322(b)(2), (3), (5).

[184] 3 WILLIAM H. BROWN ET AL., THE LAW OF DEBTORS AND CREDITORS § 17:2 (2024) ("Chapter 13 is designed to encourage debtors to pay creditors out of future income, if this approach is reasonably feasible, rather than resorting to a liquidation proceeding, in the belief that creditors will frequently receive more than they would in a liquidation proceeding. Chapter 13 is also intended to assist debtors who believe they should attempt to pay their creditors to the extent reasonably possible, or to save assets such as homes or vehicles, but who need protection from creditor collection action while doing so.").

In Chapter 13, secured creditors are generally entitled to the value of their collateral. But instead of receiving it quickly after the bankruptcy petition, as would occur in Chapter 7, a Chapter 13 plan makes the creditor wait 3-5 years. So, for a plan to be confirmed, it must promise the secured creditor payments of at least the present value of the collateral.[185] However, the interest rate used to calculate the payments will likely be lower than the pre-bankruptcy contract's rate of interest, so even fully secured creditors tend to receive less in Chapter 13 than they do from their borrowers who stay out of bankruptcy and perform their contracts.[186] If the collateral is worth less than the debt, then the difference becomes an unsecured claim.[187]

d. Chapter 13 Applies to a Broader Range of Unsecured Debts

The previous subpart explains that Chapter 13 applies to a broader range of debts than Brazil's Over-Indebtedness Law insofar as Chapter 13 but not the Over-Indebtedness Law applies to secured debts. In addition, Chapter 13 applies to a broader range of unsecured debts than does the Over-Indebtedness Law. Both Chapter 13 and the Over-Indebtedness Law except debts obtained by crime or intentional torts,[188] like fraud.[189] But Chapter 13 excludes few other debts, while, Brazil's Over-Indebtedness Law excludes all but *consumer* debts, that is debts between suppliers and consumers.[190] Chapter 13 enables debtors to address those plus a wide variety of other unsecured debts, ranging from a tort debt arising out of a car accident to a sole proprietor's debts incurred for the debtor's income-producing activities.[191] In short, Chapter 13 makes most non-contractual debts—such as those arising

---

[185] 11 U.S.C. § 1325(a)(5).

[186] TABB ET AL., *supra* note 149 § 7.30 ("One senses a judicial thumb on the scales favoring plan confirmability, with the risk assessment calculus skewed to cut the debtor a break, rather than to fairly compensate the creditor.").

[187] 11 U.S.C. § 506(a) (exceptions to this rule prevent the debtor from splitting into secured and unsecured claims undersecured home mortgages, 11 U.S.C. § 1322(b)(2), and certain car and consumer loans, 11 U.S.C. § 1325(a)) ("hanging paragraph").

[188] 11 U.S.C. § 1328(a).

[189] 11 U.S.C. §§ 523(a)(2), 1328(a)(2); Lei No. 14,181 (Lei do Superendividamento) [Law No. 14,181] [Overindebtedness Law] art. 104-A, § 1 ("The following debts are excluded from the restructuring process, even if arising from consumer relationships: debts from contracts entered into fraudulently without the intention of making payment, as well as debts from secured credit contracts, real estate financing, and rural credit.").

[190] The Over-Indebtedness Law does not define "supplier" or "consumer." Instead, it uses the definitions in Brazil's Consumer's Protection Code, which says, "Consumer is any individual or legal entity that acquires or uses a product or service as the final recipient" and "supplier" is "any individual or legal entity, public or private, domestic or foreign, as well as depersonalized entities, that engage in activities of production assembly, creation, construction transformation, importation, exportation, distribution, or commercialization of products or provision of services." Consumer Protection Code (CDC), Law No. 8,078, of September 11th, 1990. In addition, the legal definition of "consumer" in Brazil has been expanded by case law to covers those (natural person or legal entity) that, although are not the final recipient of the good or service, are in a situation of economic, judicial or technical vulnerability when compared to the supplier. Claudia Marques, et al., I. O SUPERIOR TRIBUNAL DE JUSTIÇA ADMITE A MITIGAÇÃO DA TEORIA FINALISTA PARA AUTORIZAR A INCIDÊNCIA DO CÓDIGO DE DEFESA DO CONSUMIDOR NAS HIPÓTESES EM QUE A PARTE (PESSOA FÍSICA OU JURÍDICA), APESAR DE NÃO SER DESTINATÁRIA FINAL DO PRODUTO OU SERVIÇO, APRESENTA-SE EM SITUAÇÃO DE VULNERABILIDADE. Claudia Marques, et al., TESES JURÍDICAS DOS TRIBUNAIS SUPERIORES - DIREITO DO CONSUMIDOR (2017).

[191] 11 U.S.C. § 109(e).

from negligence and most statutory liability—every bit as dischargeable as contractual debts.[192] So, for example, a debtor whose negligent (as distinct from "willful and malicious"[193]) driving paralyzed several people might be liable for millions of dollars in tort, but through a Chapter 13 plan the debtor can discharge that debt while paying, as discussed below, little or nothing to unsecured creditors such as the tort victims.[194] In contrast, as noted above, the Over-Indebtedness Law is limited to consumer debts, which are necessarily contractual.

e. Consensual and Non-Consensual Plans

i. Chapter 13 Plans are Non-Consensual

Confirmation of a Chapter 13 plan does not require approval by creditors.[195] Indeed, the main effect of Chapter 13 is enabling the debtor to reduce creditors' rights without their consent.[196] While secured creditors may get more involved in a Chapter 13 case, general unsecured creditors typically just file a proof of claim and do not otherwise invest any time in their debtors' bankruptcy cases,[197] both because general unsecured creditors have so little chance of collecting much from it and because they are basically represented by a Chapter

[192] 11 U.S.C. § 101(5) (defining "claim" to include a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured").

[193] *See* 11 U.S.C. § 1328(a)(4) (excepting from discharge any debt "for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual."); *id.* §§ 1328(a)(2), 523(a)(9) (excepting from discharge personal injuries from auto accidents if the debtor was intoxicated).

[194] *See, e.g.*, *Ortiz v. Ovalles* (*In re* Ovalles), 619 B.R. 23 (Bankr. D.P.R. 2020) (Chapter 13 case denying exception from discharge for multi-million dollar debt arising from debtor losing control of vehicle he was driving, which injured pedestrian).

[195] TABB ET AL., *supra* note 149 § 12.9 ("Unlike Chapter 11, Chapter 13 is not predicated on the concept of a consensual plan. Instead, in Chapter 13 the debtor proposes the terms of the plan, which the court judges against prescribed statutory standards. If those statutory tests are met, the court will confirm the plan, whether the creditors like it or not. In Chapter 13, creditors do not vote on the plan, like they do in Chapter 11.").

[196] TABB ET AL., *supra* note 149 § 12.1 (instead of Chapter 13, "most debtors would prefer to liquidate immediately under Chapter 7, receive a discharge, and move on. . . . Chapter 13 is needed [by the debtor] only if the creditor will not agree to reaffirm, the debtor cannot redeem, or the debtor needs to cure a default or reverse an acceleration.").

[197] Michelle H. Bass, *Granting A Discharge to the Dishonest and Fortunate Debtor? Fraud, Fairness and Finality in Chapter 13*, AM. BANKR. INST. J. 16, 16 (2022) ("Unsecured creditors with claims in Chapter 13 cases are the very last to potentially receive cents on the dollar. Depending on the amount of a claim, unsecured creditors often have little reason to spend time and money litigating the merits of a debtor's reorganization plan, a debtor's pre-petition conduct or the reasonableness of the debtor's personal expenses. Most unsecured creditors file a proof of claim by the bar date and entrust their fate to the scrutiny of the Chapter 13 trustee."); *id.* (referring to "[t]he lack of incentive for unsecured creditors to participate in confirmation," and stating that "While it is not uncommon for unsecured creditors to play an active role in a plan's pre-confirmation phase, it is not the norm because participation is often economically irrational. Post-confirmation, most general unsecured creditors with claims in typical nominal base plans cease monitoring the docket altogether.").

13 trustee.[198] Chapter 13 debtors make their plan payments to the trustee who keeps a portion of those payments before distributing the rest to creditors.[199]

While Chapter 13 plans are non-consensual, Chapter 13 offers two important protections for unsecured creditors. First, an unsecured creditor can prevent confirmation of a Chapter 13 plan unless it promises to pay the holder of each unsecured claims at least as much as would have been paid on that claim had the debtor filed for Chapter 7 bankruptcy.[200] This basically means the plan must promise unsecured creditors at least the value of the debtor's pre-petition, non-exempt property.

Second, to be confirmed, a Chapter 13 plan must commit all the debtor's "disposable income" to plan payments for three years if the debtor's income is below her state's median income or for five years if her income is above median.[201] More specifically, if the trustee or an unsecured creditor objects to confirmation of a proposed plan, the court may not approve the plan unless it "provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."[202] The term "disposable income" basically means "current monthly income received by the debtor" "less amounts reasonably necessary to be expended" "for the maintenance or support of the debtor or a dependent of the debtor."[203]

Those "amounts reasonably necessary to be expended" for the debtor and debtor's dependents are determined differently for debtors whose income is below their state's median and debtors whose income is above their state's median. For below-median-income debtors, who are the vast majority of debtors in bankruptcy, "amounts reasonably necessary" is determined by the court without statutory guidance. These fact-intensive determinations leave a lot of discretion for individual bankruptcy judges, as Charles Tabb explains:

> Even for categories of expenses that all would concede are "necessary" (such as food, clothing, shelter, utilities, transportation, etc.), this statutory assignment required the court to exercise very specific financial oversight of the amount of the debtor's projected expenses on a case-by-case basis. How much does a family of four need to spend on groceries each month? How much on clothing? How much for rent or the mortgage? The list could

---

[198] Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 84 (2012) (in Chapter 13 cases, "the mean distribution as a percentage of claims was 29.5% pre-BAPCPA and 26.4% post-BAPCPA.");

Gordon Bermant & Ed Flynn, Distributions and Expenses in Chapter 13, Am. Bankr. Inst., May 2000, https://www.abi.org/abi-journal/distributions-and-expenses-in-chapter-13 (last visited Feb. 17, 2026) ("the average payout to unsecured creditors is 25 percent" in Chapter 13); TABB ET AL., *supra* note 149 § 12.5 (Chapter 13 trustee has duty "to investigate the debtor's financial affairs, and to object when advisable to the debtor's discharge."); *id.* (Chapter 13 trustee's compensation is a percentage of plan payments made to creditors).

[199] TABB ET AL., *supra* note 149 § 12.5 ("The primary but not exclusive role of the Chapter 13 trustee is to serve as the disbursing agent for monies paid by the debtor under the plan. What normally happens is that the debtor makes her monthly plan payment to the trustee, who then makes the distributions to each individual creditor provided for by the plan") (citing 11 U.S.C. § 1326(a)(2), (c)).

[200] 11 U.S.C. § 1325(a)(4).

[201] 11 U.S.C. § 1325(b)(4).

[202] 11 U.S.C. § 1325(b)(1)(B).

[203] 11 U.S.C. § 1325(b)(2)(A)(i).

> go on and on. With the large number of bankruptcy filings, making the bankruptcy judges engage in this sort of extremely fact-intensive inquiry was a questionable use of judicial resources.
>
> An even more fundamental objection to this whole enterprise was that adjudicating which expenses were reasonably necessary inevitably placed the court in the position of having to make sensitive value-laden judgments about the appropriate lifestyle of the debtor. Inevitably, too, the outcome was that like debtors were not treated alike. The [Bankruptcy] Code itself gave no guidance on the standards the court should apply in making those subjective assessments. There was general judicial agreement that debtors should neither be permitted to live like a prince nor be condemned to live like a pauper; but between the two is a wide chasm in which the court had much discretion in drawing the lines. Should debtors be required to sell their cars and take the bus to work? Or can a family have one car? Or two, if both spouses work? How fancy a car can it be? How new? Can the debtor's family ever eat dinner out? How often? Where?[204]

These challenges played a role in Congress enacting 2005 amendments to the Bankruptcy Code which prescribed a different method of determining "amounts reasonably necessary to be expended" if the debtor's income is above their state's median income. For above-median debtors, expenses are governed by the "means test" that excludes many above-median debtors from a Chapter 7 discharge.[205] "This cross-reference makes sense, because the whole premise of the means test in chapter 7 as applied to above-median debtors is that if the debtor has sufficient repayment capacity, that debtor is only allowed to proceed under chapter 13; therefore, the chapter 13 calculations must be consistent."[206]

Importantly, the requirement that a debtor pay all their disposable income in Chapter 13 is merely a requirement to confirm a plan. So, a debtor who is displeased with all possible plans committing the debtor's disposable income can simply not propose a plan and dismiss their Chapter 13 case. Bankruptcy law in the U.S. does not force a debtor to pay their disposable income to creditors. The relevant force comes from the non-bankruptcy law, such as wage garnishment, discussed in Part III. A debtor will presumably only choose paying disposable income in Chapter 13 if that was more attractive to the debtor than whatever level of garnishment the debtor experienced or expected under non-bankruptcy law.

ii. Consensual and Non-Consensual Plans in Brazil's Consumer Over-Indebtedness Law

While Chapter 13 enables debtors to impose payment plans on creditors without their consent, creditor consent is presumptively required to bind the creditor to the debtor's plan

[204] TABB ET AL., *supra* note 149 § 12.17.
[205] 11 U.S.C. § 1325(b)(3).
[206] TABB ET AL., *supra* note 149 § 12.17.

in Brazil's Over-Indebtedness Law. The Over-Indebtedness Law encourages what U.S. lawyers call "composition agreements"—multiparty contracts in which several creditors agree to accept partial payment in full satisfaction of the debtor's obligations to these creditors.[207]

A Brazilian debtor starts the procedure of the Over-Indebtedness Law by making a request to a judge,[208] or to a member of Brazil's National Consumer Defense System, which is a law-created network of government and private entities that work together to protect consumer rights.[209] Whichever body receives the request requires the above-defined[210] creditors to attend a conciliation hearing overseen by whichever body receives the request. At this hearing, the conciliator encourages negotiation among the debtor and the debtor's creditors. While the Over-Indebtedness Law says a creditor may appear at the hearing through its "attorney with full and special powers to settle," the Law does not speak to legal representation for the debtor.[211] This uncertainty about debtor representation persists among

[207] TABB ET AL., *supra* note 149 § 1.4 ("A composition is a contract between the debtor and two or more creditors, pursuant to which all of the participating creditors agree to accept less than full payment on their claim in full satisfaction of the debt. An extension is a contract between the debtor and two or more creditors, pursuant to which all of the participating creditors agree to extend the time for repayment of their claim. When a composition and an extension are combined, creditors agree to accept less than full payment over an extended period of time.").

[208] Lei No. 14.181 de 1 de julho de 2021 (Lei do Superendividamento) [Law No 14,181 of July 2021] [Overindebtedness Law] art. 104-A ("A requerimento do consumidor superendividado pessoa natural, o juiz poderá instaurar processo de repactuação de dívidas, com vistas à realização de audiência conciliatória, presidida por ele ou por conciliador credenciado no juízo, com a presença de todos os credores de dívidas previstas no art. 54-A deste Código, na qual o consumidor apresentará proposta de plano de pagamento com prazo máximo de 5 (cinco) anos, preservados o mínimo existencial, nos termos da regulamentação, e as garantias e as formas de pagamento originalmente pactuadas.") ("[U]pon request of the overindebted natural person consumer, the judge may initiate a debt renegotiation process, aiming to hold a conciliation hearing, presided over by the judge or by a conciliator accredited in the court, with the presence of all creditors of debts outlined in Article 54-A of this Code, in which the consumer will present a proposed payment plan with a maximum term of 5 (five) years, preserving the minimum existence, in accordance with regulations, and the guarantees and forms of payment originally agreed upon."). (Braz.).

[209] Lei No. 14.181 de 1 de julho de 2021 (Lei do Superendividamento) [Law No 14,181 of July 2021] [Overindebtedness Law] art. 104-C ("[C]ompete concorrente e facultativamente aos órgãos públicos integrantes do Sistema Nacional de Defesa do Consumidor a fase conciliatória e preventiva do processo de repactuação de dívidas, nos moldes do art. 104-A deste Código, no que couber, com possibilidade de o processo ser regulado por convênios específicos celebrados entre os referidos órgãos e as instituições credoras ou suas associações.")["[I]t is the concurrent and optional responsibility of the public bodies that are part of the National Consumer Defense System to handle the conciliatory and preventive phase of the debt renegotiation process, as outlined in Art. 104-A of this Code, as applicable, with the possibility for the process to be regulated by specific agreements signed between these bodies and the creditor institutions or their associations."). (Braz.). By adding this article, the Over-Indebtedness Law establishes that the renegotiation's first phase, that is, the one in which the payment plan will be presented by the debtor can be held extrajudicially, before a member of Brazil's Nation Consumer Defense System.

[210] *See supra* note 190 (defining consumer and supplier).

[211] Lei No. 14.181 de 1 de julho de 2021 (Lei do Superendividamento) [Law No 14,181 of July 2021] [Overindebtedness Law] art. 104-A, § 2º ("[O] não comparecimento injustificado de qualquer credor, ou de seu procurador com poderes especiais e plenos para transigir, à audiência de conciliação de que trata o *caput* deste artigo acarretará a suspensão da exigibilidade do débito e a interrupção dos encargos da mora, bem como a sujeição compulsória ao plano de pagamento da dívida se o montante devido ao credor ausente for certo e conhecido pelo consumidor, devendo o pagamento a esse credor ser estipulado para ocorrer apenas após o pagamento aos credores presentes à audiência conciliatória.") ("[T]he unjustified absence of any creditor, or of their attorney with full and special powers to settle, from the conciliation hearing referred to in the *caput* of this article shall result in the suspension of the enforceability of the debt and the interruption of default charges, as well as the compulsory

specialists who provided divergent responses to interview questions by the Brazilian author of this Article. While the Judicial Center for the Settlement of Conflicts and Citizenship reported that, in most cases, consumers file debt renegotiation requests without legal representation,[212] Judge Karen Bertoncello stated that, in her experience, consumers are, in most cases, represented by a lawyer.[213]

Although the court[214] requires the debtor's consumer creditors to attend the conciliation hearing, the court does not require attendance by secured creditors (those with a mortgage or fiduciary guarantee) or tort creditors,[215] as the Over-Indebtedness Law is designed only to relieve unsecured consumer debts.

The Over-Indebtedness Law says that during the conciliation hearing, "the consumer will present a payment plan proposal with a maximum term of 5 (five) years, preserving the minimum existential level, according to the regulations, and the guarantees and payment terms originally agreed upon."[216] However, a plan "preserving" "the guarantees and payment terms originally agreed upon" would not help the debtor. Claudia Marques writes that "the explicit purpose of the provision is to preserve the existential minimum," and "The mention of preserving guarantees and originally agreed forms of payment does not, naturally, imply that the original obligation cannot be modified, as that would result in an irreconcilable contradiction with the very nature of conciliation and the renegotiated restructuring of

---

submission to the debt repayment plan if the amount owed to the absent creditor is certain and known to the consumer. Payment to such creditor shall be scheduled to occur only after payment to the creditors present at the conciliation hearing.") (Braz.).

[212] Email from Annik Magro, Judicial Center for Dispute Resolution and Citizenship of Porto Alegre/RS, to Camila Rhoden, (August 5, 2025, at 1:05 pm) (on file with author) ("[I]nformo, conforme solicitado, que nas Reclamações pré-processuais de superendividamento, em regra, os solicitantes/consumidores comparecem sem advogado") ["[I] hereby inform you, as requested, that in pre-procedural over-indebtedness claims, as a rule, the applicants/consumers appear without legal counsel."].

[213] Email from Judge Karen Rick Danilevicz Bertoncello to Camila Rhoden, (August 11, 2025, at 12:19 pm) (on file with author) ("[O]s credores sempre estão com advogados. E, no geral, os consumidores estão representados por advogados também em ambas as fases.") ["[C]reditors are always represented by lawyers. In general, consumers are also represented by lawyers in both phases."].

[214] *Id.*

[215] Lei No. 14.181 de 1 de julho de 2021 (Lei do Superendividamento) [Law No 14,181 of July 2021] [Overindebtedness Law] art. 104-A (Braz.) (only requires "the presence of all creditors of debts outlined in Article 54-A," which are defined as "any financial commitments undertaken within the scope of consumer relations, including credit transactions, deferred payment purchases, and ongoing service agreements.").

[216] Lei No. 14.181 de 1 de julho de 2021 (Lei do Superendividamento) [Law No. 14,181 of July 2021] [Overindebtedness Law] art. 104-A ("A requerimento do consumidor superendividado pessoa natural, o juiz poderá instaurar processo de repactuação de dívidas, com vistas à realização de audiência conciliatória, presidida por ele ou por conciliador credenciado no juízo, com a presença de todos os credores de dívidas previstas no art. 54-A deste Código, na qual o consumidor apresentará proposta de plano de pagamento com prazo máximo de 5 (cinco) anos, preservados o mínimo existencial, nos termos da regulamentação, e as garantias e as formas de pagamento originalmente pactuadas") ["At the request of the overindebted natural person consumer, the judge may initiate a debt restructuring process, with a view to holding a conciliation hearing, chaired by the judge or a court-appointed conciliator, with the presence of all creditors of debts provided for in Article 54-A of this Code, in which the consumer will present a payment plan proposal with a maximum term of 5 (five) years, preserving the minimum existential level, according to the regulations, and the guarantees and payment terms originally agreed upon."]. (Braz.).

debts."[217] Marques says, "In such cases, duties of cooperation between the parties apply, requiring them to make efforts toward conciliation and renegotiation, including the possibility of waiving or modifying guarantees or originally agreed payment terms. This constitutes a novation-plan, and therefore both the guarantees and the originally agreed form of payment may be modified."[218] Consistent with Marques' interpretation, courts have approved plans extending due dates,[219] and reducing interest rates.[220] In addition, the proposal will set a date by which the debtor's default will be removed from credit bureaus and will condition the Plan on the debtor not incurring new debts that could jeopardize the debtor's ability to make payments provided by the plan.[221]

If some or all creditors accept this "consensual plan," the court will then confirm it to bind all agreeing creditors, resulting in the novation of the debts owed to them.[222] Some confirmed plans have received unanimous creditor consent,[223] while other plans have

---

[217] Claudia Marques et al., *Capítulo VI-A. Da Prevenção e do Tratamento do Superendividamento*, in Claudia Marques et al., Comentários ao Código de Defesa do Consumidor (internet edition) (2022)) ("The mention of preserving guarantees and originally agreed-upon payment methods does not, of course, mean that modifying the original obligation is impossible, as this would lead to an insurmountable contradiction with the characteristics of conciliation and the negotiated restructuring of debts. In this case, the parties have a duty to cooperate by making efforts toward conciliation and renegotiation, including waiving or modifying guarantees or originally agreed-upon payment methods. This constitutes a novation-plan, which is why both the guarantees and the originally agreed-upon payment method may be altered.").

[218] *Id.*

[219] Lei No. 0003780-21, de 16 de agosto de 2022, moved by Cristiane Aparecida Mattiola, before the Second Civil Court of União da Vitória/PR. ("It is inferred that the agreement in question established the installment payment of the debts, extending the deadline for payment. . . . I ratify by judgment, so that it may produce its legal effects, the settlement reached between CRISTIANE APARECIDA MATTIOLA and ANGHEBEN e CIA LTDA and MERCADOMÓVEIS LTDA, thereby terminating the case with a decision on the merits."). (Braz.).

[220] *E.g.*, Judicial Action No. 5019669-98 de 12 de agosto de 2022, moved by Leonti Kwaszko before the Court for Over-Indebtedness Management Project of Rio Grande do Sul, in which the parties agreed to reduce the interest rates from 1.8% to zero, (Braz.).

[221] Lei No. 14.181, de 1 de julho de 2021, (Lei do Superendividamento) [Law No 14.181 of July 2021] [Overindebtedness Law] art. 104-A, § 4 ("Constarão do plano de pagamento referido no § 3º deste artigo: I - medidas de dilação dos prazos de pagamento e de redução dos encargos da dívida ou da remuneração do fornecedor, entre outras destinadas a facilitar o pagamento da dívida; II - referência à suspensão ou à extinção das ações judiciais em curso; III - data a partir da qual será providenciada a exclusão do consumidor de bancos de dados e de cadastros de inadimplentes; IV - condicionamento de seus efeitos à abstenção, pelo consumidor, de condutas que importem no agravamento de sua situação de superendividamento.") ["[T]he payment plan referred to in § 3 of this article shall include: I - measures to extend payment deadlines and reduce the debt charges or the supplier's compensation, among others aimed at facilitating the debt repayment; II - reference to the suspension or termination of ongoing legal actions; III - the date from which the consumer's exclusion from databases and default registries will be arranged; IV - conditioning its effects on the consumer's abstention from behaviors that would worsen their over-indebtedness situation."]. (Braz.).

[222] Lei No. 14.181, de 1 de julho de 2021 (Lei do Superendividamento) [Law No 14.181 of July 2021] [Overindebtedness Law] art. 104-A, § 3 ("[N]o caso de conciliação, com qualquer credor, a sentença judicial que homologar o acordo descreverá o plano de pagamento da dívida e terá eficácia de título executivo e força de coisa julgada") ["[I]n the case of conciliation with any creditor, the judicial decision that ratifies the agreement will describe the debt repayment plan and will have the effect of an enforcement title and the authority of res judicata."] (Braz.).

[223] A case of unanimous consensual plan is the one observed in the judicial action No. 5164983-63.2023.8.21.0001, moved by Luiz Carlos Dal Moro, before the Court of the Over-Indebtedness Management Project of the state of Rio Grande do Sul through which the debtor declared a debt of R$ 10.640,66 to two banks (Banrisul S.A. and Caixa Econômica Federal). (TJRS; Action for specific performance No.

received only some creditors' consent.[224] In the latter situation, creditors who did not agree to the plan (often banks[225]) are not bound by it.

However, "at the consumer's request," the judge "will initiate a process" to subject non-consenting consumer creditors to "a compulsory judicial plan."[226] During this phase, the debtors are usually represented by a lawyer or public defender.[227] This compulsory plan binds all consumer creditors that did not agree with the consensual plan, including those who did not even attend the hearing.[228] The compulsory plan may not reduce a non-consenting

516498363.2023.8.21.0001 Porto Alegre/RS, Judge: Karen Rick Danilevicz Bertoncello (Brazil, August 11th, 2023)). (Braz.).

[224] *E.g.*, a case of a non-unanimous consensual plan is judicial action No. 5006113-68, de 8 de agosto de 2024, moved by Rogerio Ramos Nimer, before the Court of the Over-Indebtedness Management Project of the state of Rio Grande do Sul, through which the debtor declared a debt of R$ 10,081.83 to banks and was able to reach an agreement with only one of them (Banrisul S.A.) in the hearing held. The procedure (Nimer's case) now continues towards the other creditors that are, in the moment, waiting for the court to present a compulsory plan. (TJRS; Action for debt renegotiation due to over-indebtedness No. 5006113-682024.8.21.00005 Porto Alegre/RS, Judge: Karen Rick Danilevicz Bertoncello, 04/24/2024.) (Braz.).

[225] *See also*, TJRS. Agravo de Instrumento No. 5114784, de 8 de agosto de 2025, Porto Alegre. Relator: Roberto José Ludiwg, 05/08/2025, Diário de Justiça Eletrônico 05/08/2025. ("In this case, although the appellant [Banco do Brasil S.A.] appeared at the conciliation hearing through a legal representative vested with settlement powers, no counterproposal for renegotiation of the debts was presented [by the resisting creditor, Banco do Brasil S.A.]. . . . Thus, once the initial judicial review had been carried out and the consumer's over-indebtedness established, it was incumbent upon the creditor to present, in the first phase of the procedure, strong evidence to the contrary in order to justify its refusal—which did not occur—thereby characterizing a generic and unjustified resistance on the part of the creditor."). (Braz.).

[226] Lei No. 14.181, de 1 de julho de 2021 (Lei do Superendividamento) [Law No 14.181, of July 2021] [Overindebtedness Law] art. 104-B ("[S]e não houver êxito na conciliação em relação a quaisquer credores, o juiz, a pedido do consumidor, instaurará processo por superendividamento para revisão e integração dos contratos e repactuação das dívidas remanescentes mediante plano judicial compulsório e procederá à citação de todos os credores cujos créditos não tenham integrado o acordo porventura celebrado") ["[I]f there is no success in conciliation regarding any creditors, the judge, at the consumer's request, will initiate a process for over-indebtedness to review and integrate contracts and renegotiate the remaining debts through a compulsory judicial plan and will proceed to serve notice to all creditors whose credits have not been included in any agreement that may have been reached."]. (Braz.).

[227] Email from Judge Karen Rick Danilevicz Bertoncello to Camila Rhoden, (July 27th, 2025, 4:26 pm) (on file with author) ("Aqui no RS estou responsável pela jurisdição especializada, centralizando o volume de mais de 14.000 ações classificadas como superendividamento (Tabela processual unificada do CNJ). São da fase do art.104-B do CDC, todas com representação de advogados e poucos da defensoria pública.") ["Here in the state of Rio Grande do Sul, I am responsible for the specialized jurisdiction, centralizing the volume of more than 14,000 lawsuits classified as over-indebtedness cases (Unified Procedural Table of the CNJ). These are at the stage provided for in Article 104-B of the Consumer Defense Code, all with representation by private attorneys and only a few by the Public Defender's Office."].

[228] *See supra* note 224. Lei No. 14.181 de 1 de julho de 2021 (Lei do Superendividamento) [Law No 14.181 of July 2021] [Overindebtedness Law] art. 104-A, § 2 ("[O] não comparecimento injustificado de qualquer credor, ou de seu procurador com poderes especiais e plenos para transigir, à audiência de conciliação de que trata o caput deste artigo acarretará a suspensão da exigibilidade do débito e a interrupção dos encargos da mora, bem como a sujeição compulsória ao plano de pagamento da dívida se o montante devido ao credor ausente for certo e conhecido pelo consumidor, devendo o pagamento a esse credor ser estipulado para ocorrer apenas após o pagamento aos credores presentes à audiência conciliatória") ["[T]he unjustified non-appearance of any creditor, or of their attorney with special and full powers to settle, at the conciliation hearing referred to in the heading of this article, shall result in the suspension of the enforceability of the debt and the interruption of default charges, as well as compulsory submission to the debt payment plan if the amount owed to the absent creditor is certain and known to the consumer, with payment to this creditor stipulated to occur only after payment to the creditors present at the conciliation hearing."]. (Braz.).

creditor's claim,[229] but may provide that payments to non-consenting creditors do not begin until payments under the consensual plan are complete.[230]

Although the law is silent on whether the debtor can reject the compulsory plan, scholars conclude that the debtor may not reject it, and this follows also in Portuguese from naming it "compulsory plan".[231] Research revealed no case law confirming this, but if it persists, it is a stark difference from Chapter 13 where debtors can dismiss their cases.

f. Minimum Existential

The Over-Indebtedness Law provides that both consensual and compulsory plans shall preserve the debtor's "minimum existential."[232] The Over-Indebtedness Law does not

---

[229] Lei No. 14.181, de 1 de julho de 2021, (Lei do Superendividamento) [Law No 14.181, of July 2021] [Overindebtedness Law] art. 104-B, § 4 ("[O] plano judicial compulsório assegurará aos credores, no mínimo, o valor do principal devido, corrigido monetariamente por índices oficiais de preço, e preverá a liquidação total da dívida, após a quitação do plano de pagamento consensual previsto no art. 104-A deste Código, em, no máximo, 5 (cinco) anos, sendo que a primeira parcela será devida no prazo máximo de 180 (cento e oitenta) dias, contado de sua homologação judicial, e o restante do saldo será devido em parcelas mensais iguais e sucessivas") ["[T]he compulsory judicial plan shall ensure creditors, at minimum, the principal amount owed, adjusted monetarily by official price indices, and shall provide for the full liquidation of the debt, after the settlement of the consensual payment plan provided for in Article 104-A of this Code, within a maximum period of 5 (five) years, with the first installment due within a maximum period of 180 (one hundred and eighty) days from its judicial approval, and the remaining balance shall be due in equal and successive monthly installments."]. (Braz.).

[230] Art. 104-A, § 2, of Law No. 14.181/2021 specifically applies to creditors absent from the hearing (**"**The unjustified absence of any creditor, or their attorney with special and full powers to negotiate, at the conciliation hearing referred to in the caput of this article will result in the suspension of the debt's enforceability and the interruption of default charges, as well as compulsory submission to the debt repayment plan if the amount owed to the absent creditor is certain and known to the consumer. The payment to this creditor should be scheduled to occur only after the payment to creditors present at the conciliation hearing."). However, art. 104-B, § 4º, of Law No. 14.181/2021 makes it clear that this understanding applies to all creditors, included those who attended that meeting but did not consent to the voluntary plan, subject to the compulsory plan. ("The compulsory judicial plan shall guarantee creditors, at a minimum, the payment of the principal amount owed, adjusted for inflation according to official price indices, and shall provide for the full settlement of the debt following the completion of the consensual payment plan provided for in Article 104-A of this Code, within a maximum period of five (5) years. The first installment shall be due within no more than one hundred and eighty (180) days from its judicial approval, and the remaining balance shall be paid in equal and successive monthly installments.").

[231] Laura Beatriz Pereira Silva, *The Overindebtedness of the Elderly: An Analysis of Hypervulnerability and the Violation of the Minimum Existential Standard*. 2024. 65 f. Trabalho de Conclusão de Curso (Graduação em Direito) – Universidade Federal do Ceará, Fortaleza, 2024 (Braz.) ("If conciliation proves unsuccessful, the judge must, at the request of the overindebted consumer and in accordance with the principle of official procedural impulse, conduct the revision and integration of the contracts, as well as the restructuring of the remaining debts through a judicial plan of compulsory adherence"); Daniel Atanásio Moreira, Alves. *Os aspectos da lei do superendividamento*: a vinculação obrigatória do credor ao plano de pagamento do devedor. 2024 (Braz.). 24 f. Trabalho de Conclusão de Curso (Graduação em Direito) – Universidade Federal de Uberlândia, Uberlândia, 2024. ("This plan, now prepared and imposed by the judge, is binding on all parties regardless of their consent, serving the purpose of safeguarding the debtor's fundamental rights, such as the principle of human dignity.").

[232] *E.g.*, when it comes to voluntary plans, art. 104-A of Law No. 14.181/2021 makes the adoption of the minimum existential as a parameter clear ("At the request of an over-indebted natural person consumer, the judge may initiate a debt renegotiation proceeding, aiming to hold a conciliation hearing—presided over by the judge or by a court-accredited conciliator—with the participation of all creditors of debts covered under Article 54-A of this Code. During the hearing, the consumer shall present a proposed payment plan with a maximum term of five (5) years, preserving the existential minimum as defined by regulation, as well as the originally agreed guarantees and

guarantee a lawyer for debtors proposing consensual plans,[233] so the Over-Indebtedness Law's exhortation to preserve the minimum existential seems to reflect the legislature's fears that creditors (even while watched by the conciliator) will pressure a debtor to propose a plan requiring payments that would put the debtor below the minimum existential. The Over-Indebtedness Law requiring that courts' compulsory plans preserve the debtor's "minimum existential" seems to be the legislature's reminder to courts not to impose a plan requiring payments that would put the debtor below that level.[234]

g. Debtor's Failure to Perform Plan

Just because a payment plan is confirmed does not mean that the debtor will make the payments required by the plan. In fact, many Chapter 13 debtors do not complete their plan payments.[235] When this occurs, a debtor may in rare cases receive a hardship discharge.[236]

---

forms of payment."); on the other hand, although the law section destined to regulate the compulsory plan does not explicitly mention the preservation of the minimum existential, case law makes it clear that it applies in the same way. *See, e.g.*, TJSP. Agravo de Instrumento No 2281355-77.2024.8.26.0000. São Paulo. Relator: Alexandre David Malfatti, 11/12/2024, Diário de Justiça Eletrônico 11/12/2024 ("This identification of the existential minimum will, in fact, be relevant for the voluntary or compulsory payment plan."). (Braz.).

[233] Claudia Marques et al., Capítulo VI-A. *Da Prevenção e do Tratamento do Superendividamento*, *in* Claudia Marques; Antonio Bejamin; Bruno Miragem, Comentários ao Código de Defesa do Consumidor (internet edition) (2022) ("Until specialized units are established, the courts must designate the body responsible for handling over-indebtedness cases, where the consumer may request pre-litigation debt conciliation (Article 104-A) without the need for a lawyer, by providing the essential socioeconomic information required for case analysis and negotiation referral."). (Braz.).

[234] The necessity of this reminder is supported by the fact that Brazilian appellate courts have reversed lower court orders seizing goods or wages from the debtor to such an extent as to jeopardize the debtor's minimum existential. *See also,* TJDF. Agravo de Instrumento No 0751987-68.2020.8.07.0000. Brasília. Relator: Arquibaldo Carneiro Portela, 03/10/2021, Diário de Justiça Eletrônico, 04/12/2021 (Braz.). ("In the present case, after comparing the debtor's income and expenses, it was found that the garnishment of a portion of their salary would violate the minimum existential and human dignity. This specific circumstance prevents any potential exception to the rule of salary inalienability, making it necessary to uphold the original decision denying the salary garnishment."); TJSP. Agravo de Instrumento No 2241557-80.2022.8.26.0000. São Paulo. Relatora: Anna Paula Dias da Costa, 12/18/2022, Diário de Justiça Eletrônico, 12/18/2022 ("It is worth highlighting at this point that the relativization of the inalienability of income with a subsistence nature has been allowed in exceptional cases, provided that an amount sufficient to safeguard the dignity of the debtor and their family is preserved. ... In the present case, the appellant has proven that they receive disability retirement benefits and a private pension supplement, with a total monthly income not exceeding approximately R$5,000.00 (…). This prevents any exception to the provision in Article 833, IV, of the CPC, given the necessity of preserving the debtor's minimum existential, especially considering their undisputed visual impairment.")

[235] Richard M. Hynes & Nathaniel Pattison, *Chapter 13 Outcomes*, 22 J. of Empir. Legal Studies 455-474 (2025) ("Each year the United States Courts reports the percentage of closed Chapter 13 cases that end in a discharge, and over the last 10 fiscal years (ending in 2023) this number has averaged 50.8%.").

[236] 11 U.S.C. § 1328(b). This applies only if:

> (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
>
> (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
>
> (3) modification of the plan under section 1329 of this title is not practicable.

While the Over-Indebtedness Law has no analog to the hardship discharge, at least one commentator has advocated for one.[237]

More common than a hardship discharge when a Chapter 13 debtor misses plan payments is that the court will dismiss the debtor's bankruptcy case or convert it to Chapter 7. The debtor generally gets to choose between dismissal and conversion,[238] but the court may choose according to the best interest of the creditors when it receives such request from a party in interest.[239] When a Chapter 13 case is converted to Chapter 7, it follows the usual Chapter 7 process, which often results in a substantial discharge of debt.[240] On the other hand, when a Chapter 13 case is dismissed, the debtor does not receive a discharge and the debts resume their pre-petition forms, discounted by payments the debtor made during the bankruptcy case.[241] After dismissal, the debtor is no longer protected by the stay and thus is subject to pre-petition creditors' collection actions again.[242]

In contrast, the Over-Indebtedness Law contains no provision authorizing a court to convert to Civil Insolvency a Brazilian debtor who has breached their Plan. A confirmed consensual Plan in Brazil, unlike a confirmed Chapter 13 plan, is a composition agreement on which the court has entered judgment, or, to use the civil law concepts of Brazil, a novation that becomes a judicial title,[243] enforceable through an Enforcement of Sentence procedure.[244] So if the debtor does not make the payments required by the consensual plan,

---

Id.

[237] Lara Fernandes Vieira, *A dignidade do consumidor superendividado: estudo à luz da lei do superendividamento* (2022) (Doctorate Thesis, Repositório da Universidade Federal do Ceará) (transferring the 2005 Brazilian bankruptcy law's rationale for business debtors to consumer debtors under the Over Indebtedness Law and concluding that discharge should be possible when at least 25% of the unsecured debts or paid or when three years passes from the moment the debtor was declared bankrupt. (Braz.).

[238] 11 U.S.C. § 1301(a) and (b).

[239] 11 U.S.C. § 1301(c).

[240] *See supra* Part IV.

[241] TABB ET AL., *supra* note 149, § 12.21 (upon dismissal, "Creditors' claims will be reinstated to their original amounts, less any payments made during the Chapter 13 case.").

[242] Lei No. 14.181, de 1 de julho de 2021, (Lei do Superendividamento) [Law No 14.181 of July 2021] [Overindebtedness Law] art. 104-A, § 5 ("[O] pedido do consumidor a que se refere o caput deste artigo não importará em declaração de insolvência civil e poderá ser repetido somente após decorrido o prazo de 2 (dois) anos, contado da liquidação das obrigações previstas no plano de pagamento homologado, sem prejuízo de eventual repactuação.") ["[T]he consumer's request referred to in the caput of this article shall not result in a declaration of civil insolvency and may only be repeated after a period of 2 (two) years, counted from the settlement of the obligations outlined in the approved payment plan without prejudice to any potential renegotiation."]. (Braz.).

[243] The Bankruptcy Law applicable to companies in Brazil is more developed in this area as it explicitly foresees that the novation operated by the confirmed Plan in a Judicial Recovery procedure is "sui generis," meaning that if the debtor defaults the payments established by the Plan in the two years following its ratification the debts will return to their original conditions. This conclusion is a combination of Articles 59 ("The judicial reorganization plan entails the novation of claims existing prior to the filing of the petition and binds the debtor and all creditors subject to it, without prejudice to any guarantees, in accordance with the provisions of § 1 of Article 50 of this Law") and 61, § 2º, ("Once the decision referred to in Article 58 of this Law has been rendered, the court may order the debtor to remain under judicial reorganization until all obligations set forth in the plan that become due within a maximum of two (2) years after the granting of the judicial reorganization have been fulfilled, regardless of any applicable grace period. . . . § 2. Once bankruptcy is declared, creditors shall have their rights and guarantees reinstated under the terms originally contracted, with deductions for any amounts already paid and subject to the validity of acts duly performed during the judicial reorganization.") both of Law No 11.101/2005 (Braz.).

[244] *See supra* Part II.B.

the creditor's right is to enforce the Plan, rather than the earlier debt replaced by the Plan.[245] A court has so held with respect to compulsory plans.[246]

VVI. Conclusion

This Article shows that beneath the conceptual and terminological differences between the common law (U.S.) and the civil law (Brazil), consumer debt collection is substantively similar in the two nations. Among these similarities are the possibility of self-help repossession of goods (moveables) and foreclosure of real estate (immoveable property) securing a debt, as well as the enforcement of money judgments against the debtor's non-exempt property and through wage garnishment. Both nations regulate creditors' collection practices and reporting debtors to credit bureaus.

In contrast to consumer debt collection which is fairly similar between the U.S. and Brazil, consumer debt relief is much easier in the U.S. than in Brazil. While Chapter 7 enables hundreds of thousands of American consumers each year to receive a broad bankruptcy discharge of most unsecured debts at a low cost and within just a few months, Brazil's archaic "Civil Insolvency" procedure delays the discharge for at least five years,[247] and is rarely used. In 2021 however, Brazil enacted the Consumer Over-Indebtedness Law,[248] which resembles Chapter 13 in discharging debt through a court-confirmed plan to pay some pre-bankruptcy debt with income the debtor earns after filing, while the debtor keeps their pre-bankruptcy property, even if non-exempt.

Notwithstanding the similarities, this Article shows that the Over-Indebtedness Law is harder on debtors than Chapter 13 with respect to eligibility, secured debts, non-contractual and non-consumer unsecured debts, and the role of creditor consent in confirming a repayment plan. In sum, even with the Over-Indebtedness Law, Brazilian consumers continue to have far less ability than US consumers to discharge debts through a court-confirmed repayment plan.

---

[245] As Claudia Marques writes:

> [C]onsidering that the consensual payment plan constitutes a novation, the correct approach would be to foresee the dismissal of actions involving the renegotiated debts. In the event of non-compliance, the creditor may request the enforcement of the payment plan, which has the force of a judicial executive title, as provided in § 3. . . . The judicially approved payment plan implies the novation of debts, so that clauses for reversal in the event of non-compliance cannot be accepted. The only possibility of altering the consensual plan will be at the consumer's will, as § 5 allows for renegotiation.

Claudia Marques et al., *6. Da Cultura do Pagamento: Tratamento e Conciliação em Bloco em Caso de Superendividamento do Consumidor*, in Claudia Marques; Antonio Bejamin; Clarissa Lima; Sophia Vial, Comentários à Lei 14.181/2021: A Atualização do Cdc em Matéria de Superendividamento. (Internet edition) (2022).

[246] *E.g.*, TJSP. Cumprimento Provisório de Sentença No 0007559-61.2024.8.260068. Barueri. Judge: Bruno Paes Straforini.

[247] Art. 778 of the Brazilian 1973 Civil Procedure Code. The former Civil Procedure Code of 1973 provides for civil insolvency, and this law was continued in Brazil's current Civil Procedure Code of 2015. See Art. 1052 of the Brazilian 2015 Civil Procedure Code ("Until a specific law is enacted, executions against an insolvent debtor, both those that are pending and those that will be filed, shall continue to be regulated by Book II, Title IV, of Law No. 5.869, of 11 January 1973.").

[248] Lei No. 14.181, de julho de 2021, Lei do Superendividamento, [Law No. 14.181, of July 2021] [Overindebtedness Law] (Law No. 14.181, 2021) (Braz.).

UNIVERSITY OF CONNECTICUT
1881

EFFECTIVENESS OF THE UN FRAMEWORK CONVENTION ON CLIMATE CHANGE AND THE PARIS AGREEMENT

Rafael Leal-Arcas,[¨] *Aosama Alghamdi,*[§] *and Mohammed Alharethi*[ª]

THE
CONNECTICUT JOURNAL
OF
INTERNATIONAL LAW

ABSTRACT

This Article argues that, while the United Nations Framework Convention on Climate Change ("UNFCCC") remains a foundational institution for global climate governance, it is insufficient on its own to address the scale and urgency of the climate crisis. It advocates for a strengthened UNFCCC, supported by complementary institutional arrangements to drive deeper international cooperation. The analysis begins by outlining the scientific and economic imperatives for robust global climate governance. It then critically evaluates the UNFCCC's performance, focusing on its historical evolution, legal architecture, and compliance challenges. Building on this assessment, the paper explores pathways for institutional reform, including enhanced enforcement mechanisms and more ambitious implementation strategies. It also examines alternative frameworks such as climate clubs among major emitters, polycentric governance models, and energy-focused international initiatives. The roles of non-state actors and multilevel governance are discussed as critical components in expanding the reach and impact of climate action. Considerations of equity, justice, and loss and damage are integrated to assess the fairness and legitimacy of these emerging governance approaches. The paper concludes with a set of forward-looking policy recommendations aimed at developing a more inclusive, accountable, and effective global climate regime that can meet the demands of a rapidly changing climate landscape.

THE
CONNECTICUT JOURNAL
OF
INTERNATIONAL LAW

TABLE OF CONTENTS

THE
CONNECTICUT JOURNAL
OF
INTERNATIONAL LAW

1. Introduction

Climate change poses a global threat that requires collective action by all nations.[1] The Earth's average temperature has already risen approximately 1.1 °C above pre-industrial levels, and the world is on track to reach or exceed 1.5 °C of warming within the next two decades even if drastic emission cuts are made now.[2] The consequences of unchecked warming from extreme weather to sea-level rise transcend national borders.[3] Effective governance of the climate, a classic global commons problem, demands cooperation on an international scale.[4]

We argue that the United Nations Framework Convention on Climate Change (UNFCCC) remains a necessary but insufficient institutional platform for addressing the scale and urgency of the global climate crisis. Only by strengthening its legal and enforcement architecture—while integrating complementary governance mechanisms across multiple levels and actors—can the international community forge a climate regime that is both effective and just. The UNFCCC is the central international instrument established to coordinate the global response.[5] Adopted in 1992, the Convention now has near-universal participation with 198 state parties,[6] and its ultimate aim is to prevent "dangerous" human interference with the climate system.[7] Over three decades, the UNFCCC process has produced major agreements, notably the 1997 Kyoto Protocol[8] and the 2015 Paris Agreement, seeking to curb greenhouse gas emissions through collective action.[9]

However, these efforts have not yet succeeded in halting the rise of global emissions.[10] Greenhouse gas output has continued to increase despite the international frameworks put in place since 1992.[11] Current national pledges under the Paris Agreement

---

[¨] Professor of Law, Alfaisal University College of Law and International Relations. Jean Monnet Chaired Professor in EU International Economic Law, awarded by the European Commission; Ph.D., European University Institute; M. Res., European University Institute; J.S.M., Stanford Law School; LL.M., Columbia Law School; M.Phil., London School of Economics and Political Science. Email: r.leal-arcas@outlook.com.

[§] Researcher, KAPSARC School of Public Policy, Riyadh, Saudi Arabia. Email: SA24070039@kspp.edu.sa

[ª] Researcher, KAPSARC School of Public Policy, Riyadh, Saudi Arabia. Email: SA24070017@kspp.edu.sa

[1] Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report – Summary for Policymakers* at 4 (IPCC 2023).

[2] *Id.* at 8.

[3] *Id.* at 10-13.

[4] Robert O. Keohane & David G. Victor, *Cooperation and Discord in Global Climate Policy*, 6 Nature Clim. Change 570, 572 (2016).

[5] U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

[6] UNFCCC Secretariat, "Status of Ratification of the Convention" (10 May 2025), https://unfccc.int/process/the-convention/status-of-ratification (last accessed May 10, 2025).

[7] *Id.* art. 2.

[8] For a legal analysis of the Kyoto Protocol, *see* R. Leal-Arcas, *Is the Kyoto Protocol an Adequate Environmental Agreement to Solve the Climate Change Problem*?, 10 Eur. Env't L. Rev. 282, 282-294 (2001).

[9] Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 11, 1997; 2303 U.N.T.S. 162; Paris Agreement, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/10/Add.1.

[10] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Rep* fig. SPM.1. (Cambridge Univ. Pres 2022).

[11] *Id.* SPM-15.fig.

remain insufficient to meet the agreed-upon temperature goals, putting the world on a pathway well above the 1.5 °C limit.[12] The UNFCCC's consensus-based decision making, combined with divergent interests between developed and developing countries, has often impeded ambitious action.[13] Commitments under the regime are largely voluntary, and there is no robust enforcement mechanism to hold parties accountable, leading to an implementation gap in practice.[14] This track record raises a critical question: is the UNFCCC in its current form the most effective tool for global environmental governance to address climate change? If so, how can it be improved? If not, what alternative or complementary structures might better address the climate challenge's scale, urgency, and equity dimensions?[15]

The accelerating climate crisis continues to reveal the inadequacies of current international responses.[16] The Intergovernmental Panel on Climate Change (IPCC) projects global warming will likely surpass 1.5 °C soon, even under low-emissions scenarios, and could reach between 2.7 °C and 4.4 °C by 2100 if high-emission pathways persist.[17] This trajectory is misaligned with the 1.5 °C goal set by the Paris Agreement.[18] After more than thirty years of negotiations under the UNFCCC, global emissions are still rising, and the gap between national pledges and actual progress is widening.[19] This raises a critical question: is the UNFCCC still an effective platform for climate governance, or is it fundamentally constrained in delivering timely and equitable outcomes?

Established in 1992 during the Rio Earth Summit, the UNFCCC was designed to facilitate global cooperation on climate change.[20] It became the legal foundation for the Kyoto Protocol[21] and the Paris Agreement,[22] introduced mechanisms for climate finance and transparency, and secured near-universal participation.[23] However, its consensus-based process and reliance on voluntary commitments have limited its enforcement capacity.[24] Evaluating the UNFCCC's effectiveness requires clear criteria: legitimacy, inclusivity,

---

[12] Rep. U.N. Environment Programme, *Emissions Gap Report 2024*, at xvi-xvii (2024).

[13] Keohane, *supra* note 4, at 570.

[14] Michele M. Betsill & Desirée Fiske, *International Climate Change Policy: Complex Multilevel Governance*, *in* The Global Environment: Institutions, Law, and Policy 265, 274 (Regina S. Axelrod & Stacy D. Vandeveer Eds., 4th ed., Sage Publ'g 2019).

[15] *See* e.g., R. Leal-Arcas ET AL., *Balancing Equity and Urgency: Reshaping Global Economic Institutions for a Just Low-Carbon Transition*, 19 IUP J. Int'l Rel. (2025).

[16] Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report — Summary for Policymakers*, 5 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf.

[17] *Id*. at 12.

[18] U.N. Framework Convention on Climate Change: *Paris Agreement* art. 2(1)(a), Dec. 12, 2015, https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[19] U.N. Env't Programme, *Emissions Gap Report 2023: Broken Record – Temperatures Hit New Highs, Yet World Fails to Cut Emissions (Again)* 6–7 (2023), https://www.unep.org/resources/emissions-gap-report-2023.

[20] U.N. Framework Convention on Climate Change, *What is the United Nations Framework Convention on Climate Change?*, https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change.

[21] Kyoto Protocol to the U.N. Framework Convention on Climate Change, *supra* note 9.

[22] U.N. Framework Convention on Climate Change, *Paris Agreement,* UNFCCC, https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[23] U.N. Framework Convention on Climate Change, *supra* note 20.

[24] Michael Oppenheimer et al., *The Limits of Consensus*, 317 Science 1505, 1506-06 (2007), https://pubmed.ncbi.nlm.nih.gov/17872430/.

enforceability, adaptability, and measurable impact.[25] While the UNFCCC performs well on legitimacy and inclusivity, it lags in enforceability and results. This discrepancy is especially problematic given the urgency and complexity of climate change. [26]

The global governance landscape is also evolving.[27] The IPCC provides science-based assessments but lacks decision-making authority.[28] The World Trade Organization (WTO) affects climate through instruments such as Carbon Border Adjustment Mechanisms (CBAMs).[29] Multilateral Development Banks (MDBs), such as the World Bank, play a central role in financing mitigation and adaptation.[30] At the same time, regional and coalition-based initiatives such as the European Union Emissions Trading System (EU ETS),[31] the G7's climate platforms,[32] and the climate-club idea are shaping climate cooperation.[33] While this pluralism fosters innovation, it also risks institutional fragmentation and policy inconsistency.[34]

This paper argues that, while the UNFCCC remains an indispensable forum, it is not by itself sufficient to meet the climate challenge. The climate crisis demands a strengthened UNFCCC alongside new or complementary institutional approaches to galvanize deeper international cooperation. In making this case, the paper first outlines the scientific and economic rationale for global climate governance. It then evaluates the performance of the UNFCCC to date, examining its historical record, legal architecture, and gaps in compliance. Next, potential ways to strengthen the UNFCCC are explored, followed by an examination of alternative frameworks including club-based agreements among key emitters, polycentric governance networks, and energy-focused initiatives that could augment or replace aspects of the current regime. The analysis also considers the role of non-state actors and multi-level governance in enhancing climate action, as well as issues of justice and loss-and-damage to assess the fairness of these governance approaches. The paper then offers policy recommendations and outlines a forward-looking vision for climate governance. The conclusion summarizes the findings and presents specific policy recommendations for building a more effective international framework to address climate change.

Let's start with the scientific and economic rationale for global climate governance.

---

[25] F. Biermann et al., *The Fragmentation of Global Governance Architectures: A Framework for Analysis,* Global Envtl. Pol. 14, 21-23 (2009), https://doi.org/10.1162/glep.2009.9.4.14.

[26] *Id*. at 24.

[27] F. Biermann, *supra* note 25.

[28] Intergovernmental Panel on Climate Change, *Principles Governing IPCC Work,* 1 (2013) https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles.pdf.

[29] WTO, *World Trade Report 2022: Climate Change and International Trade*, WTO Doc. 72, https://www.wto.org/english/res_e/booksp_e/wtr22_e/wtr22_e.pdf.

[30] World Bank, *Climate Finance Update – Fiscal Year 2023* 1(Oct. 10, 2023), https://www.worldbank.org/en/news/factsheet/2023/10/10/climate-finance-update.

[31] European Commission, *About the EU ETS* (2024), https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/about-eu-ets_en.

[32] G7, *Climate, Energy and Environment Ministers' Meeting Communiqué* [G7] 2 (2024), https://www.g7italy.it/wp-content/uploads/G7-Climate-Energy-Environment-Ministerial-Communique_Final.pdf.

[33] G7, *Statement on Climate Club* [G7] (June 28, 2022), https://www.g7germany.de/resource/blob/974430/2057926/2a7cd9f10213a481924492942dd660a1/2022-06-28-g7-climate-club-data.pdf.

[34] F. Biermann, *supra* note 25.

2. The Scientific and Economic Case for Global Climate Governance

2.1 Overview

Climate change exemplifies a global coordination problem grounded in physical science and economic theory.[35] Its causes and impacts cross national borders, making unilateral efforts insufficient.[36] As climate scientist Mark Maslin observes, global warming cannot be treated as purely a scientific issue but rather as "a problem for our global society".[37] This section explains why empirical science and economics both insist on coordinated international action to address climate change. It outlines the scientific consensus on anthropogenic climate risks and the economic concepts—atmospheric externalities, the tragedy of the commons, and the discounting of future harm—that underlie the need for collective governance across jurisdictions.

Modern climate science provides compelling evidence that climate change is a worldwide threat requiring a united response. The IPCC's Sixth Assessment report confirms that human activities have unequivocally warmed the atmosphere, ocean and land.[38] Global average temperatures have already risen about 1.1°C above pre-industrial levels, driving more frequent extreme weather events in every region[39]. Greenhouse gases such as carbon dioxide (CO_2) accumulate in the atmosphere and trap heat; critically, CO_2 is a well-mixed gas that disperses around the planet, so emissions anywhere contribute to warming everywhere.[40]

Scientific forecasts warn that without deep cuts in emissions, warming will exceed 1.5°C or even 2°C within this century.[41] Such an outcome would intensify droughts, floods, heatwaves, and sea-level rise across all continents. In short, empirical science shows climate stability is a global public good. No single nation can, on its own, prevent disruptive climate change, because the problem's scope is planetary. This scientific reality establishes the

---

[35] Intergovernmental Panel on Climate Change, *supra* note 16, at 3.

[36] *See generally* KATHERINE MICHONSKI & MICHAEL A. LEVI, HARNESSING INTERNATIONAL INSTITUTIONS TO ADDRESS CLIMATE CHANGE (Council on Foreign Rels. 2010), https://www.cfr.org/report/harnessing-international-institutions-address-climate-change; Robert Keohane & David Victor, *Cooperation and discord in global climate policy*, 6 NATURE CLIMATE CHANGE 570 (2016), https://doi.org/10.1038/nclimate2937 , ,https://www.nature.com/articles/nclimate2937; MICHELE M. BETSILL & DESIRÉE FISKE, *International Climate Change Policy: Complex Multilevel Governance*, *in* THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY (Regina S. Axelrod & Stacy D Vandeveer Eds., Sage Publ'g 2019).; "Building Toward Breakthrough: Energizing the Paris 2015 Climate Negotiations and Post-Paris Action Agenda Through Broader Engagement," Yale Center for Environmental Law and Policy, (2015), available at: https://envirocenter.yale.edu/sites/default/files/yale_climate_change_dialogue_white_paper.pdf; DANIEL ESTY & MARIA IVANOVA, *Revitalizing Global Environmental Governance: A Function-Driven Approach*, *in* GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES 181 (Daniel Esty & Maria Ivanova eds., EliScholar Pub. 2002).

[37] MARK MASLIN, GLOBAL WARMING: A VERY SHORT INTRODUCTION 1 (Oxford Univ. Press 2004).

[38] Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report – Summary for Policymakers,* AR6 SYNTHESIS REPORT: CLIMATE CHANGE 2023 1, 4 (2023), https://www.ipcc.ch/report/ar6/syr/.

[39] *Id*. at 5.

[40] PAOLA A. ARIAS ET AL., *Technical Summary, in* CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 38 (Cambridge Univ. Press 2023).

[41] Intergovernmental Panel on Climate Change, *supra* note 38, at 8–9.

foundation for global climate governance: only coordinated worldwide mitigation can limit the risks that science has illuminated.[42]

Economic theory further demonstrates why climate change is inherently a global governance challenge. Greenhouse gas emissions are a textbook case of an atmospheric externality: those who produce the emissions generally do not bear the full costs of the damage they inflict on others via climate change.[43] As economist Nicholas Stern describes, the climate problem involves "a fundamental failure of markets" because emitters can emit carbon freely while society at large pays for the resulting harm.[44] In other words, the social cost of carbon—the real damage each ton of CO_2 causes to economies and ecosystems—is not reflected in the market price of fossil fuels.

This market failure leads to over-emission of greenhouse gases if left unregulated. Each country or firm has an incentive to use the atmosphere as a free waste sink for carbon, even though this imposes costs on the global climate system. The result is a collective action problem: individual actors, pursuing narrow self-interest, will emit more than is collectively optimal. Recognizing this economic logic, the UNFCCC was established in 1992 explicitly to correct the externality by negotiating a worldwide agreement to reduce greenhouse gases.[45] Without such international intervention, the climate externality would remain uninternalized, and dangerous warming would continue unabated.

Because the atmosphere is a shared global common, climate change exemplifies what economists call the "tragedy of the commons."[46] In a tragedy of the commons, individuals or states acting in their own interest overuse a common resource, undermining the collective good. With climate change, every nation benefits when other countries restrain their emissions, but each nation may prefer to continue emitting and free ride on others' efforts. This dynamic makes it hard to secure cooperation, even though all recognize the collective benefit of limiting climate risks.[47]

The IPCC notes that without cooperation, countries' incentives to cut emissions are weaker because a country "does not enjoy the benefits of its own mitigation efforts that accrue outside its borders".[48] In practical terms, if one country invests in costly emissions reductions, much of the climate benefit is distributed globally, including to other countries. Meanwhile, that country bears the economic costs alone. This creates a powerful temptation to defect – to let others take action while one's own economy avoids carbon constraints.

The result, as theoretical models show, is a free-rider problem that complicates any global climate agreement.[49] Every major emitting nation has the incentive to delay action as

---

[42] Kehone & Victor, *supra* note 36, at 571.

[43] NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW, at ix, xvi (Cambridge Univ. Press 2007).

[44] Alison Benjamin, *Stern: Climate Change a 'Market Failure,'* THE GUARDIAN (Nov. 29, 2007), https://www.theguardian.com/environment/2007/nov/29/climatechange.carbonemissions.

[45] Kehone & Victor, *supra* note 36, at 573.

[46] Garrett Hardin, *The Tragedy of the Commons,* 162 SCIENCE 1243, 1244 (1968).

[47] David Kestenbaum, *Climate Change Is Victim of 'Tragedy Of The Commons,'* NPR (Nov. 29, 2009), https://www.npr.org/2009/11/27/120883813/climate-change-is-victim-of-tragedy-of-the-commons.

[48] Intergovernmental Panel on Climate Change, *Annex IV: Contributors to the IPCC Working Group III Sixth Assessment Report*, CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE Ch. 13 ¶ 13.3 (2023), https://doi.org/10.1017/9781009157926.023.

[49] *Id.* at Ch 14.

long as others are cutting emissions, leading to under-provision of mitigation worldwide. Indeed, analysts have long warned that climate change will be "an example of the tragedy of the commons," where each of the big emitters must act or else the collective outcome is failure.[50] Overcoming this dilemma requires mechanisms to align individual interests with the global interest – the central purpose of climate governance regimes.[51]

Climate change also poses a temporal coordination problem: its most severe effects will occur in the future, raising questions of how current generations value future generations' welfare. Economists address this through discounting – weighting future costs and benefits less than present ones. However, standard economic discounting can perversely downplay long-term climate risks. A high discount rate means that damages occurring decades from now are viewed as negligible today.

For example, using a 7% annual discount rate effectively means little importance is assigned to harm beyond about 25–30 years into the future.[52] This approach may encourage short-term thinking and policy inaction, a phenomenon former Bank of England Governor and current Prime Minister of Canada Mark Carney has termed the "tragedy of the horizon." By contrast, if a low discount rate is used, future climate impacts loom larger in current decisions, strengthening the case for aggressive action now. The famous Stern Review (2006) adopted a low discount rate of roughly 1.4%, concluding that strong early mitigation is economically justified to avoid catastrophic future costs.[53]

Other economists, such as William Nordhaus, criticized that approach as too stringent on the present economy, favoring higher, market-based discount rates that imply a slower pace of emissions reduction.[54] This debate highlights an ethical dimension: how much weight do we give to future generations' safety versus present-day expenditures? In global climate governance, finding consensus on this trade-off is essential. If each country shortsightedly discounts future climate damage, coordinated long-term action will falter. Effective governance must therefore encourage decision-makers to look beyond immediate costs and value the shared future benefits of a stable climate.

Both science and economics indicate that piecemeal national efforts cannot adequately resolve climate change—a coordinated international response is required. Physically, the atmosphere is indifferent to political boundaries: an extra gigaton of CO_2 reduced in one country has the same effect on global temperature as a gigaton reduced elsewhere. This means all major emitters must participate to achieve climate goals.[55] If only a few nations cut emissions while others do not, the progress will be insufficient and easily negated by unabated pollution elsewhere.

Moreover, in the absence of a common framework, countries fear that unilateral action could put their industries at a competitive disadvantage or simply shift emissions

---

[50] Kehone & Victor, *supra* note 36, at 572.

[51] *See generally* Rafael Leal-Arcas et al., *Balancing Specificity and Flexibility: Policy Strategies for Clean Energy Deployment and U.S. Climate Governance*, 20 J. OF STRATEGIC INNOVATION AND SUSTAINABILITY (2025).

[52] WILLIAM NORDHAUS, THE CLIMATE CASINO: RISK, UNCERTAINTY AND ECONOMICS FOR A WARMING WORLD 189 (Yale Univ. Press, 2013).

[53] Stern, *supra* note 43, at xxv –xxvi.

[54] William D. Nordhaus, *Critical Assumptions in the Stern Review on Climate Change,* 317 SCIENCE 201, 202 (2007).

[55] Kestenbaum, *supra* note 47.

abroad (so-called "carbon leakage"). Global governance arrangements serve to mitigate these concerns by ensuring broad burden-sharing and mutual accountability. International agreements create structures where countries agree to coordinated emissions targets, monitoring, and reciprocal obligations, thereby overcoming the free-rider problem. Indeed, research shows that nations are more willing to implement ambitious climate policies when they are part of a binding or reputable international regime.[56] The UNFCCC and its progeny (the Kyoto Protocol and the Paris Agreement)[57] were conceived to fill this coordination role. By negotiating commitments collectively, countries aim to align their individual actions with the global interest in climate stability.

In summary, the case for global climate governance rests on solid scientific and economic grounds. Empirical science demonstrates that climate change is a borderless threat—one that only concerted global emission reductions can manage. Economic theory explains why, left to its own devices, the free market will not solve this problem: greenhouse gas emissions impose external costs on others, and each actor has an incentive to free ride on others' restraint.

Furthermore, without governance, short-term biases and the tragedy of the commons would prevent the sustained cooperation needed to protect the climate for future generations. These scientific realities and economic principles underpin the creation of international frameworks such as the UNFCCC. They make clear that coordinated action across all jurisdictions is not just preferable but necessary to effectively address the climate crisis. Only through collective governance can humanity internalize the atmospheric externality, overcome the tragedy of the commons, and safeguard the global climate for the long term.

2.2 Role of the UNFCCC

The UNFCCC serves as the central platform for coordinating global efforts on climate mitigation, adaptation,[58] and finance. [59] Since its adoption, the Convention has provided the legal, diplomatic, and procedural foundation for international cooperation, exemplified by the establishment of the Loss and Damage Fund at COP27 to support vulnerable countries facing climate-induced disasters.[60]

---

[56] Intergovernmental Panel on Climate Change, *supra* note 48, at Ch. 14.

[57] *See generally* Rafael Leal-Arcas & Antonio Moreli*, The Resilience of the Paris Agreement: Negotiating and Implementing the Climate Regime,* 31.1 GEORGETOWN ENV'T L. REV. 1, 1–63 (2018) (analyses of the Paris Agreement); R. Leal-Arcas et al., *The Paris Agreement: Critical Assessment and Proposals for Key Clean Energy Initiatives*, 17 THE IUP J. OF INT. OF RELS. 43, 43–80 (2023).

[58] U.N. Conf. on Trade & Dev., UNCTAD/TDR/2024 (2024).

[59] *United Nations Framework Convention on Climate Change*, UNFCCC, https://unfccc.int/process-and-meetings/united-nations-framework-convention-on-climate-change.

[60] U.N. Framework Convention on Climate Change, Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage, UNFCCC (Nov. 22, 2022), https://unfccc.int/documents/624440.

a. *Founding Purpose and Historical Background*

Adopted in 1992 at the United Nations Conference on Environment and Development (the Rio Earth Summit), the UNFCCC was the first international legal agreement recognizing the collective responsibility to address climate change.[61] Article 2 of the Paris Agreement on Climate Change sets the objective of stabilizing greenhouse gas concentrations to prevent dangerous interference with the climate system.[62] The Convention entered into force in 1994 and, by 2024, had 198 Parties. Its core principles include equity[63] and common but differentiated responsibilities (CBDR).[64] These principles acknowledge historical emissions disparities and different national capacities. As a framework treaty, the UNFCCC was designed to evolve through protocols and implementation mechanisms.[65]

b. *Legal Structure and Institutional Bodies*

The primary decision-making body of the UNFCCC is the Conference of the Parties (COP), which brings together all member states annually to review progress, adopt decisions, and negotiate new legal instruments.[66] Two permanent subsidiary bodies support the COP: The Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI). SBSTA addresses scientific, technical, and methodological issues[67] while SBI focuses on policy implementation, compliance, and capacity-building.[68] The UNFCCC Secretariat, headquartered in Bonn, Germany, provides administrative and technical support. It manages reporting systems, assists developing countries in accessing finance, and helps implement obligations.[69]

c. *Core Agreements and Mechanisms*

The Convention has led to two major legal instruments. The Kyoto Protocol, adopted in 1997 and enforced in 2005, imposed binding emissions targets on developed countries. However, its effectiveness was undermined by the withdrawal of key states (such as Canada) and the absence of obligations for emerging economies (such as China and

---

[61] U.N. Framework Convention on Climate Change, *supra* note 59.
[62] *Id.*
[63] U.N. Framework Convention on Climate Change, May 9, 1992, art. 3, 1771 U.N.T.S. 107, https://unfccc.int/resource/docs/convkp/conveng.pdf.
[64] *Id.*
[65] U.N. Framework Convention on Climate Change, *supra* note 59.
[66] U.N. Framework Convention on Climate Change, *Conference of the Parties (COP)*, UNFCCC, https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop.
[67] U.N. Framework Convention on Climate Change, *Subsidiary Body for Scientific and Technological Advice (SBSTA)*, UNFCCC, https://unfccc.int/process/bodies/subsidiary-bodies/sbsta.
[68] U.N. Framework Convention on Climate Change, *Subsidiary Body for Implementation (SBI)*, UNFCCC, https://unfccc.int/process/bodies/subsidiary-bodies/sbi.
[69] U.N. Framework Convention on Climate Change, *About the Secretariat*, UNFCCC, https://unfccc.int/about-us/about-the-secretariat.

India).[70] The Paris Agreement, adopted in 2015, marked a shift toward a more inclusive approach. All Parties are now required to submit Nationally Determined Contributions (NDCs), outlining their climate plans.[71] While NDCs are not binding in terms of emissions targets, they entail procedural obligations, including regular updates and participation in the global stocktake every five years.[72] The stocktake assesses collective progress and promotes accountability through transparency and peer pressure rather than enforcement.[73]

d. Climate Finance Architecture

The UNFCCC has also developed mechanisms to support developing countries.[74] These include the Green Climate Fund,[75] the Adaptation Fund,[76] and the Loss and Damage Fund launched at COP27 in 2022. These instruments aim to close the financial gap between developed and developing countries and uphold climate justice principles.[77]
Let's now evaluate the performance of the UNFCCC to date, examining its historical record, legal architecture, and gaps in compliance.

2.3 Evaluating the Performance of the UNFCCC

The UNFCCC has become the centerpiece of global climate governance, but its institutional performance presents a mixed picture. In assessing its effectiveness, it is crucial to examine how the UNFCCC's legal architecture and organizational processes have functioned, and to what extent its decisions translate into concrete climate action. This section evaluates the UNFCCC regime's performance—including its legal framework, decision-making procedures, compliance mechanisms,[78] and implementation record—and analyzes how instruments such as the Kyoto Protocol and the Paris Agreement have tested the UNFCCC framework. It finds that while the UNFCCC has achieved near-universal participation and catalyzed important climate initiatives, it faces persistent limitations in enforcement, coordination, ambition, and delivery that constrain its ability to meet its ultimate objectives.

---

[70] **Letter from** George W. Bush, President to Sens. Hagel, Helms, Craig, and Roberts(Mar. 13, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010314.html.

[71] U.N. Framework Convention on Climate Change, *Paris Agreement* , UNFCCC, https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[72] *Id*. at art. 14(1).

[73] *Id*. at art. 14(3).

[74] *See generally* R. Leal-Arcas *et al*., *Carbon Markets, International Trade, and Climate Finance*, 16 TRADE, L. AND DEV. 189 (2025)(India).

[75] U.N. Framework on Climate Change, *Green Climate Fund* ,U.N. Climate Change (Jan. 10, 2025), https://unfccc.int/process/bodies/funds-and-financial-entities/green-climate-fund.

[76] U.N. Framework on Climate Change, *Adaptation Fund*, U.N. Climate Change, https://unfccc.int/Adaptation-Fund.

[77] U.N. Framework on Climate Change, *Introduction to Climate Finance*, U.N. Climate Change, https://unfccc.int/topics/introduction-to-climate-finance.

[78] *See generally* R. Leal-Arcas, *Compliance to Promote Sustainability*, COMPLIANCE AND ENV'T L. 453–64, (2020).

The UNFCCC was adopted in 1992 as a framework treaty setting broad principles and goals for international climate action.[79] It enjoys virtually universal membership, reflecting a strong foundational consensus that climate change is a common concern. The Convention's Article 2 commits parties to stabilize greenhouse gas (GHG) concentrations at a level that would prevent dangerous anthropogenic interference with the climate system. A key principle guiding the UNFCCC is "common but differentiated responsibilities and respective capabilities" (CBDR-RC), which acknowledges that all states are responsible for addressing climate change but not equally accountable, given different historical emissions and capacities.[80] In practice, this principle was operationalized by dividing countries into Annex I (developed countries with binding mitigation commitments) and non-Annex I (developing countries with no mandatory targets) under the Convention and its first major implementing agreement, the Kyoto Protocol.[81]

The Kyoto Protocol (1997) tested the UNFCCC's legal architecture by establishing the first binding GHG emission targets—but only for Annex I industrialized nations.[82] This narrow approach, excluding developing economies, limited Kyoto's effectiveness as a *global* response. By the end of Kyoto's first commitment period (2008–2012), emissions from covered countries did fall below 1990 levels, but fast-growing emissions from uncapped developing countries (such as China and India) meant that global emissions kept rising.[83] Indeed, by 2012—just after Kyoto's first period—worldwide emissions were 44% higher than in 1997, demonstrating that Kyoto failed to stem the overall emissions trajectory.[84] The United States' refusal to ratify Kyoto and the subsequent withdrawal of Canada and others from their commitments (with no legal penalty) further undermined the Protocol's impact.[85] These outcomes highlighted flaws in the UNFCCC's initial legal design: a top-down treaty imposing binding targets on a subset of emitters proved politically unsustainable and ineffective at the global scale.

Learning from Kyoto's limitations, parties pivoted to a more inclusive but less centralized model with the Paris Agreement (2015). The Paris Agreement, adopted under the UNFCCC, replaced Kyoto's rigid "targets and timetables" approach with a framework of voluntary Nationally Determined Contributions (NDCs) from all countries.[86] Every party must outline and periodically update its own mitigation pledge, reflecting a bottom-up strategy driven by national circumstances rather than negotiated top-down quotas. Notably, the Paris Agreement's mitigation targets are not legally enforced, but the process obligations (namely submitting new or updated NDCs on a five-year cycle and aiming for progression in ambition) are binding under international law.[87]

---

[79] U.N. Framework Convention on Climate Change, May 9. 1992, 1771 U.N.T.S. 107.

[80] *Id*. at art. 3(1).

[81] Kyoto Protocol art. 3-5, Dec. 11, 1997, 2303 U.N.T.S. 162.

[82] *Id*.

[83] Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report – Summary for Policymakers* 14 (2023).

[84] U.N. Environment Program, *Emissions Gap Report 2024* (Oct. 24, 2024).

[85] Robert O. Keohane & David G. Victor, *Cooperation and Discord in Global Climate Policy*, 6 NATURE CLIMATE CHANGE 570, 571 (2016).

[86] Paris Agreement, art. 4, Dec. 12, 2015, 3156 U.N.T.S 79.

[87] *Id*. at art. 4.2–4.3, 13.7.

This compromise "finds a balance between binding and nonbinding obligations" and crucially achieved a "global response" with broad buy-in.[88] Paris achieved near-universal participation—195 signatories and 190+ ratifications (including major developing emitters)—something impossible under Kyoto's bifurcated regime.[89] In essence, Paris tests the UNFCCC framework by relying on *political* commitment and transparency, rather than strict legal enforcement, to elicit climate action from all nations. It also expanded the focus of the regime beyond mitigation: whereas Kyoto centered on emissions cuts, the Paris framework incorporates adaptation and finance commitments, reflecting a more comprehensive interpretation of the UNFCCC's objectives.[90] This evolution in legal architecture has improved participation and flexibility, but it raises questions about effectiveness, since the stringency of action hinges on national political will.

The UNFCCC's operational structure is highly inclusive—but this very inclusivity imposes constraints on decision-making. The Conference of the Parties (COP), comprising all 197 parties, is the supreme decision-making body of the regime. In theory, the COP can adopt binding decisions or protocols, but in practice all substantive decisions under the UNFCCC are taken by consensus rather than by majority vote.[91] Notably, the Convention's parties never agreed on formal voting rules in the early years; draft Rule 42 of procedure, which offered a fallback majority voting option, remains bracketed and has been blocked for decades.[92]

Consensus applies by default, effectively giving every state a veto over COP outcomes.[93] This has often meant that ambitious proposals can be watered down or stalled by a small number of reluctant parties, leading to lowest-common-denominator outcomes. For example, from the outset certain oil-exporting countries pushed to ensure that any future protocol (such as Kyoto) could only be adopted by consensus—explicitly to preserve their ability to block strong climate agreements that might threaten their interests.[94] As observers noted at the time, by requiring unanimity for major decisions, parties such as Saudi Arabia and Kuwait guaranteed themselves a de facto veto against stringent emission cuts. The 2009 Copenhagen climate summit vividly illustrated the pitfalls of consensus: the meeting nearly collapsed when a handful of states opposed the accord forged by major powers, forcing the COP to merely "take note" of a weak political declaration instead of adopting a binding agreement.

---

[88] Daniel Bodansky, *The Legal Character of the Paris Agreement,* 25 REV. OF EUR. CMTY. & INT'L ENV'T L. 142, 144 (2016).

[89] *Declarations Status of Ratification of the Convention*, UNFCCC Secretariat, https://unfccc.int/process/the-convention/status-of-ratification (last visited May 10, 2025).

[90] Navroz K. Dubash et al., *National and Sub-National Policies and Institutions,* IPCC SIXTH ASSESSMENT REPORT, CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE 1355 (2022).

[91] U.N. Framework Convention on Climate Change, *United Nations Framework Convention on Climate Change, at* art. 7 (1992).

[92] U.N. Framework Convention on Climate Change, *Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies*, at Rule 42, (May 22, 1996).

[93] Robert O. Keohane & David G. Victor, *Cooperation and Discord in Global Climate Policy*, 6 NATURE CLIMATE CHANGE 570, 573 (2016) (U.K.).

[94] Farhana Yamin, The Challenge of Consensus Decision-Making in UN Climate Negotiations (Carbon Brief, 1 December 2015).

On the one hand, this consensus rule upholds the UNFCCC's legitimacy—decisions have broad acceptance, and all voices (including those of vulnerable developing nations) must be heard. The UNFCCC process gives equal vote to each country, creating a forum seen as more equitable than exclusive clubs of major emitters. Coordination through annual COP meetings has steadily built a shared normative framework and kept climate change high on the international agenda.[95] The COP and its subsidiary bodies facilitate technical exchange, capacity building, and agenda-setting that involve not just governments but also observers from civil society, business, and the scientific community, making the regime a central "hub" for global climate discourse.[96]

On the other hand, the need for consensus profoundly slows and weakens decision-making. It empowers even a small subset of obstructionist parties to dilute outcomes—as seen in years when a single state's objection can excise key language from decisions or impede the adoption of robust rules. The static division between "developed" and "developing" in the Convention's annexes further complicated negotiations for years, fueling recursive disputes over fairness that often-deadlocked talks.[97] In short, the UNFCCC's inclusive governance structure, while important for legitimacy, has made decisive action difficult. As Keohane and Victor (2016) observe, "climate change politics, as currently structured, is not conducive to much cooperation" given the misalignment of national interests and the consensus-bound negotiations.[98] This structural challenge remains a defining feature of the regime's performance.

A critical measure of any governance regime is whether parties adhere to their commitments. The UNFCCC regime's compliance mechanisms have evolved, but enforcement remains weak in the traditional sense of compelling states to act. The Convention itself contained no enforcement provisions beyond requirements for parties to report their emissions and actions. Under the Kyoto Protocol, a Compliance Committee was established with a facilitative branch (to advise and assist parties) and an enforcement branch (empowered to declare non-compliance and apply consequences).[99] On paper, the Kyoto enforcement branch could require a non-compliant country to make up shortfalls in a subsequent period with a 30% penalty and suspend its eligibility to sell carbon credits.

In practice, these provisions had limited effects. States could simply exit the regime to avoid penalties, since there was (and is) no supra-national authority to coerce participation. For instance, when it became clear Canada would overshoot its Kyoto target, it opted to withdraw from the Protocol in 2011 without incurring any sanction.[100] Similarly, Japan and Russia declined second-round targets and faced no consequences. The Kyoto compliance system, never truly tested on a recalcitrant major emitter, thus underscored the UNFCCC's reliance on political will rather than legal force. As one analyst dryly noted, "we cannot

[95] Michele M. Betsill & Desirée Fiske, *International Climate Change Policy: Complex Multilevel Governance,* in The Global Environment: Institutions, Law, and Policy 270, (4th ed. Sage 2019).

[96] *Id*. at 271.

[97] *Id*. at 274.

[98] William Burke-White & Laura Barron, *The Changing Landscape of Climate Governance: The Role of Cities as Political Actors and Policy Implementers,* PENN: CURRENT RSCH. ON SUSTAINABLE URB. DEV. 2 (2018).

[99] U.N. Framework for Climate Control, *Compliance Committee,* https://unfccc.int/Compliance-Committee-CC (last visited May, 11 2025).

[100] Kyoto Protocol art. 27, Dec. 11, 1997, 2303 U.N.T.S. 162.

imprison a state for its breach of laws"—ultimately, sovereign nations will act only if they consent to the obligations.[101]

The Paris Agreement departed from Kyoto's punitive concept and embraced a "transparency and peer pressure" model to promote compliance. Instead of binding targets, Paris instituted binding procedural commitments: every party must submit updated NDCs on a five-year cycle, undergo international review of implementation, and participate in a global stocktake assessing collective progress. The Agreement created an expert Implementation and Compliance Committee (per Article 15) that is explicitly facilitative and non-adversarial, lacking authority to impose penalties.[102] Transparency is the main enforcement tool: all parties are subject to an Enhanced Transparency Framework requiring detailed reporting on emissions and implementation efforts, with technical expert review and a multilateral forum where performance is scrutinized.[103]

The logic is that public scrutiny—a "naming and shaming" dynamic—will incentivize countries to honor their pledges for fear of reputational costs.[104] This approach relies on political and social pressure, rather than legal compulsion. It has been buttressed by outside monitoring (e.g., civil society tracking initiatives) and by mechanisms such as the climate "Global Stocktake" (occurring in 2023 for the first time) to highlight the gap between commitments and the UNFCCC's goals.

While this transparency regime has improved the quantity and quality of reporting, its efficacy depends on states' sensitivity to international reputational harm. Some scholars argue that such soft enforcement can work in tandem with domestic legal processes—once a country commits internationally, that commitment can galvanize internal accountability even if the international agreement itself can't punish non-compliance.[105] Indeed, many Paris parties have integrated their NDC targets into domestic laws or policies. However, if a government's political will shifts (as with the U.S. withdrawal from Paris in 2017–2020), the international system has little recourse.

No country can be fined, sanctioned, or compelled by the UNFCCC a reality that reflects the broader limits of international law in the climate sphere.[106] Thus, a core challenge for the UNFCCC is that its success hinges on goodwill and peer pressure among sovereign states. The shift from Kyoto's punitive design to Paris's facilitative design acknowledges this reality; yet, it leaves the regime vulnerable to free-riding and backsliding if diplomatic pressure is insufficient. In summary, the UNFCCC's compliance mechanisms have favored encouragement over enforcement, with some success in fostering transparency and norm internalization, but they cannot guarantee implementation of commitments in the face of political resistance.

---

[101] Ezgi Ediboglu, *Effectiveness Analysis of the United Nations Climate Change Regime,* UNIVERSITY OF ABERDEEN SCHOOL OF LAW BLOG, (Feb. 28, 2018) https://www.abdn.ac.uk/law/blog/effectiveness-analysis-of-the-united-nations-climate-change-regime/.

[102] Paris Agreement art. 15, Dec. 12, 2015, 3156 U.N.T.S 79.

[103] *Id*. art. 13.11–13.12.

[104] Ediboglu, *supra* note 101.

[105] Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. & INT'L ENVTL. L. 142, 147 (2016).

[106] *Id*. at 148.

Ultimately, the performance of the UNFCCC must be judged against real-world outcomes: is the regime delivering emissions reductions and climate resilience consistent with its objectives? By this metric, the UNFCCC's track record shows important outputs (treaties, institutions, national plans) but lagging outcomes (namely global emissions and warming continue to rise). Nearly three decades since the Convention's entry into force, global GHG emissions are at an all-time high. The IPCC reports that average annual GHG emissions in 2010–2019 were the highest in human history, despite the proliferation of climate policies in that decade.[107] Carbon dioxide concentrations and global temperatures have climbed steadily upward. The UNFCCC's *ultimate* goal—to stabilize GHG concentrations at a safe level—is far from being achieved; instead, the world has already warmed about 1.1°C above pre-industrial levels and is on track for considerably more warming absent drastic action.

That said, the UNFCCC process has contributed significantly to shaping national and global responses, even if the aggregate effect is insufficient so far. Through its protocols and agreements, the UNFCCC has compelled governments to *at least formulate and announce* climate policies. Under the Kyoto Protocol, 37 industrialized countries accepted binding targets and, in fact, most met or exceeded those targets (helped by economic shifts and the 2008 global economic recession). Under the ongoing Paris regime, 192 countries (virtually all nations) have put forward NDCs outlining their climate action plans—a remarkable increase from the patchwork of pledges pre-UNFCCC. This has mainstreamed climate planning into national agendas and driven the creation of domestic laws, renewable energy programs, and adaptation strategies in many countries. The UNFCCC's institutions (e.g., financial mechanisms such as the Green Climate Fund, technology transfer bodies, adaptation committees) have also supported implementation by mobilizing resources and knowledge, albeit at a scale dwarfed by the actual need.

However, the ambition and the delivery of these commitments remain in question. The collective pledges made under the Paris Agreement fall well short of the Convention's temperature goals. Even if every country fully implements its current NDC, projections suggest a median warming on the order of 2.7°C by 2100, far above the "well below 2°C, preferably 1.5°C" target of Paris.[108] In other words, there is a substantial "emissions gap" between what countries have promised and what is required to achieve the UNFCCC's objectives. This gap is confirmed by independent assessments and the UNFCCC's own periodic reviews. Encouragingly, these same analyses indicate that without the UNFCCC framework, the world could be on an even worse trajectory—one estimate finds that absent any UNFCCC/Paris efforts, warming might exceed 4°C by 2100, meaning current multilateral efforts have at least bent the curve partway from a 4°C+ catastrophe down toward 2.7°C. In that sense, the UNFCCC has made a difference, but not yet the decisive one needed.

Furthermore, implementation on the ground has been uneven. Many countries are not on track to meet their NDC targets, and policy action within countries often lags the promises made internationally. For example, several G20 economies' emissions trajectories

---

[107] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2023: Synthesis Report – Summary for Policymakers* 6, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf.

[108] United Nations Environment Program, *Emissions Gap Report 2024* (October 24, 2024) .

are not yet aligned with their Paris pledges. The provision of finance and support to developing countries—critical for implementation—has also fallen short.

Developed nations pledged to mobilize $100 billion per year in climate finance by 2020, but failed to meet that deadline, reaching the target only in 2022 (and even then, counting significant private finance and loans).[109] This delay has eroded trust and hindered developing countries' ability to deliver stronger climate action, illustrating a gap in *delivering* on commitments made under the UNFCCC framework.[110] In areas such as adaptation, the UNFCCC has established processes (e.g., National Adaptation Plans) and funds, yet vulnerable communities worldwide are still struggling to cope with worsening climate impacts, indicating that global adaptation support remains inadequate relative to the challenge.

In sum, the UNFCCC's implementation record reflects a serious ambition-action gap. The regime has succeeded in institutionalizing climate action—creating a platform where nearly all countries regularly articulate and update their climate strategies. It has normalized the expectation that every country should take action and report progress, a noteworthy normative shift from 30 years ago.[111] It also has arguably moderated what would otherwise be unconstrained emissions growth.[112] But measured against its core purpose—preventing dangerous climate change—the UNFCCC so far has not delivered the necessary outcomes. Global emissions have not been "stabilized" but continue to grow, and the world is presently on track to overshoot the agreed temperature limits by a wide margin. This shortfall forces a critical reflection on the regime's key limitations.

3. Strengths of the UNFCCC Framework

Despite criticisms, the UNFCCC remains a foundational structure for international climate cooperation.[113] Its strengths lie in its legal legitimacy, norm-setting capabilities, inclusivity, and institutional infrastructure supporting finance and transparency.

a. Global Legitimacy and Universal Membership

The UNFCCC is one of the most widely ratified environmental treaties in history, with 198 Parties, including all UN member states and the European Union.[114] This extensive participation enhances its legal and political legitimacy. The Convention has consistently brought countries together under a shared platform for climate dialogue and policy

[109] OECD, Climate Finance Provided and Mobilised by Developed Countries in 2013–2022 (2024).

[110] Kate Abnett, *Wealthy Countries Met Global Climate Finance Goal Two Years Late, OECD Says*, REUTERS, (May 29, 2024), https://www.reuters.com/business/environment/wealthy-countries-met-global-climate-finance-goal-two-years-late-oecd-says-2024-05-29/

[111] Lukas Hermwille et al., *UNFCCC before and after Paris: What's Necessary for an Effective Climate Regime?*, 17 CLIMATE POL'Y 150 (2017).

[112] United Nations Environment Program, *supra* note 108, at 15.

[113] Ravi S. Prasad & Ridhima Sud, *The Pivotal Role of UNFCCC in the International Climate Policy Landscape: A Developing Country Perspective* 7 GLOB. AFF. 67, 67–68 (2021).

[114] United Nations Framework Convention on Climate Change (UNFCCC), *Status of Ratification of the Convention.* Available at https://unfccc.int/process/the-convention/status-of-ratification.

coordination.[115] Its longevity has enabled the development of legal norms, institutional memory, and sustained diplomatic engagement. These features make the UNFCCC a reliable reference point for multilateral climate action, even as new forums and coalitions emerge.[116]

b. Norm-Setting and Agenda-Defining Role

One of the UNFCCC's key contributions is shaping global norms. Through COP decisions and agreements such as the Kyoto Protocol and Paris Agreement, the Convention has institutionalized critical concepts such as equity, climate justice, common but differentiated responsibilities (CBDR), and progressive ambition.[117] The 1.5 °C target, once a political aspiration, has become a central benchmark following its endorsement in the Paris Agreement[118] and the IPCC's 2018 Special Report.[119] Similarly, the net-zero emissions goal, now adopted by more than 140 countries, reflects the Convention's influence in guiding national and global agendas.[120] These developments show that even without strong enforcement tools, the UNFCCC can steer global expectations and influence climate-related decisions across public and private sectors.

c. Platform for Multilateral and Inclusive Engagement

The Convention offers a structured space for diplomatic negotiation and multilateral cooperation. Groupings such as the Group of 77 (G77) and China, the Alliance of Small Island States (AOSIS), and the Least Developed Countries (LDC) group help amplify voices of countries with shared concerns.[121] Beyond state actors, the Convention engages observer constituencies such as non-governmental organizations, youth groups, indigenous communities, and research institutions.[122] Their participation adds depth, technical insight, and moral authority to the negotiations. This inclusivity is more than symbolic. It ensures that diverse interests, particularly from vulnerable countries, are represented. Small Island

---

[115] Richard Kinley et al., *Beyond Good Intentions, to Urgent Action: Former UNFCCC Leaders Take Stock of Thirty Years of International Climate Change Negotiations* 21 CLIMATE POL'Y 593, 594–95 (2020).

[116] Jonathan Kuyper, Heike Schroeder & Björn-Ola Linnér, *The Evolution of the UNFCCC* 43 ANN. REV. OF ENV'T AND RES. 343, 345–50 (2018).

[117] Daria Shapovalova, *In Defense of the Principle of Common but Differentiated Responsibilities and Respective Capabilities,* in DEBATING CLIMATE LAW 1, 1-2 (2021).

[118] Paris Agreement art. 2.1a (a), Dec. 12, 2015, 79 U.N.T.S 3156.

[119] Intergovernmental Panel on Climate Change (IPCC), *Summary for Policymakers: Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels*, 1 (2018). https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf.

[120] Hermine Van Coppenolle , Mathieu Blondeel & Thijs Van de Graaf, *Reframing the Climate Debate: The Origins and Diffusion of Net Zero Pledges* (2023) 14 GLOB. POL'Y 48, 51–52. Available at https://doi.org/10.1111/1758-5899.13161.

[121] Antto Vihma, Yacob Mulugetta & Sylvia Karlsson-Vinkhuyzen, *Negotiating Solidarity? The G77 Through the Prism of Climate Change Negotiations*, 23 GLOB. CHANGE, PEACE & SEC. 315, 320–25 (2011).

[122] Jonathan W. Kuyper & Karin Bäckstrand, *Accountability and Representation: Nonstate Actors in UN Climate Diplomacy*, 16 GLOB. ENV'T POL. 61, 61-65 (2016).

Developing States (SIDS), for example, have successfully brought issues such as loss and damage to the forefront of the global agenda.[123]

d. Foundations for Climate Finance and Transparency

The UNFCCC has built essential infrastructure for tracking progress and supporting implementation. The Enhanced Transparency Framework (ETF) under the Paris Agreement sets common reporting standards, enabling accountability and peer comparison.[124] In addition, the Convention oversees key climate finance mechanisms such as the Green Climate Fund, Adaptation Fund, and Loss and Damage Fund. These entities aim to direct resources toward the countries that are most in need, based on principles of equity and differentiated responsibility. While challenges remain regarding funding levels and delivery timelines, the existence of these mechanisms is an institutional strength.[125] They convert abstract commitments into operational support, reinforcing the Convention's credibility as more than just a negotiation forum.[126]

3.1 Shortcomings and Structural Limitations of the UNFCCC

While the UNFCCC has established a legitimate and inclusive platform for climate diplomacy, its structure presents serious limitations that hinder effective action. These include its voluntary commitments, consensus-based decision-making, persistent power asymmetries, and weak performance in climate finance delivery.

e. Voluntary Commitments and Lack of Enforcement

A major limitation of the UNFCCC is its dependence on voluntary national pledges. Under the Paris Agreement, Parties are required to submit NDCs that describe mitigation, adaptation, and finance plans.[127] However, these targets are not legally enforceable in terms of emissions reductions.[128] Although the Paris Agreement includes procedural obligations such as regular updates and reporting, it does not contain penalties for non-compliance. Reputational concerns and peer pressure may motivate countries to stay engaged, but these soft incentives are not sufficient to address the urgency of the climate crisis.[129] This reliance on voluntary action creates a gap between commitments and real-world outcomes. Countries

---

[123] Adelle Thomas & Lisa Benjamin, *Management of Loss and Damage in Small Island Developing States: Implications for a 1.5 °C or Warmer World*, 18 REG'L ENV'T CHANGE 2369, 2370 (2018).

[124] Paris Agreement, *supra* note 118, art. 16.

[125] Luis Gomez-Echeverri, *The Changing Geopolitics of Climate Change Finance*, 13 CLIMATE POL'Y 632, 635–37 (2013).

[126] *Id*.

[127] Paris Agreement, *supra* note 118, at 3-4.

[128] *Id*. at 4.

[129] Dustin Tingley & Michael Tomz, *The Effects of Naming and Shaming on Public Support for Compliance with International Agreements: An Experimental Analysis of the Paris Agreement*, 76 INT'L ORG. 445, 446–48 (2021).

may pledge ambitious targets without the political will, financial resources, or institutional capacity to implement them effectively.[130]

f. Consensus-Based Decision-Making and Gridlock

The Convention's requirement for consensus in decision-making, while intended to promote fairness, often leads to watered-down outcomes.[131] Any Party can delay or block progress, pushing negotiations toward the lowest common denominator.[132] This dynamic has caused stalemates in critical areas such as carbon markets, climate finance, and loss and damage.[133] As climate negotiations grow more complex and contentious, the consensus model becomes increasingly inefficient.[134] Deadlocks also erode trust among Parties, especially when influential countries are seen as obstructing progress. This undermines the Convention's legitimacy and slows collective momentum at a time when faster action is essential.[135]

g. Power Asymmetries in Negotiations

Despite the Convention's principles of equity and differentiated responsibility, real-world power dynamics still shape outcomes. Wealthier nations including the U.S., the EU and China possess greater negotiating capacity, technical expertise, and financial leverage, allowing them to dominate agenda-setting and institutional design.[136] In contrast, many developing countries lack the resources to participate fully and consistently. While blocs such as the G77 and AOSIS provide a collective voice, their influence is often constrained by procedural and resource limitations.[137] Moreover, the dominance of mitigation-focused agendas aligned with technological solutions can overshadow adaptation and capacity-building priorities vital for low-income and climate-vulnerable states.[138] This imbalance reduces the Convention's legitimacy in the eyes of countries that feel marginalized or underserved.

---

[130] Kilian Raiser et al., *Understanding Pledge and Review: Learning from Analogies to the Paris Agreement Review Mechanisms*, 22 CLIMATE POL'Y 711, 717–19 (2022).

[131] Jesse Vogel, *The Problem with Consensus in the U.N. Framework Convention on Climate* Change, 32 PHIl. & PUB. POL'Y Q. 14, 15–17 (2014).

[132] Lukas Hermwille et al., *UNFCCC Before and After Paris – What's Necessary for an Effective Climate Regime?*, 17 CLIMATE POL'Y 150, 158 (2017).

[133] Charlotte Streck, Moritz von Unger & Sandra Greiner, *COP 25: Losing Sight of (Raising) Ambition*, 17 J. EUR. ENV'T & PLAN. LAW 136, 144–47 (2020).

[134] Gregg B. Walker, *Confronting Complex Global Challenges: Comparing the Climate Change and Law of the Sea Negotiations*, 2 SELECT PROC. OF THE EUR. SOC'Y OF INT'L LAW 275, 280–85 (2013).

[135] Heike Schroeder et al., *The Role of Trust in the International Climate Negotiations*, 35 ENV'T POL'Y AND GOVERNANCE 328, 336–39 (2025).

[136] Fuzuo Wu, *Shaping China's Climate Diplomacy: Wealth, Status, and Asymmetric Interdependence*, 21 J. OF CHINESE POL. SCI. 199, 203–08 (2016).

[137] Vihma, *supra* note 121, at 330-32.

[138] Mizan R. Khan & J. Timmons Roberts, *Adaptation and International Climate Policy*, 4 WIREs CLIMATE CHANGE 171, 174–76 (2013).

h. Gaps in Climate Finance Delivery

Climate finance remains a persistent weakness in the UNFCCC system.[139] Developed countries committed in 2009 to mobilize $100 billion annually by 2020 to support developing nations.[140] That pledge was later increased in 2024 to $300 billion by 2035;[141] however, delivery remains inconsistent.[142] There are no binding formulas or timelines to ensure fulfillment. Reporting standards vary, and there is insufficient transparency about the nature of finance such as how much are grants versus loans.[143] These shortcomings damage trust and weaken the Convention's credibility as a mechanism for equity and support.[144] The failure to deliver finance also has direct effects on implementation. Many developing countries cannot meet climate goals without predictable and accessible funding.[145] The lack of enforceable finance commitments contributes to the growing divide between countries' ambitions and their ability to act.[146]

4. Strengthening the UNFCCC

4.1 Overview

The UNFCCC relies on consensus for nearly all decisions, which often slows progress and dilutes outcomes.[147] Every party must effectively agree, allowing even a small minority to block or weaken measures. This practice has led to "lowest common denominator" results in climate negotiations.[148] Research confirms that institutions requiring universal consensus—such as the UNFCCC—tend to achieve only modest policy

---

139 For various proposals, see Rafael Leal-Arcas, Michalis Kanakakis, George Thanos & Gemma Fearnley, *Regulation and Innovative Finance for Sustainable Energy*, 34 EMORY INT'L LAW REV., 435-532 (2020).

140 Framework Convention on Climate Change, Conf. of the Parties on its Fifteenth Session, U.N. Doc. FCCC/CP/2009/11/Add.1 (2009), https://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf.

141 United Nations Framework Convention on Climate Change, COP29: *UN Climate Conference Agrees to Triple Finance to Developing Countries, Protecting Lives and Livelihoods* (2024), https://unfccc.int/news/cop29-un-climate-conference-agrees-to-triple-finance-to-developing-countries-protecting-lives-and.

142 Orgs. for Econ. Coop. & Dev. (OECD), *Climate Finance and the USD 100 Billion Goal* (2024), https://www.oecd.org/en/topics/sub-issues/climate-finance-and-the-usd-100-billion-goal.html.

143 Robert Bergsvik et al., *Is Transparency Furthering Clarity in Multilateral Climate Governance? The Case of Climate Finance*, INTERNATIONAL ENVIRONMENTAL AGREEMENTS: POLITICS, LAW AND ECONOMICS (Nov. 9, 2024), https://doi.org/10.1007/s10784-024-09652-y.

144 Virenda Kumar, *Financing Loss and Damage and International Climate Governance: A Climate Justice Perspective*, 6 INT'L J. OF POL. SCI. AND GOVERNANCE 231, 236 (2024), https://doi.org/10.33545/26646021.2024.v6.i2c.379.

145 Luis Gómez-Echeverri, *The Changing Geopolitics of Climate Change Finance*, 13 CLIMATE POLICY 632–48, 635–37 (2013), https://doi.org/10.1080/14693062.2013.822690.

146 *Id*.

147 Robert O. Keohane & David G. Victor, *Cooperation and Discord in Global Climate Policy,* 6 *NATURE CLIMATE CHANGE* 570, 572 (2016).

148 Michele M. Betsill & Desirée Fiske, *International Climate Change Policy: Complex Multilevel Governance,* in THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY 273 (Regina S. Axelrod & Stacy D. VanDeveer eds., 4th ed. Sage 2019).

ambition.[149] While consensus upholds universal participation, it hinders timely and bold action.

Reform proposals focus on introducing qualified majority voting as a backstop when consensus fails. Notably, Papua New Guinea and Mexico proposed amending the UNFCCC to allow decisions by a three-quarters majority after all efforts at consensus are exhausted.[150] This would mirror voting rules in other international regimes, preventing one state from exercising a de facto veto.[151] However, the proposal did not gain sufficient support and remains dormant on the COP agenda.[152]

In practice, many Parties remain extremely reluctant to abandon consensus, and attempts to formally adopt voting rules have stalled.[153] Even incremental steps —such as reinterpreting what constitutes consensus or streamlining overloaded agendas—face political resistance.[154] Observers note a fundamental tension: moves to expedite decisions can conflict with the UNFCCC's ethos of inclusive, party-driven negotiation.[155] Without broad trust and buy-in, any shift away from full consensus is unlikely. Thus, while modifying the consensus rule could strengthen decision-making efficiency, it may only be viable through gradual, confidence-building measures, rather than sweeping rule changes.

A second set of reforms aim to improve Parties' compliance with their commitments. The Kyoto Protocol's compliance system included an enforcement branch that could apply sanctions—for example, suspending a country's eligibility to trade emission credits if it breached its emissions target.[156] This hard mechanism underscored the seriousness of commitments, but also carried the risk of states withdrawing to avoid penalties (as Canada did after defaulting on its Kyoto target). Learning from that experience, the Paris Agreement deliberately adopted a non-punitive approach.

Article 15 established a Compliance Committee that is "facilitative" in nature, lacking any enforcement branch or sanction power.[157] The emphasis is on assistance and encouragement rather than penalties. Strong enforcement measures were seen as politically infeasible to secure universal participation.[158] Indeed, during the Paris negotiations the wording of key obligations was softened (from "shall" to "should") under pressure, to ensure major emitters would sign on.[159] The result is a framework that prioritizes flexibility and broad buy-in over legal force.

---

[149] Daniel Bodansky, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 112 (Harvard Univ. Press 2010).

[150] Daniel Bodansky & Elliot Diringer, *Building Flexibility and Ambition into a 2015 Climate Agreement*, 11 CENTER FOR CLIMATE AND ENERGY SOLUTIONS (2014).

[151] *Id*. at 12.

[152] UNFCCC, *Admission of Observers: Organizations Applying for Admission as Observers*, ¶ 22, U.N. Doc. FCCC/CP/2010/4 (Sept. 30, 2010).

[153] Robert O. Keohane & David G. Victor, *Cooperation and Discord in Global Climate Policy, 6 NATURE CLIMATE CHANGE* 574 (2016).

[154] Betsill & Fiske, *supra* note 148, at 265, 274.

[155] *Id*.

[156] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, arts. 18–19.

[157] Paris Agreement art. 15.

[158] Lavanya Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations,* 28(2) J. Env't L. 337, 339 (2016).

[159] *Id*. at 340.

Analysts have advanced concrete ideas to bolster compliance without formal sanctions. One proposal is to strengthen review processes under the Paris "enhanced transparency framework." All countries' progress reports could undergo more rigorous expert scrutiny, with findings publicly highlighted to generate reputational pressure on laggards.[160] Parties falling short of their Nationally Determined Contributions (NDCs) might be required to submit corrective action plans or attend special sessions to explain how they will get on track. While still non-punitive, such measures would draw greater attention to gaps between promises and performance, leveraging diplomacy and public opinion as enforcement tools.[161]

Another idea is to expand the mandate of the Paris Compliance Committee so it can, at a minimum, issue findings of non-compliance and recommendations for remedial steps.[162] This could include outlining specific actions or offering targeted capacity-building to help countries meet their obligations. Some scholars also suggest linking compliance to access to climate finance or other benefits, creating positive incentives to honor commitments. However, any move toward conditional incentives or penalties would require consensus approval by the Parties—the very hurdle that makes robust enforcement difficult. The most realistic path in the near term is to enhance transparency and peer review, fostering an expectation of accountability. Over time, a norm of compliance can be built through repeated reporting and naming-and-shaming, even absent formal sanctions.[163] In short, stronger monitoring and review mechanisms—rather than strict punishments—are the feasible tools to improve implementation under current political constraints.[164]

The UNFCCC's architecture has become increasingly complex, with numerous bodies addressing mitigation, adaptation, finance, technology, and loss-and-damage. Poor coordination among these constituted bodies can lead to duplication, gaps, and inefficiency.[165] For example, multiple institutions often work in parallel on related adaptation initiatives, following separate mandates and timelines.[166] Weak coordination and siloed efforts limit the overall effectiveness of the climate regime's response.[167] Recognizing this, Parties and experts have called for reforms to streamline institutional interactions.

One approach is to assign clearer coordination mandates to key committees. The Paris Agreement-era bodies are already tasked to work "in a coherent manner" with the Convention—for instance, the Adaptation Committee is explicitly charged with promoting coherent action on adaptation under both the UNFCCC and Paris Agreement.[168] This role could be amplified by regular joint meetings between related bodies (such as adaptation, finance, and technology committees) to align workplans. Dedicated liaison teams or secretariat units might support information flow across tracks. Indeed, the Executive

---

[160] Intergovernmental Panel on Climate Change [IPCC], in *Climate Change 2022: Mitigation of Climate Change, Working Group III contribution to the Sixth Assessment Report*, ch. 13 (Cambridge Univ. Press 2023).
[161] *Id*.
[162] Rajamani, *supra* note 158, at 345.
[163] *Id*. at 346.
[164] *Id*. at 347.
[165] UNFCCC, *Report of the Adaptation Committee,* ¶ 6, U.N. Doc. FCCC/SB/2022/3 (2022).
[166] *Id*. ¶ 8.
[167] *Id*. ¶ 11.
[168] Paris Agreement, art. 7.7.

Committee of the Warsaw International Mechanism on Loss and Damage has been directed to strengthen dialogue and synergies among relevant stakeholders and institutions inside and outside the UN climate process.[169] Expanding such coordination efforts—for example, through cross-cutting task forces or shared reporting frameworks—can help ensure that decisions by one body inform and reinforce others.

Improving coordination also means linking the UNFCCC with initiatives beyond its own framework. Climate governance now exists as a "regime complex" involving parallel forums, clubs, and national pledges.[170] Keohane and Victor note that a loosely coupled set of initiatives can complement the UNFCCC, but only if they are effectively coordinated.[171] In practice, this could involve the UNFCCC forging closer ties with institutions such as the G20, multilateral development banks, or climate clubs formed by ambitious countries. The aim would be to avoid working at cross purposes and instead harness outside efforts to support UNFCCC goals.

For example, technical standards or finance pledges from smaller coalitions could be fed into the UNFCCC process for broader adoption. Academic analyses suggest that a global climate governance landscape with strong coordination among its many pieces will outperform a fragmented approach.[172] Therefore, strengthening the UNFCCC procedurally includes not just internal streamlining, but also acting as the focal node in a network of climate action. By improving coherence across its various bodies and aligning with external initiatives, the UNFCCC can better leverage collective efforts and deliver more effective global climate governance.[173]

4.2 The Implementation Versus Ambition Gap

One of the most pressing challenges in global climate governance is the widening gap between stated ambitions and real-world implementation. Despite new mechanisms under the Paris Agreement, national pledges often fail to translate into meaningful progress. This section explores the nature of this gap, its root causes, and its implications for the UNFCCC's credibility and effectiveness.

a. Defining the Gap

The implementation gap refers to the growing disconnect between national pledges such as commitments to limit global warming to 1.5 °C or achieve net-zero emissions and the actual measures taken to realize them. While countries have submitted increasingly ambitious NDCs, global emissions continue to rise, and many NDCs are not aligned with

---

[169] UNFCCC, *Warsaw International Mechanism for Loss and Damage: Report by the Executive Committee,* ¶ 18, U.N Doc. FCCC/SB/2021/4 (2021).

[170] Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change,* 9(1) PERSPECTIVES ON POLITICS 7, 8 (2011).

[171] *Id*. at 9.

[172] *Id*. at 11.

[173] *Id*. at 12.

national policies, financial flows, or infrastructure investments.[174] The IPCC's Sixth Assessment report emphasizes that global emissions must fall by 43% from 2019 levels by 2030 to stay within the 1.5 °C threshold.[175] Current trends are not consistent with this goal. The 2023 Global Stocktake (GST) amplified this situation by demonstrating how all countries systematically fall short of the milestones established in the framework of the Paris Agreement.[176]

b. Causes of the Gap

A major cause is the non-binding nature of the Paris Agreement. While countries must submit and update NDCs, there are no legal consequences for failing to meet targets.[177] The reliance on transparency, peer pressure, and reputational incentives has not proven sufficient to ensure delivery.[178] Institutional and technical capacity constraints also play a role, particularly in low- and middle-income countries. These include weak governance, limited access to technology, inadequate data systems, and difficulties in accessing climate finance.[179] Without the necessary support, ambitious pledges remain aspirational.

Domestic political-economy factors further complicate implementation. Fossil fuel interests often wield considerable influence over national energy policies, and governments may prioritize short-term economic stability over long-term climate goals.[180] In some cases, public opposition to climate policies or concerns over job losses in carbon-intensive sectors delay or dilute reforms.[181]

c. Evidence of the Gap

The 2023 Global Stocktake concluded that current national policies are insufficient to meet the Paris Agreement's long-term goals. According to Climate Action Tracker,

---

[174] Janna Hoppe et al., *Three Decades of Climate Mitigation Policy: What Has It Delivered?,* 48 ANN. REV. OF ENV'T AND RES., 620-624 (2023), https://www.annualreviews.org/docserver/fulltext/energy/48/1/annurev-environ-112321-103821.pdf?expires=1743859792&id=id&accname=guest&checksum=2AD605DDA61639B6F9929D071CD15BC3.

[175] Intergovernmental Panel on Climate Change [IPCC]*, Climate Change 2022: Mitigation of Climate Change: Summary for Policymakers*. *Working Group III contribution to the Sixth Assessment Report 21 (C1.1) (2022),* https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SPM.pdf.

[176] United Nations Framework Convention on Climate Change [UNFCCC], *Technical Dialogue of the First Global Stocktake: Synthesis Report by the Co-Facilitators*, 13 ¶ 80, U.N. Doc. FCCC/SB/2023/9, https://unfccc.int/sites/default/files/resource/sb2023_09_adv.pdf.

[177] Vernon Rive, *Reflections on the Paris Agreement* 1-17, 6-8 (Auckland U. Tech. Sch. L., Working Paper, 2016), https://doi.org/10.2139/SSRN.2778412.

[178] Killian Raiser, Başak Çalı & Christian Flachsland, *Understanding Pledge and Review: Learning from Analogies to the Paris Agreement Review Mechanisms*, 22 CLIM. POL'Y, 711, 721–723 (2022), Available at https://doi.org/10.1080/14693062.2022.2059436.

[179] Edidah L. Ampaire et al., *Institutional Challenges to Climate Change Adaptation: A Case Study on Policy Action Gaps in Uganda*, 75 ENVTL/SCI. & POL'Y 81, 83–86 (2017), https://doi.org/10.1016/J.ENVSCI.2017.05.013.

[180] Michael Lazarus & Harro van Asselt, *Fossil Fuel Supply and Climate Policy: Exploring the Road Less Taken*, 150 CLIMACTIC CHANGE 1, 5–7 (2018), https://doi.org/10.1007/s10584-018-2266-3

[181] Britta Rennkamp, *Power, Coalitions and Institutional Change in South African Climate Policy*, 19 CLIMATE POL'Y 756, 760–763 (2019), https://doi.org/10.1080/14693062.2019.1591936.

existing trajectories could lead to a 2.7 °C temperature increase by 2100, far above agreed targets.[182] Carbon dioxide emissions rose from 35.4 gigatons in 2016 to 37.79 gigatons in 2023.[183] This upward trend reflects continued dependence on coal, oil, and gas, and limited success in deploying low-carbon alternatives at the necessary scale.[184]

Carbon pricing also remains inadequate. In 2023, only 24% of global emissions were subject to carbon pricing mechanisms.[185] The global average carbon price was $32 per ton,[186] far below the International Monetary Fund (IMF)'s recommended $75 level needed to shift investment behavior meaningfully.[187] Adaptation and finance gaps are equally significant. The United Nations Environment Program (UNEP)'s 2023 Adaptation Gap Report found that, in developing countries, adaptation finance needs were five to 10 times higher than the funding actually provided at the time.[188] Delays in implementation due to insufficient support leave vulnerable regions exposed to climate impacts.[189]

d. Implications

The persistence of the implementation gap damages the credibility of the UNFCCC and undermines confidence in international climate governance. Repeated failures to deliver on finance pledges such as the unmet $100 billion goal have eroded trust between developed and developing countries. The gap also worsens climate risks. Without effective implementation, the likelihood of crossing planetary tipping points increases, while unaddressed adaptation needs leave many communities at risk of food insecurity, displacement, and economic loss.[190] The longer the gap persists, the more complex and financially burdensome it will be to achieve the Paris Agreement's objectives.

---

[182] Climate Action Tracker, *Global Emissions Pathways* (Climate Analytics & New Climate Inst. 2024), https://climateactiontracker.org/global/emissions-pathways/.

[183] Hannah Ritchie & Max Roser, *CO_2 and Greenhouse Gas Emissions* (Our World in Data 2024), https://ourworldindata.org/co2-emissions.

[184] Cora Fernández-Dacosta et al., *Potential and Challenges of Low-Carbon Energy Options: Comparative Assessment of Alternative Fuels for the Transport Sector,* 236 *Applied Energy* 590, 700–704 (2019), https://doi.org/10.1016/j.apenergy.2018.11.055.

[185] *Carbon Pricing Dashboard. Compliance Instruments*, WORLD BANK GROUP (2024), https://carbonpricingdashboard.worldbank.org/compliance/instrument-detail.

[186] *Id*.

[187] Art Dam*, IMF Chief Says $75/ton Carbon Price Needed by 2030*, CARBON CREDIT MARKETS (Dec. 26, 2022), https://www.carboncreditmarkets.com/en/single-post/imf-chief-says-75-ton-carbon-price-needed-by-2030.

[188] ORGANIZATION ON ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) SECRETARY GENERAL, CLIMATE FINANCE PROVIDED AND MOBILISED BY DEVELOPED COUNTRIES IN 2013-2021 (2023), https://www.oecd-ilibrary.org/sites/e20d2bc7-en/1/3/1/index.html?_csp_=314d5027cab082b3d529a036ee3951a4&itemContentType=book&itemIGO=oecd&itemId=%2Fcontent%2Fpublication%2Fe20d2bc7-en.

[189] Giuseppe Scandurra et al., *Does Climate Finance Reduce Vulnerability in Small Island Developing States? An Empirical Investigation*, 256 *J. of Cleaner Prod.* 6, 6–9 (2020), https://doi.org/10.1016/j.jclepro.2020.120330.

[190] Lawrence Huang, *Climate Migration 101: An Explainer* (Migration Policy Inst. 2023) https://www.migrationpolicy.org/article/climate-migration-101-explainer.

4.3 Comparative Institutional Models and Their Lessons

The structural limitations of the UNFCCC have led many analysts to examine other international institutions for lessons in effective governance.[191] Organizations such as the WTO, the World Health Organization (WHO), and emerging climate-specific coalitions offer useful insights into alternative approaches to rule enforcement, coordination, and implementation.

a. *World Trade Organization: Rule Enforcement and Legal Accountability*

The WTO operates under a comprehensive legal framework that includes binding obligations and an established dispute settlement system.[192] When violations occur, affected member states may seek redress through formal complaints. If a breach is confirmed, retaliatory trade measures can be authorized. This model demonstrates how legal accountability can coexist with respect for sovereignty. Despite recent challenges to the WTO's Appellate Body, its dispute mechanism historically strengthened compliance and institutional credibility.[193] For the UNFCCC, the lesson is that enforceable procedural rules such as stronger review mechanisms or conditional participation in financial instruments could enhance credibility and encourage compliance, even without binding emission targets.[194]

b. World Health Organization: Centralized Coordination and Emergency Response

The WHO is built around scientific legitimacy, centralized coordination, and crisis response capacity.[195] Under the legally binding International Health Regulations (IHR), countries must develop health infrastructure and report disease outbreaks.[196] During the COVID-19 pandemic, the WHO coordinated responses, offered technical guidance, and

---

[191] Alexios Antypas, *Saving the United Nations Framework Convention on Climate Change from Itself: Complementary and Alternative Approaches,* 24 EKISTICS & THE NEW HABITAT 24, 26–28 (2024), https://doi.org/10.53910/26531313-e2022823668.

[192] World Trade Organization (WTO), *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2, arts. 1.1, 3.2, 3.7, 21, 22 (1995), https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

[193] Steve Charnovitz, *The Enforcement of WTO* Judgments, 34 YALE J. INT'L L. 529, at 530–534 (2009), https://consensus.app/papers/the-enforcement-of-wto-judgments-charnovitz/06615d95a0f753e892537877bfea7500.

[194] Luke Tomlinson, *The UNFCCC: A Necessary Ideal*, *in* THE ETHICS OF CLIMATE GOVERNANCE 177, 187–194 (Springer ed., 2015), https://doi.org/10.1007/978-3-319-17184-5_8.

[195] Margaret Chan , *Learning from Ebola: Readiness for Outbreaks and Emergencies*, 93 BULL. WORLD HEALTH ORG. 818. 818–818A (2015), https://doi.org/10.2471/BLT.15.165720.

[196] HEALTH SECURITY PREPAREDNESS & INTERNATIONAL HEALTH REGULATIONS SECRETARIAT, INTERNATIONAL HEALTH REGULATIONS (2005) (World Health Org., 3d ed. 2005), arts. 5–6, https://www.who.int/publications/i/item/9789241580496.

promoted equitable vaccine access.[197] Although it cannot enforce compliance,[198] the WHO's strength lies in operational readiness and rapid coordination.[199] A similar model within the UNFCCC such as a specialized emergency response unit for climate-related disasters could improve preparedness and international solidarity during extreme climate events.[200]

c. Regional and Coalition-Based Climate Initiatives

Various regional and coalition-based initiatives have emerged to complement global efforts. The EU ETS covers about 40% of EU emissions[201] and includes enforceable penalties for non-compliance, ensuring a functioning carbon market with declining emissions caps.[202] The G7's Climate Club, launched in 2022, promotes coordination on industrial decarbonization and carbon pricing. While still voluntary, it holds potential for setting standards across trade-exposed sectors such as steel and cement.[203] Additionally, G7-led green finance platforms are helping define investment taxonomies and transition financing frameworks.[204] These targeted initiatives offer practical examples of how functional cooperation can advance goals even when universal consensus is lacking.[205]

The next section offers an examination of alternative frameworks including club-based agreements among key emitters, polycentric governance networks, and energy-focused initiatives that could augment or replace aspects of the current regime. The analysis also considers the role of non-state actors and multi-level governance in enhancing climate action.

---

[197] Ngozi A Erondu, Iya Saidou Conde & Afifah Rahman-Shepherd., *WHO Has Been Reformed: How Can It Be Empowered to Lead Global Public Health?*, 20 GLOB. SOC. POL'Y 20(3), 393, 393–96 (2020), https://doi.org/10.1177/1468018120966656.

[198]Mark Eccleston-Turner et al., *Implementation, Compliance, and Pandemic Legal Obligations* 380 SCIENCE 792,–at 792-94 (2023), https://doi.org/10.1126/science.adh2080.

[199] Arturo Pesigan et al., *Building Operational Readiness for Responding to Emergencies in the WHO South-East Asia Region*, 9(1) WHO S.E. ASIA J. PUBLIC HEALTH 37, 37–39 (2020), https://doi.org/10.4103/2224-3151.282994.

[200] Tim Stephens, *Wishful Thinking? The Governance of Climate Change-Related Disasters in the Anthropocene*, in J. Peel and D Fisher (eds.), *The Research Handbook on Climate Disaster Law* 3–5 (Edward Elgar Publ'g 2018), https://doi.org/10.4337/9781786430038.00008.

[201] European Commission, *About the EU Emissions Trading System (EU ETS)* (2023), https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/about-eu-ets_en.

[202] Andrea Flori, *Energy Commodities Spillover Analysis for Assessing the Functioning of the European Union Emissions Trading System Trade Network of Carbon Allowances*, 14 SCI. REP. art. 72518 (2024), https://doi.org/10.1038/s41598-024-72518-5.

[203] European Parliament, *G7 Climate Club – At a Glance* (2023), https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739385/EPRS_ATA(2023)739385_EN.pdf.

[204] Green Finance Platform, *Standards and Regulations*, https://www.greenfinanceplatform.org/themes/standards-and-regulations.

[205] Charles F. Sabel & David G. Victor, *Governing Global Problems Under Uncertainty: Making Bottom-Up Climate Policy Work*, 144 CLIMATIC CHANGE 15, 16–19, 21 (2017), https://doi.org/10.1007/s10584-015-1507-y.

5. Alternative Frameworks

5.1 Overview

The limitations of the UNFCCC's universal approach have led to the rise of complementary frameworks rather than outright replacements. Scholars observe that global climate governance now consists of a "regime complex"—a mosaic of overlapping institutions and initiatives addressing different facets of the climate problem.[206] Keohane and Victor argue that this patchwork, if properly designed, can be more adaptable and effective than any single comprehensive regime, given the varied interests and capabilities of states.[207] In particular, alternative frameworks such as climate clubs, polycentric coalitions, and energy-focused agreements have been proposed to fill enforcement gaps, raise ambition, and coordinate specific sectors beyond what the UNFCCC alone can achieve. Each of these frameworks seeks to support and augment the Paris Agreement architecture, rather than replace it, targeting weaknesses such as the lack of binding commitments and the slow pace of consensus-based action.

Climate clubs are smaller coalitions of countries that agree on stronger climate action among themselves, often using exclusive benefits or trade measures to enforce compliance. Nordhaus's seminal proposal defines a climate club as a coalition that implements robust carbon pricing internally and penalizes free-riders through tariffs on imports from non-members.[208] This model directly addresses the enforcement gap of the UNFCCC: whereas Paris Agreement pledges are voluntary and lack penalties, a club could impose tangible costs on countries that do not meet its standards.[209] Nordhaus and others view club arrangements as a necessary "complementary solution" to multilateralism's failures—noting that decades of UN climate talks have "persistently failed to produce a legally binding international agreement" with adequate targets, incentives or penalties.[210] By creating incentives to participate (such as preferential trade terms or technology sharing) and sanctions for non-participation, clubs aim to overcome free-rider problems and bolster compliance with emission-reduction efforts.

Climate clubs can also help close the ambition gap by encouraging willing nations to move faster and deeper than the UNFCCC's lowest common denominator outcomes.[211]

---

[206] Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9(1) PERSP. ON POL. 7, 8 (2011) .

[207] Robert O. Keohane & David G. Victor, *Cooperation and Discord in Global Climate Policy*, 6 NATURE CLIMATE CHANGE 570, 573 (2016).

[208] William D. Nordhaus, *Climate Clubs: Overcoming Free-Riding in International Climate Policy*, 105(4) AMER. ECON. REV. 1339, 1340 (2015).

[209] *Id*. at 1341.

[210] *Id*. at 1345.

[211] *See generally* RAFAEL LEAL-ARCAS, CLIMATE CLUBS FOR A SUSTAINABLE FUTURE: THE ROLE OF INTERNATIONAL TRADE AND INVESTMENT LAW, (2021); R. LEAL-ARCAS, CLIMATE CHANGE AND INTERNATIONAL TRADE, (2013); Dyuti Pandya & R. Leal-Arcas, *The creation of a climate club for a sustainable economic future: The role of international economic law amidst geopolitical confrontation*, 52 GA. J. INT'L & COMP. L. 1, 1-88 (2024).; R. Leal-Arcas, *Creating an Effective, Legally Binding, and Enforceable Climate Club*, THINK 7 POLICY BRIEF: TASK FORCE CLIMATE AND ENV'T (G7 Germany's Presidency) Apr. 2022 1, 1-11; R. Leal-Arcas and A. Filis, *International Cooperation on Climate Change Mitigation: The role of climate clubs*, 30 EUR. ENERGY & ENVTL. L. REV. 195, 195-218 (2021); R. Leal-Arcas, *Climate Clubs and International Trade across the European and International Landscape*, 29 EUR. ENERGY & ENVTL. L. REV. 72, 72-88 (2020).

For example, the G7-led Climate Club launched in 2022 seeks to harmonize ambitious decarbonization policies among major economies. Unlike Nordhaus's tariff-centric club, the G7 Climate Club emphasizes partnerships and shared standards over punitive measures – focusing on industry decarbonization, avoiding carbon leakage, and coordinating carbon pricing approaches in an open, inclusive manner.[212] The underlying idea is that like-minded leaders can ratchet up climate ambition together and then attract others to join, gradually expanding the club's membership and impact.

Similarly, proposals have been made to form clubs around the EU's CBAM,[213] creating an alliance of countries with compatible carbon pricing so that high standards are rewarded and shielded from unfair competition. Such mini-lateral initiatives complement the UNFCCC by setting higher benchmarks and experimenting with enforcement tools (e.g., trade measures) that a universal regime cannot easily deploy. Early analyses suggest that narrow coalitions focused on specific issues or sectors can achieve deeper cooperation and spur innovation in ways that the sprawling UN process struggles to do.[214] In short, climate clubs offer a flexible, focused venue to advance climate action—addressing UNFCCC shortcomings on binding commitments and collective ambition while remaining aligned with its overall goals.

A different alternative framework is the polycentric governance approach, as championed by Elinor Ostrom and others. A polycentric strategy involves multiple centers of decision-making—national governments, cities, states/provinces, international alliances, corporations, and civil society—all taking initiative in climate mitigation. Ostrom argues that relying on a single global policy or authority is "inherently weak" due to free-rider problems and the difficulty of building trust among all parties.[215] In contrast, bottom-up action at various levels can generate more credibility and momentum. For example, cities and regions have forged transnational networks (such as C40 Cities and ICLEI) to set emission targets, share best practices, and implement climate solutions on the ground, often exceeding the ambition of their national governments.[216] Private-sector and public-private partnerships—from renewable energy initiatives to deforestation-free supply chain pledges—likewise create independent channels of commitment and enforcement outside the UNFCCC framework.

Polycentric governance helps address enforcement and ambition gaps by distributing authority and accountability across many actors. Instead of waiting for top-down mandates, sub-national and non-state leaders are "taking matters into their own hands" to cut emissions and adapt to climate impacts. This creates a form of peer enforcement and

---

[212] G7, Leaders' Communiqué*: 2022 Elmau Summit* (28 June 2022) para 27.

[213] For a legal analysis of the European Union's carbon border adjustment mechanism (CBAM), *see* Rafael Leal-Arcas & Manuliza Faktaufon, EU Trade Policy and Climate Change: The case for a Carbon Border Adjustment Mechanism, *Oxford Encyclopedia of EU La* 1-9, (Oxford Univ. Press 2025); *see also* Rafael Leal-Arcas et al., *A legal exploration of the European Union's Carbon Border Adjustment Mechanism*, 31 *Eur. Energy and Ent't. L. Rev.* 223, 223-240 (2022); Rafael Leal-Arcas et al., *The European Union's Carbon Border Adjustment Mechanism*, in R. Leal-Arcas (ed.), *International Trade and Sustainability: Perspectives from Developing and Developed Countries*, 185-228 (Palgrave Macmillan 2022).

[214] Keohane and Victor, *supra* note 170, at 11.

[215] Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 550, 551 (GLOBAL ENVIRONMENTAL CHANGE, 20TH ED, 2010).

[216] *Id*. at 553–54.

mutual accountability: cities or companies in the same network often monitor each other's progress and uphold shared standards, backed by public scrutiny and market pressure. Ostrom notes that climate mitigation is a classic collective-action problem best tackled at multiple scales simultaneously, with local, regional and national efforts reinforcing one another.[217]

A polycentric system encourages experimentation and learning—different jurisdictions can trial policies (e.g., carbon fees, transit solutions, reforestation programs) and diffuse the successful ones, leading to overall greater effectiveness.[218] Crucially, broadening participation to include municipalities, businesses, and communities builds grassroots commitment that top-down treaties often lack. As Ostrom observes, getting individuals and smaller units to change behavior works better when they see others doing the same, and when they are linked through information networks that track performance at all levels. In sum, polycentric climate governance augments the UNFCCC by mobilizing a wider array of actors and initiatives. It addresses the UN's ambition gap by allowing pioneers to move ahead (raising the bar for laggards), and it mitigates the enforcement gap through local legislation, regional agreements, and norm-driven compliance that do not depend on a single global enforcer. This diversity of efforts makes the overall climate regime more resilient and dynamic, as progress can continue in some centers even if others stall.[219]

Given that the energy sector accounts for roughly three-quarters of global greenhouse gas emissions, specialized energy-focused frameworks play a pivotal role alongside the UNFCCC.[220] Institutions such as the International Energy Agency (IEA) and agreements such as the Energy Charter Treaty (ECT) provide channels for cooperation and rules in the energy domain that can complement climate negotiations.[221] These frameworks are tailored to address sector-specific coordination challenges (e.g., technology deployment, energy trade, investment security) that the UNFCCC's broad agreements cannot detail.

The IEA, for instance, has increasingly become a forum for climate-action support in the energy realm. Founded to coordinate oil security among OECD nations, it has evolved to facilitate the clean energy transition globally. The IEA produces a Net Zero by 2050 roadmap for the energy sector, laying out concrete milestones to meet the Paris Agreement's 1.5°C goal.[222] It also convenes collaborative platforms for technology and policy innovation: through over 40 Technology Collaboration Programs, the IEA coordinates research and development on topics from renewable integration to energy efficiency, involving not only

---

[217] *Id*. at 555.

[218] *Id*. at 556-57.

[219] *Id*. at 557-58.

[220] International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* 13 (2021).

[221] *See*, generally, COMMENTARY ON THE ENERGY CHARTER TREATY (Rafael Leal-Arcas ed., Edward Elgar Publishing Ltd, 2nd ed. 2023); Rafael Leal-Arcas and Andreas Filis, *Linking the European Union to the Energy Charter Treaty and the Energy Community,* 3 Energy Charter Knowledge Centre Review 16, 16-19 (2014); Rafael Leal-Arcas and Andreas Filis, *The Energy Community and the Energy Charter Treaty: Special Legal Regimes, their Systemic Relationship to the EU, and their Dispute Settlement Arrangements*, 12 Oil, Gas & Energy L. J. 1, 1-42 (2014); Rafael Leal-Arcas and A Filis, "The Energy Community, the Energy Charter Treaty and the Promotion of EU energy security," in Buschle, D. and Talus, K. (eds.) *The Energy Community: A New Energy Governance System*, Intersentia, pp. 551-589, 2015.

[222] International Energy Agency, *supra* note 220, at 14.

its member states but dozens of partner countries, corporations and international organizations.[223]

This kind of cooperation helps raise ambition and close implementation gaps—for example, by setting shared benchmarks (such as efficiency standards or renewable targets) and disseminating best practices faster than consensus diplomacy could. While the IEA does not "enforce" climate action in a legal sense, it exerts soft power and accountability by tracking countries' energy policies, benchmarking progress, and spotlighting shortfalls. Indeed, the IEA has warned that far greater policy ambition and international coordination are required to achieve global climate goals, urging governments to swiftly implement and strengthen their energy commitments in line with climate science.[224] In this way, the IEA's work complements the UNFCCC by focusing on practical energy-sector decarbonization and by pressing countries to bridge the gap between pledges and action.

The Energy Charter Treaty, by contrast, illustrates both the potential and pitfalls of a legally binding sectoral framework. Agreed in the 1990s, the ECT created a multilateral legal regime for energy cooperation and investment, complete with an investor–state dispute settlement (ISDS) mechanism to enforce rules.[225] In theory, this framework addressed an enforcement gap in the energy sector: companies and investors could rely on binding arbitration if governments reneged on energy trade or investment commitments. However, in practice the ECT has been criticized for protecting fossil fuel investments and thus undermining climate action.

Its strong enforcement tools were turned against states' climate measures—for example, oil and gas firms have sued governments over coal phase-outs and environmental regulations. As the Paris Agreement raised global climate ambition, the ECT's goals increasingly conflicted with decarbonization efforts. By 2024 the European Union and several countries decided to withdraw from the ECT, deeming it fundamentally incompatible with the Paris goals due to its protection of high-carbon assets.[226] This episode highlights that sectoral agreements must be aligned with climate objectives to serve as effective complements. A reformed or alternative energy cooperation framework could, however, be valuable—one that directs investment toward clean energy and enforces commitments to phase out fossil fuels rather than to perpetuate them.

Overall, these alternative frameworks demonstrate ways to buttress global climate governance by tackling specific weaknesses of the UNFCCC system. Climate clubs introduce enforcement through club benefits and penalties, motivating deeper emission cuts among smaller groups of committed countries. Polycentric initiatives unleash bottom-up momentum, driving ambition and implementation across all levels of society. Energy-focused institutions bring technical coordination and binding rules to the heart of the emissions problem—the energy sector. Each framework addresses enforcement gaps, ambition gaps, or sectoral coordination in which the UNFCCC alone has limited leverage. Together, they form an increasingly important complementary architecture around the

[223] International Energy Agency, *IEA Role in International Cooperation on Clean Energy* 2 (2013).

[224] International Energy Agency, *Climate Change*, https://www.iea.org/topics/climate-change.

[225] Energy Charter Treaty art. 26, Dec. 17, 1994, 2080 U.N.T.S. 95.

[226] Jim Brunsden and Andy Bounds, 'EU Set to Quit Energy Charter Treaty' *Financial Times* (London, 18 October 2024).

UNFCCC's core regime.[227] While the UN climate regime provides the overarching goals and transparency framework, these alternative arrangements enhance compliance, raise collective ambition, and target sector-specific challenges—suggesting that a more polycentric, multi-tiered governance approach can better deliver the deep transformations required to stabilize the global climate.

5.2 Alternatives or Enhancements to the UNFCCC

While the UNFCCC remains the central forum for climate diplomacy, its limitations have led to increasing interest in how it might be strengthened, complemented, or, in extreme cases, restructured. Three main pathways have been proposed: internal reform, complementary institutional linkages, and more radical alternatives.

a. Strengthening the UNFCCC from Within

Internal reform focuses on improving the Convention's existing mechanisms. One priority is enhancing the compliance system established under Article 15 of the Paris Agreement. Currently facilitative and non-punitive, it could evolve to include graduated measures such as access restrictions to financial instruments or market mechanisms for countries that fail to meet procedural obligations.[228] The UNFCCC could also better integrate scientific input. Although the IPCC provides assessments, it plays no formal role in evaluating country plans. A scientific review function within the Conference of the Parties (COP), tasked with assessing the adequacy of NDCs, could strengthen the evidence-policy link.[229] Transparency tools should be upgraded as well. Expanding the Enhanced Transparency Framework (ETF) to include independent expert review, public benchmarking, and comparative scorecards could drive progress through peer accountability and civil society scrutiny.[230]

b. Complementary Governance through Trade and Finance Institutions

A second pathway involves linking climate goals with other international institutions that possess enforcement tools or financial influence. The WTO already intersects with climate policy through trade measures[231] such as CBAMs. A formal interface

[227] Keohane and Victor, *supra* note 170, at 12.

[228] Huggins A, 'The Paris Agreement's Compliance Mechanism: An Incomplete Compliance Strategy' (2021), Available at https://consensus.app/papers/the-paris-agreement-'-s-compliance-mechanism-an-incomplete-huggins/e7b7f30acf2d5d3ab0accbd8b30efded.

[229] Carlo Carraro, *A Bottom-Up, Non-Cooperative Approach to Climate Change Control: Assessment and Comparison of Nationally Determined Contributions (NDCs)* 9 J. Sustainable Dev. 175, 175–76, (2016), https://doi.org/10.5539/jsd.v9n5p175.

[230] Aarti Gupta and Harro van Asselt, *Transparency in Multilateral Climate Politics: Furthering (or Distracting from) Accountability?* 13 (Regul. & Governance 18, 19–22 (2019)), https://doi.org/10.1111/rego.12159.

[231] For analyses, see Rafael Leal-Arcas et al. *Green Bills for Green Earth: How The International Trade and Climate Regimes Work Together to Save The Planet*, 31 Eur. Energy and Env't L. Rev. 19, 19–40 (2022); Rafael Leal-Arcas, *Empowering Citizens for Common Concerns: Sustainable Energy, Trade and Climate Change*, 6 GSTF

between the WTO and the UNFCCC could improve coherence between climate and trade rules.[232] Multilateral development banks, including the World Bank, could be mandated to align their portfolios with the Paris Agreement and report regularly on climate finance contributions.[233] The IMF is also integrating climate risk into its country assessments. A more formalized "Green IMF" model could incentivize climate action by linking access to concessional finance with implementation metrics.[234] These institutional linkages would reinforce domestic policy implementation, particularly in countries facing financial or institutional constraints.

c. Recognizing High-Ambition Coalitions

The UNFCCC could also formally recognize and engage regional or sectoral coalitions such as the EU's climate mechanisms or the G7 Climate Club. Granting them observer or semi-official status would allow them to test innovative policies, such as sector-specific carbon pricing or shared infrastructure investments, while maintaining alignment with global goals.[235] This approach would create a cooperative dynamic where high-performing actors can push ambition forward, and their successes can be shared or scaled through the broader Convention framework.

d. Bold Alternatives: Redesigning Climate Governance

Some scholars propose more radical reforms. One idea is a global climate authority modeled after the WTO, with binding rules, verification mechanisms, and sanctions for non-compliance.[236] Another proposal envisions a Green Bretton Woods system that integrates climate, trade, and finance under a unified global institution.[237] While these models offer systemic solutions to enforcement and coherence, they face substantial political obstacles.

J. L. and Soc. Scis. 1, 1–37 (2018); RAFAEL LEAL-ARCAS, WORKING TOGETHER: HOW TO MAKE TRADE CONTRIBUTE TO CLIMATE ACTION, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, INFORMATION NOTE NO. 18 (2013).

232 Ethan Biji, *Sustainable Trade and the WTO: The Compliance Dilemma* 2 Int'l. J. L. and Pol'y. 1, 1–15 (2024), https://doi.org/10.59022/ijlp.226; *see* also Rafael Leal-Arcas, Expert contributor, in Bacchus, James (2016) "Global Rules for Mutually Supportive and Reinforcing Trade and Climate Regimes," E15 Expert Group on Measures to Address Climate Change and the Trade System – Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, available at https://www3.weforum.org/docs/E15/WEF_Climate_Change_POP.pdf

233 CAROLYN NEUNUEBEL ET AL., ALIGNING POLICY-BASED FINANCE WITH THE PARIS AGREEMENT (2022), https://doi.org/10.46830/wriwp.21.00066.

234 ANNA BELIANSKA ET AL. CLIMATE CHANGE AND SELECT FINANCIAL INSTRUMENTS: AN OVERVIEW OF OPPORTUNITIES AND CHALLENGES FOR SUB-SAHARAN AFRICA (2022), https://doi.org/10.5089/9798400225208.066.

235 Charlotte Unger and Sonja Thielges, *Preparing the Playing Field: Climate Club Governance of the G20, Climate and Clean Air Coalition, and Under2 Coalition* 167 Climatic Change at 1, https://doi.org/10.1007/s10584-021-03189-8.

236 Christine McIsaac, *Opening a GATE to Reduce Global Emissions: Getting Over and into the WTO*, 44 (J. World Trade 1053 2010), https://doi.org/10.54648/trad2010040.

237 Joseph Aldy, *Designing a Bretton Woods Institution to Address Climate Change* Harvard Kenedy School Faculty Research Working Paper Series (2012), https://doi.org/10.2139/SSRN.2236198.

Many countries are reluctant to surrender national sovereignty or invest in entirely new institutions.[238] Still, the failure of current frameworks to meet climate goals suggests that such alternatives deserve serious consideration.

e. Evaluating the Options

Each pathway offers distinct advantages and trade-offs. Internal reforms are more feasible but may not be sufficient to overcome systemic inertia.[239] Cross-institutional linkages can improve enforcement and financial leverage but may dilute climate equity principles.[240] Radical redesigns could offer long-term solutions, but would require unprecedented political consensus.[241] A hybrid model appears most promising, one that retains the UNFCCC's universal legitimacy while enabling targeted partnerships, flexible coalitions, and integration with trade and finance institutions.[242] This pluralist structure would preserve the strengths of the existing system while addressing its critical weaknesses.

6. Justice and Loss-and-Damage

Climate change is not only a scientific or economic challenge – it is fundamentally an issue of justice.[243] The harms of climate change are distributed unevenly, often hitting the poorest communities who contributed least to the problem. Meanwhile, the benefits of industrialization (and the bulk of historical emissions) have accrued to wealthier nations. The UNFCCC was founded on the idea of fairness, encapsulated in the principle of "common but differentiated responsibilities and respective capabilities" (CBDR-RC).[244]

This section assesses how the UNFCCC addresses different dimensions of climate justice —including distributional equity, historical responsibility, procedural fairness, and the vulnerability of least developed countries (LDCs) and small island developing states (SIDS)—with a focus on the evolution of the loss-and-damage agenda. It evaluates the role and impact of the Warsaw International Mechanism on Loss and Damage and the new Loss and Damage Fund, examines the adequacy of finance and access for hard-hit nations, and asks whether the UNFCCC's framework has delivered on its justice promises under CBDR-RC. Finally, it considers gaps in the UNFCCC regime and how complementary governance frameworks seek to fill them.

---

[238] James Murombedzi and Claudious Chikozho, *Westphalian Sovereignty and the Free-Rider Conundrum in the Atmospheric Commons: Examining Global Governance Regimes for Addressing Climate Change Adaptation* 17 Int'l. J. Commons 12, 14–17 (2023), https://thecommonsjournal.org/articles/10.5334/ijc.1159.

[239] Richard Kinley et al. *Beyond Good Intentions, to Urgent Action: Former UNFCCC Leaders Take Stock of Thirty Years of International Climate Change Negotiations* 21 Climate Pol'y. 593, 597–98 (2020).

[240] Neil Gunningham, *A Quiet Revolution: Central Banks, Financial Regulators, and Climate Finance* 12 Sustainability at 1 (2020).

[241] Tiffany Morrison et al., *Radical Interventions for Climate-Impacted Systems* 12 (Nature Climate Change 1100, 1100-06).

[242] *See generally* Rafael Leal-Arcas, CLIMATE CHANGE AND INTERNATIONAL TRADE (2013).

[243] *See generally* Rafael Leal-Arcas et al., Energy Security, Decarbonization, and the Environmental Justice Movement, 8 Sustainability in Environment 53, 53-66, (2023).

[244] United Nations Framework Convention on Climate Change, *supra* note 5 at art. 3.1.

When it comes to justice dimensions in climate governance, climate justice encompasses several interrelated principles that have guided—and sometimes divided—UN climate negotiations. Key dimensions include:

- Distributional equity: How the burdens and benefits of climate action (and inaction) are shared among countries and communities. This involves fairness in emissions reductions and in the allocation of resources to cope with climate impacts.
- Historical responsibility: The acknowledgment that countries which have emitted the most greenhouse gases over time bear a greater responsibility to act and to assist others.
- Procedural justice: Fair and inclusive decision-making processes. Formally, the UNFCCC operates by consensus with equal country votes, but in practice power imbalances can impede equitable participation.[245]
- Recognition of vulnerability[246]: An emphasis on protecting those most exposed to climate change and least able to adapt. LDCs and SIDS, for example, have long argued that justice requires prioritizing their needs for support.

In 2013, demands for acknowledgment of "loss and damage" bore fruit with the creation of the Warsaw International Mechanism for Loss and Damage (WIM) under the UNFCCC.[247] Established at COP19 in Warsaw, the WIM was, in principle, a recognition of climate injustice: it explicitly recognized the need to support developing countries in coping with climate-related losses that are beyond the limits of adaptation.[248] However, the design and function of the WIM reflected the political compromises of its time. Crucially, finance for loss and damage remained a glaring gap. The WIM's creation was significant in principle, but it did not come with a finance facility or fund, leaving developing countries without a dedicated channel to seek support for climate-induced losses.[249] From a justice perspective, this was a serious shortfall. By the late 2010s, climate-vulnerable countries grew increasingly frustrated that even as climate impacts worsened—with cyclones, floods, and droughts causing escalating damage—the international mechanism meant to address these losses had no money to help victims.[250]

After decades of advocacy, the balance shifted in 2022. At COP27 in Sharm El-Sheikh, developing countries secured a breakthrough agreement to establish a new Loss and Damage Fund (LDF)[251] dedicated to supporting vulnerable nations grappling with climate devastation. This decision was historic: it marked the first time wealthy nations agreed, in principle, that those suffering irreversible climate losses[252] deserve a specific, international

---

[245] DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 116-17 (2010).

[246] Michele M. Betsill and Desirée Fiske, *International Climate Change Policy: Complex Multilevel Governance, in* The Global Environment: Institutions, Law, and Policy 270-75 (Regina Axelrod and Stacy VanDeveer eds., 2019).

[247] United Nations Framework Convention on Climate Change, Warsaw International Mechanism for Loss and Damage at 6, U.N. Doc. FCCC/CP/2013/10 (2013).

[248] *Id*. ¶ 2.

[249] *Carbon Brief*, Explainer: Dealing with the "Loss and Damage" Caused by Climate Change (July 25, 2017).

[250] Saleemul Huq and Erin Roberts, Coming Full Circle: The History of Loss and Damage under the UNFCCC, 13 *Int'l J. Global Warming* 1, 9 (2022).

[251] United Nations Framework Convention on Climate Change, Decision -/CP.27, Funding Arrangements for Loss and Damage, ¶¶ 2–3 (2022).

[252] *Id*. ¶ 4.

fund for help. Small island states and LDCs viewed it as the "*hard-won victory*" of climate justice they had sought since the early 1990s when the idea of a compensation mechanism was first floated.[253]

However, agreeing to create the fund was only the first step. Throughout 2023, a transitional committee worked out the nuts and bolts: Who would contribute? Who would receive the money and under what conditions? How would the fund be managed? Months of negotiations ensued over these questions. By late 2023, the broad design was agreed and was formally approved at COP28 in Dubai, which operationalized the Loss and Damage Fund. The emerging governance structure of the LDF attempts to embody principles of fairness and inclusivity. Key features of the new fund include:

- Mandate and Scope: The fund is explicitly purposed to assist developing countries that are particularly vulnerable to climate change in responding to both economic and non-economic losses caused by climate impacts.[254]
- New Finance Channel: It is conceived as a new channel for multilateral finance, not merely a repackaging of existing aid.[255]
- Country Ownership and Access: The fund is supposed to pursue a country-driven approach, meaning affected countries will have a say in defining and prioritizing the projects and responses needed. Importantly, all developing countries are eligible to seek support.

From a justice perspective, the Loss and Damage Fund's establishment is a significant milestone. It validates the principle that those suffering climate harms deserve support as a matter of fairness, not charity.[256] Diplomatically, it also reflects a restoration of some trust: developing countries had made goodwill on other issues contingent on movement on loss and damage, and finally seeing movement helped to rebalance expectations.[257]

A critical test for the new Loss and Damage Fund is whether it actually mobilizes adequate finance. Climate impacts are escalating, and so are the costs. By one recent estimate, developing countries already endure more than $400 billion in climate-related losses each year, a figure that could range up to roughly $580 billion annually.[258] Against this sobering baseline, the initial pledges to the L&D Fund—while a political breakthrough—appear minuscule. At COP28, wealthy countries announced just over $700 million in contributions to kick-start the fund. This is less than 0.2% of the lower-end estimates of annual loss and damage costs faced by developing nations.[259] Moreover, there are concerns about the quality of finance being pledged. Justice advocates stress that loss-and-damage

---

[253] Harjeet Singh & Liane Schalatek, Loss and Damage Fund: A Victory for Climate Justice, *Climate Action Network* (2022).

[254] United Nations Framework Convention on Climate Change, Decision -/CP.28, Operationalizing the Loss and Damage Fund, ¶ 5 (2023).

[255] *Id*. ¶¶ 6–8.

[256] Harjeet Singh & Liane Schalatek, Loss and Damage Fund: A Victory for Climate Justice, *Climate Action Network* (2022).

[257] *Id*.

[258] Intergovernmental Panel on Climate Change (IPCC), Sixth Assessment Report: Synthesis Report, ¶ C.3.

[259] Nina Lakhani, $700m Pledged to Loss and Damage Fund Covers Less Than 0.2% Needed, *The Guardian* (Dec. 6, 2023).

support should be new and additional funding, provided as grants (not loans).[260] If funds are simply diverted from existing aid budgets or given as loans that add to poor countries' debt, it would undermine the fairness rationale.[261]

While the UNFCCC remains the central arena for global climate policy, many of the justice gaps in its framework are being addressed (or at least contested) in complementary forums and initiatives. No single institution can solve a problem as sprawling as climate justice, so a patchwork of efforts has emerged to augment the UNFCCC's work where it falls short.[262] Another development is the rise of insurance and risk-sharing schemes as partial solutions for loss and damage. These initiatives illustrate an important point: the fight for climate justice is also happening through innovative financial tools and coalitions outside the strict UN negotiating halls.[263] Finally, there are broader governance frameworks intersecting with climate justice, such as the 2030 Sustainable Development Goals (SDGs) and the Sendai Framework for Disaster Risk Reduction.[264] The SDGs' pledges to end poverty and reduce inequality are directly undermined by climate change impacts; achieving those goals requires addressing climate justice. Synergies between Sendai and UNFCCC processes can enhance justice by preventing some losses and ensuring quicker recovery.[265]

In summary, the UNFCCC has catalyzed important mechanisms for climate justice, especially now with the Loss and Damage Fund, but it is not a cure-all. The effectiveness of global climate governance in delivering justice will ultimately be judged by outcomes: whether those who have done the least to cause climate change are protected and compensated in proportion to the harm they suffer, and whether those who have benefited from high emissions shoulder their fair share of the burden in the transition and in the response to climate impacts. The story is still unfolding, but the flurry of activity inside and outside the UNFCCC suggests that climate justice, once a fringe idea, is now firmly on the world's agenda—and demands to be reckoned with.[266]

7. Policy Recommendations

Building on the analysis of the UNFCCC's strengths and limitations, this section outlines targeted policy recommendations to enhance its effectiveness, credibility, and ability to support climate action. These suggestions are structured around two strategic directions:

---

260 Organisation for Economic Co-operation and Development (OECD), Climate Finance Provided and Mobilised in 2022, at 28 (OECD Publ'g 2024).

261 *Id.* at 30.

262 Robert O. Keohane & David G Victor, The Regime Complex for Climate Change, 9 *Persp. on Pol.* 7 (2011).

263 William D. Nordhaus, Climate Clubs: Overcoming Free-Riding in International Climate Policy, 105 *Am. Econ. Rev.* 1339, 1340 (2015).

264 G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, (Oct. 21, 2015).

265 U.N. Int'l Strategy for Disaster Reduction (UNISDR), Sendai Framework for Disaster Risk Reduction 2015–2030, (2015).

266 Robert O. Keohane & David G. Victor, The Regime Complex for Climate Change, 9 *Persp. on Pol.* 7, 12 (2011).

reinforcing the UNFCCC's existing framework and developing complementary mechanisms that support its objectives.

I. Introduce a Graduated Compliance Mechanism

The compliance system under Article 15 of the Paris Agreement should be strengthened. While maintaining its facilitative nature, a tiered approach could introduce consequences for procedural non-compliance.[267] These could include delayed access to financial mechanisms or restricted participation in carbon markets. Such measures would add credibility without requiring fully binding targets.

II. Formalize Scientific Input in Decision-Making

The IPCC should play a formal procedural role in evaluating the adequacy of NDCs. Its scientific assessments could inform a pre-stocktake review process, ensuring that national commitments reflect current climate science and mitigation pathways.[268]

III. Expand the Enhanced Transparency Framework

The Enhanced Transparency Framework (ETF) should be upgraded with independent expert panels, public scorecards, and comparative benchmarking.[269] These tools would enhance political visibility, facilitate peer accountability, and empower civil society to monitor progress.

IV. Establish an Emergency Coordination Unit

The UNFCCC Secretariat should develop a dedicated unit for rapid coordination during climate-related emergencies.[270] This unit could support data collection, technical assistance, and resource mobilization in response to climate disasters, especially in vulnerable countries.

V. Link Climate Obligations with Financial and Trade Systems

---

[267] A. Huggins, The Paris Agreement's Article 15 Mechanism: An Incomplete Compliance Strategy, *Debating Climate Law* 99, 99–110, (J. Peel & H.M. Osofsky eds., Cambridge Univ. Press 2021).

[268] Harald Winkler, Putting Equity into Practice in the Global Stocktake under the Paris Agreement, 20 *Climate Pol'y* 124, 124–32 (2020), https://doi.org/10.1080/14693062.2019.1680337.

[269] Aarti Gupta & Harro van Asselt, Transparency in Multilateral Climate Politics: Furthering (or Distracting from) Accountability?, 13 *Regulation & Governance* 19, 19–22 (2019), https://doi.org/10.1111/rego.12159.

[270] Barbara Saerbeck et al., Brokering Climate Action: The UNFCCC Secretariat Between Parties and Nonparty Stakeholders, 20 *Glob. Envtl. Pol.* 105, 117–20 (2020), https://doi.org/10.1162/glep_a_00556.

International financial institutions such as the IMF and the World Bank should integrate climate indicators into their policy assessments.[271] Countries with stronger implementation records could receive enhanced technical or concessional support.[272] Additionally, a formal interface with the WTO would help align trade measures with global climate goals, reducing the risk of legal conflict and fragmentation.[273]

VI. Recognize and Support High-Ambition Coalitions

The UNFCCC should recognize regional or sectoral coalitions such as the G7 Climate Club or EU alliances as formal actors within the broader governance system.[274] These entities could pilot stronger enforcement tools and help develop templates for policy coordination across carbon-intensive sectors.[275]

VII. Use Finance to Incentivize Domestic Implementation

Climate finance, especially in adaptation and loss and damage, should be linked to clear performance metrics.[276] Disbursement criteria could include vulnerability, ambition, and demonstrated progress.[277] This would help ensure that funds are targeted effectively and that they reward real action.

VIII. Explore Long-Term Governance Integration

A joint task force involving the UNFCCC, the IMF, and the World Bank could explore the feasibility of a global institution that integrates climate, finance, and trade governance.[278] Even if politically ambitious, such planning could lay the groundwork for

---

[271] Hiroko Oura et al., Approaches to Climate Risk Analysis in FSAPs, *Staff Climate Notes*, Int'l Monetary Fund, 3–7 (2022), https://doi.org/10.5089/9798400212895.066.

[272] Benoît Chervalier, Concessional Financing Windows or the Need to Reform the Magic Triangle, *Financing for Development Review*, 4–8 (2015), https://consensus.app/papers/concessional-financing-windows-or-the-need-to-reform-the-benoît/c1f1d50c213b52de9dc4e13115a51a14.

[273] Mitali Das Gupta, Current Issues Surrounding the Trade and Climate Change Interface, 47 *FTR*, 58–80 (2012), https://doi.org/10.1177/0015732515120203.

[274] Charlotte Unger & Sonja Thielges, Preparing the Playing Field: Climate Club Governance of the G20, Climate and Clean Air Coalition, and Under2 Coalition, *Climatic Change* 167, art. 41, 2–4, 10 (2021), https://doi.org/10.1007/s10584-021-03189-8.

[275] Kimberley A. Clausing & Catherine Wolfram, Carbon Border Adjustments, Climate Clubs, and Subsidy Races When Climate Policies Vary, *Peterson Institute for International Economics Working Paper No. 23-3*, 5–8 (2023), https://doi.org/10.2139/ssrn.4476356.

[276] Satyajit Bose, Adaptation Finance: A Review of Financial Instruments to Facilitate Climate Resilience, in *The Palgrave Handbook of Climate Resilient Societies*, 2–5 (2021), https://doi.org/10.1007/978-3-030-32811-5_15-1.

[277] Florian Egli & Anna Stünzi, A Dynamic Climate Finance Allocation Mechanism Reflecting the Paris Agreement, *Envtl. Res. Lett.* 14(11), 114024 (2019), https://doi.org/10.1088/1748-9326/ab443b.

[278] Michele Betsill et al., Building Productive Links between the UNFCCC and the Broader Global Climate Governance Landscape, Glob. Envtl. Pol. 15(2), 1–10 (2015), https://doi.org/10.1162/GLEP_A_00294.

more coherent governance in the future.[279] These recommendations offer a path toward a more accountable, coordinated, and results-oriented global climate regime. While each recommendation carries implementation challenges, together they reflect a practical approach to closing the gap between ambition and delivery.

All of this brings us to the conclusion of this article, which summarizes the findings and presents specific policy recommendations for building a more effective international framework to address climate change.

8. Conclusion

More than thirty years since its establishment, the United Nations Framework Convention on Climate Change continues to serve as the central platform for multilateral climate cooperation. Its legal legitimacy, near-universal membership, and role in setting global norms have been instrumental in shaping climate discourse and enabling landmark agreements such as the Kyoto Protocol and the Paris Agreement. The Convention has built essential institutional foundations for transparency, finance, and inclusive dialogue, positioning itself as a key pillar in the architecture of global climate governance. However, the accelerating climate crisis has revealed structural weaknesses that limit the Convention's ability to deliver urgent and equitable outcomes. These include its dependence on voluntary national pledges, consensus-based decision-making, and the absence of binding enforcement mechanisms. The growing disconnect between stated ambitions and actual implementation has weakened trust among Parties and diminished confidence in the system's ability to address the scale of the crisis.

This paper has examined the design and performance of the Convention, identifying both its enduring strengths and serious limitations. It has also considered alternative institutional models, including the WTO and the WHO, as well as regional efforts such as the European Union Emissions Trading System and the G7 Climate Club. These models demonstrate how formal enforcement, technical coordination, and flexible groupings can improve effectiveness.

The question of whether the Convention remains the most effective platform for global climate action calls for a qualified response. The Convention remains indispensable due to its legitimacy and inclusivity. However, its current institutional form is not sufficient to meet the urgency of the climate challenge. A new approach is needed that preserves what works while addressing key weaknesses.

This paper proposes a hybrid governance model. Internally, the Convention must enhance compliance procedures, formalize scientific review, improve transparency through independent assessments, and establish rapid coordination capabilities. Externally, it should build structured relationships with international financial and trade institutions, acknowledge the leadership of high-performing coalitions, and link climate finance to measurable outcomes. By combining internal reform with strategic partnerships, the Convention can

[279] Fariborz Zelli et al., Conclusions: Coherence, Management, Legitimacy and Effectiveness in the Climate-Energy Nexus, in *Governing the Climate-Energy Nexus*, 235–61 (2020), https://doi.org/10.1017/9781108676397.

move beyond dialogue toward effective implementation. This would allow it to remain at the center of climate governance while improving its credibility and ability to deliver results. The path forward requires more than ambition. It requires institutional readiness, policy coherence, and accountable action. If these reforms are embraced, the Convention can continue to serve as a central driver in the global effort to stabilize the climate and support the most vulnerable.

Moreover, the UNFCCC remains an indispensable yet insufficient instrument of global climate governance. Throughout this paper, it has been argued that while the UNFCCC's universal legitimacy and convening power are unmatched, its effectiveness depends on significant improvements both within its own processes and via external support. The analysis of its institutional structure, procedural dynamics, complementary frameworks, and equity considerations indicates that the UNFCCC's future as the chief climate governance forum hinges on its ability to adapt and overcome key shortcomings.

Our assessment of the UNFCCC's design highlighted a dual reality. On the one hand, the UNFCCC's strength lies in its near-universal membership and convening power, which have fostered landmark agreements and established climate change as a shared global responsibility. It has provided a stable platform for negotiations and evolved from a top-down regime (Kyoto Protocol) to an inclusive bottom-up framework (Paris Agreement) that brings all nations on board. On the other hand, serious structural weaknesses have hampered its effectiveness. Chief among these is the consensus rule, which pushes decisions toward the lowest common denominator and grants any country a de facto veto. Combined with a lack of enforcement mechanisms, this means that even ambitious pledges often go unmet. The UNFCCC process has frequently been slow and vulnerable to political compromise—leaving action lagging behind scientific imperatives.

Several procedural reforms have been proposed to revitalize the UNFCCC from within. Key ideas include overhauling decision-making to reduce deadlock—for example, introducing qualified majority voting on certain issues or streamlining agendas so that one party cannot indefinitely block progress. Enhancing transparency and accountability is also crucial: this could involve a stronger mandate for the Paris Agreement's reporting and review framework or empowering the UNFCCC secretariat to more publicly track and call out laggards. Another important proposal is to elevate underrepresented voices (e.g., least-developed countries, indigenous communities, youth) in the negotiations, ensuring the process is fair and inclusive. Implementing such reforms would make the UNFCCC nimbler and more credible in steering global action.

Beyond internal reform, the analysis considered how other initiatives can complement the UNFCCC. A multitude of approaches have emerged—including "climate clubs" of ambitious countries, regional and sectoral alliances, and actions by cities, businesses, and civil society—that drive progress in ways a single global forum cannot. These decentralized efforts often move faster and push further than consensus-bound negotiations, pioneering new policies and technologies. Crucially, rather than replacing the UNFCCC, such initiatives work best when aligned with its overarching goals. The UNFCCC provides broad direction and legitimacy (serving as a north star for global targets and common frameworks), while complementary efforts fill gaps, raise ambition, and implement solutions on the ground. In this way, climate governance functions as a coordinated ecosystem—with the UNFCCC at its center, orchestrating diverse contributions.

Climate justice and the loss-and-damage debate emerged as pivotal tests of the UNFCCC's moral authority. The principle of common but differentiated responsibilities has long underpinned the climate regime, and the analysis reaffirmed that without a clear commitment to fairness, broad participation cannot be sustained. Recent progress—such as the creation of a dedicated loss-and-damage fund—is a step in the right direction, acknowledging the plight of vulnerable nations facing the worst impacts of climate change. Yet much work remains to turn these promises into practical support for those who did little to cause the crisis but are hit hardest by it. The UNFCCC's credibility now hinges on delivering tangible solidarity: developed countries must honor and scale up their climate finance commitments, and new mechanisms for loss-and-damage compensation must be made accessible and effective. By embedding justice into the framework as a core component of decision-making (rather than an afterthought), the UNFCCC can build the trust required for collective action and ensure the transition to a climate-safe world is truly equitable.

Regarding the UNFCCC's role and required conditions, bringing together all strands of the discussion, this paper concludes that the UNFCCC should indeed remain the primary institutional mechanism for global climate governance—but only if its current deficiencies are addressed. No other forum can match the UNFCCC's legitimacy, inclusivity, and experience; abandoning it would risk a leadership void when unified action is most needed. However, the UNFCCC's primacy is defensible only if it continues to evolve. It must implement key procedural reforms to overcome paralysis, adopt a more flexible yet accountable approach to national commitments, and welcome complementary initiatives as partners rather than rivals. Equally important, the UNFCCC's claim to leadership will hinge on its commitment to climate justice—specifically, how effectively it delivers support to developing nations and weaves equity into future agreements.

Going forward, a dual strategy is recommended to ensure the UNFCCC's central role translates into effective action:

1. Enact internal reforms to make the process more efficient, accountable, and inclusive. This will require political will from member states to update institutional rules—potentially even easing the strict consensus norm—so that critical decisions can be taken in a timely manner and commitments face stronger oversight.
2. Actively build synergy between the UNFCCC and the wider ecosystem of climate action. Formally recognize, coordinate with, and integrate the efforts of non-state actors, regional alliances, and climate coalitions into the UNFCCC framework through partnerships, aligned reporting, or incentive structures, so that global and local efforts reinforce one another.

In sum, the UNFCCC can and should remain at the heart of global environmental governance, but it must do so in a revitalized and collaborative form. The world's best hope for addressing the climate crisis lies in empowering this cornerstone institution to guide a concerted, just, and ambitious global response—one that finally matches the urgency and scale of the challenge.

UNIVERSITY OF CONNECTICUT
1881