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THE GLOBAL IMPACT OF FAN TRANSLATIONS: STRIKING A BALANCE BETWEEN COPYRIGHT OWNERS AND CONSUMER DEMAND IN MANGA

Sofia Mariona

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TABLE OF CONTENTS

I. Introduction

While Japan's recent copyright reforms aim to curb online manga piracy and protect this integral form of intellectual property, they fail to account for the role of fan-created translations in expanding global access to content. This comment therefore argues for a licensing framework that allows for regulated fan translations, balancing the economic rights of copyright owners with the demands of an international consumer base. In terms of Gross Domestic Product, Japan is the fourth largest economy in the world after the United States, China, and Germany.[1] While still a major economic player, this marks a steady decline in the economic growth Japan experienced in the late 1980s and early 1990s.[2] Since the height of Japan's economic power, one of their most stable and profitable sectors has been entertainment media, with anime and manga representing a major portion of their cultural economy.[3] However, beginning in 2013, the anime and manga industry saw a decline in sales which has been attributed to the increase of free content due to illegal sharing and downloading of content through the Internet.[4] In response to this rise in pirated content, the Japanese government and publishing industry have made a concerted effort to combat this issue by passing amendments to their Copyright Act that established new penalties for sharing and downloading pirated videos and manga, as well as establishing a committee to prevent global copyright infringement of anime and manga - the "Manga Anime Guardians Project" ("MAGP").[5]

This decline in sales comes at a time of huge growth in the overseas anime and manga market.[6] The United States (U.S.) has especially contributed to this growth with gross sales of manga up by 7.24% in 2019 and manga representing approximately 25% of the graphic novel market in the U.S.[7] Despite this growth in sales in the overseas market, the anime and manga industry has yet to reap the full benefits of this growth of interest in the overseas market due to a lack of legal access to translated content. While licensing content to overseas distributors has increased in recent years, legal access to this media has not been able to keep up with the demands of non-Japanese fans, which has contributed to the current issues with illegal translations of anime and manga.[8]

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[1] World Bank, GDP (current US$ - Japan), https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2024&locations=JP&most_recent_value_desc=true&start=1960&view=chart (last visited March 19, 2025).

[2] Uyoyo Onemu, The Economies of Anime: Anime as a Soft Power, a Cultural Product and a (Trans)National Medium (2020) (Master's Thesis, Brunel University London), at 2, http://bura.brunel.ac.uk/handle/2438/20931.

[3] *Id.* at 3.

[4] *Id.*; *see generally* Sydney Landers, *Gotta Catch 'Em All!: The National Diet's Inadequate Attempt to Control Manga Pirates*, 76 U. MIAMI L. REV. 251 (2021).

[5] *Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads*, KYODO NEWS (June 5, 2020, 2:08 PM), https://english.kyodonews.net/news/2020/06/33f524714d35-japan-enacts-copyright-control-law-to-ban-piratedmanga-downloads.html; Emily Schendl, *Japanese Anime and Manga Copyright Reform*, 15 WASH. U. GLOBAL STUD. L. REV. 631, 645 (2016).

[6] Onemu, *supra* note 2, at 3.

[7] Landers, *supra* note 4, at 254.

[8] Schendl, *supra* note 5, at 642.

While fan-created content is a recognized part of the fandom subculture with a long history, especially in relation to the anime and manga industry, fan-made translations occupy difficult legal territory as these translations constitute copyright infringement in both Japan and the United States.[9] Interestingly, the fandom translation groups that have arisen due to this accessibility problem follow an informal code of ethics that justifies their behavior and positions themselves as contributing to the industry by promoting works that may have otherwise escaped a foreign-language audience.[10] Japan's own robust market of fan-made manga "parodies"—known as *doujinshi*—poses an interesting cultural challenge as well, as it presents an environment in which the manga authors (mangakas) engage with, and even encourage, the sale of fan-made comics using their characters and settings.[11] As such, the creators of these fan translations argue that they are simply continuing this culture of fan-made contributions to fandom.

Given the complex relationship between international law, the Japanese publishing industry, mangakas, and fans of anime and manga, the issue of fan-made translations is a problem that requires serious attention to meet the demands of all parties. While Japan's recent copyright reforms aim to curb piracy and protect their valuable intellectual property, they fail to account for the role of fan-driven translations in expanding global access to anime and manga in a culture that demands quality content as quickly as possible. As such, rather than relying solely on stricter enforcement, Japan should adopt a licensing framework that allows for regulated fan translations to strike the necessary balance.

II. International Copyright Law – Japan & the United States

a. Japanese Copyright Law

A copyrightable work under Japanese law is defined as a "production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain"[12] Copyright protections in Japan vest at the moment of creation, even if that creation is not fixed or tangible in nature, and typically lasts for the duration of the author's lifetime plus fifty years after their death.[13] Copyright owners' rights are divided into two categories: moral rights and economic rights. Moral rights are non-transferable and belong permanently to the author, even in cases of work-for-hire and include the right to make the work public, the right to determine the indication of the author's name, and the right to preserve the integrity of the work.[14] Economic rights include the right of reproduction, distribution, translation, public transmission, exhibition,

[9] *Id.* at 643; Chosaku ken hō [Copyright Act], Law No. 48 of 1970, art. 27 (Japan); UNITED STATES COPYRIGHT OFFICE, CIRCULAR 14: COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS 1 (2003); *See* 17 U.S. Code § 101, 103 (defining translation as a derivative work and protecting the author's right to control derivative works outside of fair use.).

[10] *See* Alyssa Tremblay, *Found in Translation: Rethinking the Relationship Between Fan Translation Groups and Licensed Distributors of Anime and Manga*, 6 J. FANDOM STUDIES 319 (2018).

[11] Schendl, *supra* note 5, 639-641.

[12] Chosaku ken hō [Copyright Act], Law No. 48 of 1970, art. 2(1)(i) (Japan).

[13] *Id.* at art. 51.

[14] *Id.* at subsec. 2 and art. 59.

and exploitation of derivative works.[15] Unlike moral rights, these rights are transferable to another entity once registered. Registration is the only legal way to transfer copyright from one party to another, with creators wishing to license their work able to do so through the Agency for Cultural Affairs.[16]

Copyright infringement is defined as "the distribution. . . [or] exportation in the course of trade. . . of an object made through an act that infringes the moral rights of the author, the copyright, the print rights, or the neighboring rights (including an object imported. . .), with knowledge of such infringement."[17] Both civil and criminal penalties are possible, with civil remedies being the right of demanding cessation, measures for recovery of honor, etc. and compensation for damages and recovery of the undue profit.[18] Criminal punishment can be imprisonment for a term of up to ten years or a fine of up to ten million yen, or both.[19]

Manga is protected by copyright on two fronts with the text being protected as a work of literature and the artwork protected as an artistic work.[20] The analog and digital distribution models garner different kinds of copyright protection, but, given the digital nature of the fan-translated works at issue this paper will focus on the latter. Unlike physical books where the right of transfer enables a resale market, the digital market eliminates that market entirely, making it a clear benefit for rightboodlers.[21] Another unique feature of the Japanese manga industry is the lack of a work-for-hire doctrine comparable to the United States' comics industry. While publishers can technically employ the mangaka, this is uncommon as it is expensive and the work must then be published under the employer's name, essentially making the author anonymous.[22] As a result, most mangakas work as freelancers within the industry, with more popular authors working with editors employed by the publishers (more similar to novel publishing in the United States).[23]

Instead of work-for-hire, manga publishers employ the publication right, which offers them separate copyright protection, independent from the copyright owner's. The publication right permits its owner to publish a work, including its reproduction and sale to the public.[24] However, this copyright protection is functionally subordinate to the copyright owner's (in this case, the mangaka) as reprinting the work in a collection or transferring the reproduction right is not allowed without the mangaka's consent.[25] This is the preferred model for the manga industry as the publishing right overall works well with the competitive and short-cycle nature of manga magazine publishing because it is cheaper to

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[15] *Id.* at arts. 21, 23, 25-28.

[16] Schendl, *supra* note 5, at 633-34.

[17] Chosaku ken hō, at arts. 10(1)(i-iv).

[18] *Outline of the Copyright Law*, COPYRIGHT RSCH. AND INFO. CTR. (Jan. 19, 2023), https://www.cric.or.jp/english/clj/ocl.html#:~:text=Criminal%20measures%3A,yen%2C%20or%20both%20(Art.

[19] *Id.*

[20] Chosaku ken hō, at art. 113 (1(ii).

[21] Simone Schroff, *An Alternative Universe? Authors As Copyright Owners - The Case of The Japanese Manga Industry*, 12 CREATIVE INDUS. J. 125, 134 (2019).

[22] *Id.* at 140.

[23] *Id.* at 140-45.

[24] Chosaku ken hō, at arts. 79-80.

[25] Schroff, *supra* note 21, at 142.

acquire than a copyright transfer and allows the publisher to publish numerous titles at the lowest price possible.[26] As most manga series do not become popular enough to warrant collection reprinting and cross-media licensing agreements (merchandise, advertisements, etc.), the publishers ultimately save money by using the publishing right instead of outright hiring the mangaka or purchasing their transfer rights.[27] Additionally, publishers move to digital distribution models have also enhanced their copyright protections as Digital Rights Management (DRM) system protected apps have made it so that "the [app] user is not able to legally extract the copies from the system for resale and there are no re-selling options within the environment," therefore, making infringement that much clearer when it occurs.[28]

b. U.S. Copyright Law

A copyrightable work in the U.S. is an "original works of authorship fixed in any tangible medium of expression."[29] This includes both literary and artistic works. Unlike Japan, where protection vests at the moment of creation, a work in the U.S. requires fixation in order to be copyrightable. This means that the work must be captured in a form that allows it to be seen, heard, or read and must be sufficiently permanent or stable to be reproduced or communicated for more than a brief moment.[30] Along with a more stringent standard for copyright protection in the U.S., the duration of protection is longer than Japan's with it being the lifetime of the author plus seventy years after their death.[31] Copyright owners have the exclusive right to do and to authorize: the reproduction of their work; prepare derivative works; distribute the work through sale or other transfer of ownership, along with rental, lease, or lending; as well as the performance and display of the work to the public.[32] Authors of visual works, which manga falls under, also enjoy additional protections, specifically the rights to prevent their use of their name at the author of any work they did not create and the right to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."[33]

Derivative works are works based upon preexisting works and include translation, musical arrangement, dramatization, fictionalization, motion picture version, abridgment, condensation, "or any other form in which a work may be recast, transformed, or adapted."[34] These works may then be able to receive their own copyright protection if it contains sufficient original expression, but this would not affect the rights of the original copyright holder. For example, a translated work may be copyrightable as an original work, but the translator cannot sell it without permission from the original owner.[35]

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[26] *Id.* at 142-43.
[27] *Id.*
[28] *Id.* at 134.
[29] Copyright Act of 1976, 17 U.S.C. § 102.
[30] *Id.* at § 101.
[31] *Id.* at § 302.
[32] *Id.* at § 106
[33] *Id.* at § 106(a).
[34] 17 U.S.C. § 101.
[35] *See* Nicole McNew Chen, *Copyright in Translation: Gregory Rabassa*, LIBRARY OF CONGRESS BLOGS (Oct. 14, 2022), https://blogs.loc.gov/copyright/2022/10/copyright-in-translation-gregory-rabassa/.

While copyright owners have the exclusive right to create or authorize derivative works, when a work is sufficiently transformed it may qualify for Fair Use protection as an affirmative defense to copyright infringement.[36] When analyzing Fair Use, courts look at the following four factors to make their determination:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."[37]

Fair Use defenses are analyzed on a case-by-case basis and to be eligible for protection the allegedly infringing work must be found to have a majority of factors in their favor, with particular emphasis being placed on the first and fourth factors.[38]

Regarding legal manga translations, the typical way they enter the American market is through a licensing agreement between the Japanese copyright holder and a U.S.-based company. Any transfer of copyright ownership, including licensing, must be in writing and signed by the owner.[39] These licenses also typically assign specific rights to the licensee (e.g., distribution rights in a specific region) and, unless otherwise contracted, allows authors (or their heirs) to terminate the license in a five-year period thirty-five years after the work is first published under the grant, or forty years after the grant was made, whichever comes first.[40]

c. <u>Application of Law to Fan-Translated Works</u>

Under U.S. law, fan-made translations constitute unauthorized derivative works. Additionally, the fan-translated works, through modifying the artwork of the author to replace the original Japanese text with English, could constitute an intentional modification to the original author's work that may cause damage to their reputation.[41] While translated works are protected in the U.S. as derivative works with their own copyright, that protection is contingent on authorization from the original author.[42] Fan translators could instead attempt a Fair Use defense should they be sued for infringement, however, it is unlikely they would succeed on the two most important factors; purpose and character of the use and the effect on the market value of the original work.

Regarding purpose and character of the use, the fan translations are non-transformative in nature as, while they are transforming the work from being in Japanese to English, the translation itself is merely translating the dialogue and adding corresponding

[36] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[37] 17 U.S.C. § 107.
[38] *Campbell*, 510 U.S. at 594.
[39] 17 U.S.C. § 204(a).
[40] 17 U.S.C. § 203.
[41] 17 U.S.C. § 106(a).
[42] Chen, *supra* note 35.

subtitles and are created for the exact same entertainment purposes as the originals.[43] While fan-translation groups could argue in response to this that they are either restoring the quality of the work from poor English translations or are adding their own commentary to explain the cultural context behind certain phrases or dialogue that would otherwise be lost on American audiences, both arguments are unlikely to be persuasive as the first merely emphasizes a lack of original expression and the second, while adding their own commentary, is unlikely to be enough original expression to defeat the third prong, as the amount and substantiality of the portion used in relation to the copyrighted work as a whole would still sit in the original author's favor. As Alyssa Tremblay of the Journal of Fandom Studies puts rather succinctly, "the continued existence of fan translation groups is considered indicative of consumers attempting to fill a gap in service not satisfied by licensed industry players – and fan translation itself as a practice born of consumer desire and perceived necessity, rather than creative or transformative expression."[44]

Regarding the effect of the use upon the potential market for or value of the copyrighted work – this prong also does not appear to favor the fan-translators. While fan-translators argue that their translations benefit the original authors and publishers by providing them with free marketing and introducing new works to English-audiences, their actions could just as easily be viewed as supplanting a potential market.[45] By uploading free and easily accessible content, along with beating the release of officially licensed translations, their actions decrease sales as potential buyers have either already accessed the content or can just as easily search for it and come across a free version of the work they want to purchase.

Under Japanese law, fan-made translations constitute violations of both the economic and moral rights of copyright owners. Article 27 states that authors have the exclusive right to translate their work.[46] Therefore, any translation made without the author's permission is unauthorized and constitutes copyright infringement. Article 23's guarantee of an author's exclusive right to public transmission of their work encompasses any posting of copyrighted material to the Internet as they are granted the exclusive right to affect its transmission.[47] Therefore, any posting of their content without their explicit permission constitutes infringement. Most importantly is the author's inalienable moral right to preserve the integrity of their work granted by Article 20. "Integrity" here protects against any "distortion, mutilation or other modification… made against his intent."[48] Therefore, if a fan translation were inaccurate or sufficiently alters the meaning of the original work's, it could be considered infringement.

This last point is a source of contention as a reason many English-language fan-translation groups point to as a necessity for their existence is the poor English translations

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[43] Sean Kirkpatrick, Comment, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMPLE ENV'T. L. & TECH. J. 131, 140 (2003).
[44] Tremblay, *supra* note 10, at 319.
[45] *Id.*, at 325; Kirkpatrick, *supra* note 43, at 142.
[46] Chosaku ken hō, at art. 27.
[47] Chosaku ken hō, at art. 23.
[48] Chosaku ken hō, at art. 20.

that marked the early period of anime's English market expansion.[49] This point will be expanded upon further in the next section, however, it is important to note that these issues have been seldom litigated in courts, perhaps due to the complex relationship between the producers and consumers of this content.

III. Role of Piracy in Global Expansion of Anime & Manga

a. An Explanation of Fandom Terminology & Activities

Before addressing the role of piracy in the global expansion of anime and manga, it is essential to understand the terminology associated with the fan activities under discussion. While fandom activities are vast, three forms of fan-created work relevant to recent efforts to combat online piracy involve:

> Fansubs: Unauthorized fan-made subtitles added to anime episodes. These are typically created by fans who understand Japanese and want to share the content with a broader, non-Japanese-speaking audience.[50]
> Scanlations: Fan-made translations of manga, where the original Japanese text is erased and replaced with the translated dialogue. These are distributed online as free-to-read scans.[51]
> Doujinshi: Fan-created manga or comics that often use existing characters and settings. While doujinshi technically constitute derivative works, they are frequently tolerated in Japan due to their cultural significance and the lack of commercial competition they present to official products (as they are essentially viewed as works of fan-art and fanfiction). In Japan, large-scale conventions wherein they are bought and sold are common.[52]

Fan-translation groups are composed of volunteers who translate these works without compensation and in turn provide the works free of charge. These groups typically consist of one or more translators, editors, typesetters, timers, and first-tier distributors.[53] For the most part, fansub groups follow a code of ethics that calls for: (1) not translating works with licensed releases, sometimes going as far to take down their translations when a work they have already translated receives an official translation; (2) providing their services with free, with paid fan-translations being derided as "bootlegging;" and (3) including language that specifically states the translation is not for sale, not made for profit, and that the group will cease distribution when the licensed.[54] While these statements do not imbue the translations with legal protection, this form of fandom etiquette is not

[49] Tremblay, *supra* note 10, at 321-22; Hye-kyung Lee, *Cultural Consumer and Copyright: A Case Study of Anime Fansubbing*, 3 CREATIVE INDUSTRIES J. 237, 246 (2010).

[50] Tianxiang He, *What Can We Learn from Japanese Anime Industries? The Differences Between Domestic and Overseas Copyright Protection Strategies Towards Fan Activities*, 62 AM. J. COMPAR. L. 1009, 1013 n. 19 (2014).

[51] *Id.* at 1013 n. 22.

[52] Landers, *supra* note 4, at 271.

[53] *Id.* at 270.

[54] *Id.*

dissimilar to disclaimers that fanfiction and fanart authors have included since the 1990s with the explosion of fan-made content and the subsequent cases of cease and desist letters being sent and lawsuits being filed on behalf of copyright owners to the authors of fan-created content.[55]

However, this code of ethics is increasingly being abandoned in favor of getting day-of content due to the effect of social media on international fandom activities. Social media has facilitated an increase of "spoiler culture" wherein spoilers are posted "driven by the desire for likes, page traffic, and social media attention."[56] In the case of manga and anime, these spoilers can tarnish fan experience and results in international fans, who do not want to wait months for an official translation following publication in Japan, seeking out unofficial translations of these works.[57] As fan engagement is highest with already popular anime and manga, these works often already have officially licensed translations but "due to the difference in publishing cycles between the Japanese manga industry and how that work is disseminated within English-speaking markets," fandom will gravitate to the group that can release the translated works as soon as possible – the scanlators.[58] As Tremblay explains,

> "[i]n Japan, manga typically is serialized chapter by chapter in bi-weekly and bi-monthly anthologies, then later compiled and sold as volumes. However, officially licensed English-language translations of that same manga are available in volume form only, meaning that English-speaking fans must wait until enough serialized chapters accrue to warrant the printing of a new volume. Because scanlators are able to release titles without delay, new titles become available through scanlation much more quickly than publishers are able to release them, let alone obtain the license for them."[59]

Overall, the demands of non-Japanese fans and the obsessive nature of fandom has resulted in the current issues with illegal fansubs and scanlations amongst fans. However, recent advances in technology as well as a greater focus on the issue in both Japan and the U.S. has resulted in efforts to address the rampant amount of pirated content.

b. Piracy as a Market Expander

After decades of issues, anime producers have developed a solution to the issue of fansubbing. The new standard practice from English anime licensors such as Crunchyroll have been "simulcasts" (simultaneous broadcasts) where the official English dubbed

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[55] *See* Gita Jackson, *Anne Rice Really Hated When People Made Her Characters Bone*, VICE (Dec. 13, 2021, 2:03 PM), https://www.vice.com/en/article/anne-rice-really-hated-when-people-made-her-characters-bone/; John Eligon, *Rowling Wins Lawsuit Against Potter Lexicon*, N.Y. TIMES (Sept. 8, 2008), https://www.nytimes.com/2008/09/09/nyregion/09potter.html.

[56] Melinda Milhouse, *The Absurd World of Manga and Anime Leaks and Spoilers*, TALK OUT DAILY (Sept. 27, 2023), https://talkoutdaily.com/2023/09/27/the-absurd-world-of-manga-and-anime-leaks-and-spoilers/.

[57] Tremblay, *supra* note 10, at 327.

[58] *Id.* at 330.

[59] *Id.*

broadcast (dub) and subtitled broadcast (sub) air at the same time.[60] "These distributors can negotiate deals with Japanese distributors to get early access content, translate it into English ahead of time, and then simultaneously release it alongside the original version," beating out fansubbing groups by providing instant access, even if a streaming subscription is required to access the content.[61]

English-language manga distributors, however, have been slower to take cues from fan translation groups. This is due in large part to the publishing cycle of manga being incompatible with the preference of American publishers to release the manga as volume collections in graphic novel format. Another difference between fansubbing and scanlations is the audience itself. Similar to the difference between superhero films and the comics those films are based on, manga is a niche market with a small, but dedicated group of international fans whereas the audience for anime is much larger due to ease of access and streaming deals—essentially anyone who has a device capable of viewing content can become an anime fan. As manga is a smaller market, piracy has been found to be useful, to a certain extent, for the manga industry. "After 'analyz[ing] 3,360 volumes of 484 comic titles for eight months' before applying a regression model, Professor Tatsuo Tanaka found that '[p]iracy decreases sales of ongoing comics, but it increases sales of completed comics'" in Japan.[62] In the U.S. market, scanlations have only become more popular since Tokyopop, the largest translated manga producer, went bankrupt.[63] While other manga translators are still licensing and releasing manga, none have truly filled the gap due to the decline in sales of physical media and the prohibitive costs of licensing and marketing which, in tandem with a small market, would not generate enough revenue to warrant the licensing costs.[64]

c. Industry Responses to Piracy

In 2013, the Ministry of Economy, Trade and Industry (METI) formed the Manga-Anime Anti-Piracy Committee—a group that consists of fifteen major manga publishers and anime companies in Japan—overseen by the Content Overseas Distribution Association (CODA).[65] In 2014, they announced the creation of the Manga-Anime Guardians Project (MAGP) with the following objectives: "to take down illegally uploaded copies of Manga and Anime from the online space in efficient means…to create a scheme to guide the fans from illegal sources to legitimate sites… [and] to promote awareness of copyright protection among viewers and consumers."[66] Through these objectives, their goal is to "support and expand the fan base of Manga and Anime, to eliminate infringing web sites, and to popularize the idea of making proper compensation for creative works."[67] In the ten years since its creation, however, MAGP's goals have yet to be fully realized with

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[60] *Id.*
[61] *Id.*
[62] Landers, *supra* note 4, at 289.
[63] Schendl, *supra* note 5, at 641 n. 60.
[64] *Id.*
[65] *The Launch of the Manga-Anime Guardians Project ～To Bring "Genuine Creations" to Manga-Anime Fan, The Content Overseas Distribution Association*, CONTENT OVERSEAS DISTRIBUTION ASSOCIATION, https://coda-cj.jp/news/414/ (July 30, 2014).
[66] *Id.*
[67] *Id.*

the MAGP website having been criticized for its lack of meaningful content for overseas fans before the domain became defunct (as of April 2025).[68] CODA maintains a website dedicated to bringing awareness to their mission to prevent piracy of Japanese content, however, it only discusses their goals and no longer includes information about where to find legal English-language content.

On June 12, 2020, Japan's legislature, the National Diet, passed the "Law to Partially Revise the Copyright Law and the Law Concerning Special Exceptions to Registration of Copyrighted Works of Programs" (hereinafter, the "Japanese Copyright Amendment").[69] The purpose of the amendment is to address the rise of index sites (also referred to as leech sites) and illegal downloading, as well as to strengthen protections for plaintiffs in cases of digital copyright infringement.[70] Leech sites refer to websites where "link information or the like leading to infringing contents is gathered and the users are guided to infringing contents."[71] Under the previous Copyright Act, leech sites and apps did not constitute direct copyright infringement so copyright owners were unable to seek an injunction against operators of these sites.[72] This amendment to the Act reinforces CODA and the MAGP's objectives by codifying criminal penalties for online piracy that results in copyright infringement. The penalty for operating a leech site or app is steep, with offenders receiving up to five years in jail or a maximum fine of five million yen, or both.[73] Additionally, those using the operating site to upload URLs that link to infringed material can also face penalties and may be subject to imprisonment for up to three years, a fine of up to three million yen, or both.[74]

Regarding the illegal downloading of infringing material, the penalties include imprisonment for up to two years, a fine of up to two million yen, or both.[75] However, to avoid over-penalization, two elements must be met, in addition to the basic elements of copyright infringement, "(1) the work is fee based (i.e, presented to the public for value); and (2) the downloading was done continuously or repeatedly."[76] The law also includes exceptions, seemingly to preserve the casual fan from being affected by the amendment. Those exceptions are: (1) unintentionally downloading pirated content, even when grossly negligent; (2) downloading derivative works and parodies; (3) downloading or screenshotting minor amounts of pirated content, such as a couple of panels of manga; and

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[68] Schendl, *supra* note 5, at 648; Landers, *supra* note 4, at 306; Chris J. Katopis, *The Kawaii Transactions: How Fan Fiction Helped Unleash Japan's Cultural Creativity Tsunami*, 16 LANDSLIDE 1, 5 (Apr. 1, 2024).

[69] *Amendment to the Copyright Act Approved by the Ordinary Session of the Diet in 2020*, AGENCY FOR CULTURAL AFFS., GOV'T JAPAN, https://www.bunka.go.jp/english/policy/copyright/amendments_2020/#:~:text=1.,one%20year%20from%20the%20promulgation (last visited Mar. 28, 2025).

[70] *Id.*

[71] *Id.*

[72] Hitomi Iwase & Michiko Kinoshita, *Revisions to Japan Copyright Act to Tackle Online Pirating*, INT'L L. OFF. NEWSL., 1 (Nov. 23, 2020).

[73] *Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads*, *supra* note 5.

[74] Iwase & Kinoshita, *supra* note 67.

[75] *Id.*

[76] *Id.*

(4) downloading pirated content under special circumstances that do not unfairly prejudice the interests of the copyright owner.[77]

Finally, in 2024 the Copyright Act was amended again to reduce the burden of proof standard for victims of piracy by creating a new method for calculating damages due to copyright infringement.[78] Modeled after Japanese patent law, in order to create a better calculation of damages, two revisions have been implemented: (1) "recognition of an amount equivalent to the license fee based on the quantity of infringing products transferred, etc." and (2) "clarification of the factors to consider when determining the equivalent license fee."[79] The first revision "allows for the recognition of damages for lost profits due to the loss of licensing opportunities, even in cases where the infringer's sales volume exceeds the rights holder's capacity to sell or distribute."[80] Regarding the second revision, courts are directed to apply general license fees contracted under certain conditions such as usage period and scope to calculate the monetary loss of the right holder due to the unrestricted use due to copyright infringement, specifically related to the portion exceeding the copyright holder's sales capacity.[81]

These revisions are especially significant in cases of illegally reproduced manga as online distribution of pirated content circumnavigates licensing agreement and paywalls and can therefore be accessed by a larger audience than either traditional print or legally distributed digital manga ever could. By providing a framework that increases the amount of compensation right holders can recover due to online piracy, this amendment incentives both the creator and their publisher to seek legal action against infringers. In conjunction with the 2020 amendment that increased penalties for large-scale infringers, Japanese law has put forth a clear message to those who pirate manga – cease or face serious legal action. These laws have already affected Japanese-operated sites with MangaMura, one of the largest leech sites, being ordered to pay 1.7 billion yen (eleven million dollars) to three major Japanese publishers and other websites, such as KissManga shutting themselves down following the 2020 amendment.[82] International enforcement, however, is more complicated as many sites containing pirated content have servers in multiple countries – requiring international cooperation for enforcement.[83] As of January 2024, the Authorized Books of Japan (ABJ), an anti-piracy group of publishers and telecommunications companies, has identified 1,176 pirate sites, with 80% of those sites containing

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[77] *Id.*

[78] *Reducing the Burden of Proof for Victims of Piracy: Explaining the Copyright Law Amendment Enacted in January Reiwa 6 (2024)*, MONOLITH L. OFF. (Apr. 17, 2024), https://monolith.law/en/general-corporate/r6-copyright-law#:~:text=Copyright%2C%20the%20most%20familiar%20form,of%20copyright%20and%20related%20rights.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Yuto Yoneda, Ex-Mangamura Operator Ordered to Pay 1.7 Billion Yen to Publishers, ASAHI SHIMBUN: ASIA AND JAPAN WATCH (Apr. 18, 2024), https://www.asahi.com/ajw/articles/15233684#:~:text=The%20former%20operator%20of%20the,and%20Shogakukan%20Inc.; Eric Mormon, *No More Pirated Manga?*, ARIZ. ST. SPORTS & ENT. L. J. (Mar. 10, 2021), https://asuselj.org/no-more-pirated-manga/.

[83] Mormon, *supra* note 80.

scanlations.[84] The ABJ identified 446 English-language sites with the top five English sites reached 320.5 million monthly hits, much more than the 120 million hits for the top 10 Japanese sites as of December 2023.[85] Given the rampant nature of manga piracy, cooperation with U.S. law enforcement agencies is necessary to combat it, however this method would not necessarily be a quick solution. Instead, MAGP and the industry have focused on working with Google to hide piracy/leech sites from search results and have also expanded efforts to boost lawful distribution of manga by working with English-language publishers.[86]

IV. Issues & Solutions for Copyright Protection in an Age of Global Digital Fandom

a. An Interesting but Insufficient Solution: Creative Commons Licensing

Creative Commons (CC) licenses are public licenses that permits certain uses of copyrighted materials by the public at large.[87] There are six different license types, each with varying degrees permissiveness. CC BY-NC-SA would most likely be the best solution for the interests of the mangakas and publishers as it is structurally similar to the industry-recognized culture of *doujinshi* but does not allow for the monetization of fan-made content, addressing the concerns of the Japanese government and the manga industry. CC-BY-NC-SA allows fans "to distribute, remix, adapt, and build upon the material in any medium or format for noncommercial purposes only, and only so long as attribution is given to the creator. If you remix, adapt, or build upon the material, you must license the modified material under identical terms."[88] So long as the licensee follow the terms of the license, the licensor cannot revoke the freedoms allowed by the Creative Commons.[89] The licensor must also own or control (through the express permission of the copyright owner) the copyrighted work.[90]

While CC licenses could be a solution for individual copyright owners who enjoy seeing fan-created content inspired by their works, it would be near impossible for the entire industry to apply such a license. Successful mangakas with massive fanbases, such as Masashi Kishimoto (*Naruto*) or Naoko Takeuchi (*Sailor Moon*) would certainly be prime candidates for such a license, however mangakas with smaller fanbases who are reliant on publishers to release their works would be reluctant to apply such a license to

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[84] Misaki Morokuma, *After 'Manga-Mura' Suit Victory, Publishers Face Piracy Problem Beyond Japan's Borders*, MAINICHI (May 1, 2024), https://mainichi.jp/english/articles/20240430/p2a/00m/0et/026000c#:~:text=Japanese%20version-,After%20'Manga%2DMura'%20suit%20victory%2C%20publishers%20face,piracy%20problem%20beyond%20Japan's%20borders&text=TOKYO%20%2D%2D%20Major%20Japanese%20publishers,pirated%20content%20site%20Manga%2DMura.

[85] *Id.*

[86] *Id.*

[87] Creative Commons, UNIV. MICH. LIBRARY RSCH. GUIDES (Jan. 6, 2025), https://guides.lib.umich.edu/creativecommons/licenses.

[88] *About CC Licenses*, CREATIVE COMMONS, https://creativecommons.org/share-your-work/cclicenses/ (last visited Apr. 1, 2025).

[89] *Id.*

[90] *Id.*

their works. Additionally, whether translations constitute a sufficient remix or adaptation of the original work is an issue under both Japanese and U.S. copyright law, and, as applied to a CC license, would most likely have to specified as a term addressing the scope of the license.

b. An Innovative Solution: Licensing Fan Contributions with Industry Oversight

The most creative solution to combat manga piracy is to make getting a license to translate manga easier. Large-scale licensing is "a way to embrace online cultures while generating a profit, instead of attempting in vain to suppress all unauthorized uses."[91] Different models for these kinds of licensing efforts exist, with two of the biggest digital players - Google's Content ID and Amazon's Kindle Worlds - employing quite structurally distinct models.[92] Kindle Worlds allows for the monetization of fan-made content while making sure copyright owners also receives the payment.[93] While this could be an option, and aligns with *doujinshi* culture in Japan, it is unlikely this would be a favorable solution given the recent efforts to punish infringers and broaden access to legally distributed content. As such, Google's large-scale licensing model seems to be the most favorable option. Content ID employs a third-party model wherein Google (as the third-party) monitors content being uploaded to YouTube to see if audio and video from the uploaded videos match copyrighted works that owners have registered with Google.[94] Content ID offers multiple licensing options for the copyright holder to choose from, varying in permissiveness such as allowing owners to earn ad revenue or block uploaded content.[95]

As CODA has already established a partnership with Google to remove pirated sites from search results, a reasonable step forward for the agency could also be to encourage mangakas and publishers to register their works with YouTube, if they have not already done so. This way, uploaded videos that contain an infringing amount of manga or anime content could be found and copyright owners would be capable of earning instant revenue, instead of having to issue thousands of takedown notices in a never-ending stream of infringing uploads.

Specifically in relation to scanlations and fansubs, CODA could revitalize the MAGP website and restructure it to create a large-scale licensing scheme, with the focus of the scheme tailored to address fan translations in different languages.[96] Should CODA follow a third-party model similar to Content ID, the translations would be uploaded to the website and then analyzed by MAGP, who as industry players, could ensure that the translations are authentic to the message of the original while also facilitating contact with the mangakas, whose moral and economic rights give them sole discretion over translations of their work. Should the copyright owner approve of the translation, the fan translators

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[91] Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 28 BERKELEY TECH. L. J. 1447, 1453 (2014).
[92] *Id.* at 1451.
[93] *Id.* at 1468.
[94] *Id.* at 1457-58.
[95] *Id.*
[96] Landers, *supra* note 4, at 305-6.

would then become licensees and could then: (1) sell their work to make up for the licensing fee, essentially providing single issue comics in the English-speaking market as competition to the graphic novel volumes; (2) borrowing from the Kindle World's model, both the licensee and the licensor would split revenue through a contractually-guaranteed model; or (3) borrowing from Content ID's model, allowing owners to place ads on websites hosting these scanlations and fansubs.

Given the objectives of the industry and the government, of the possible options, the first licensing model (the sale of single-issue manga) seems to align the most with their interests. The first model could present an issue with pre-existing licensing agreements with English publishers; however, the industry may instead see an opportunity to reach an untapped audience, and the fan translation group could brand themselves as market disruptors within the industry. The operating structures of fan translation groups make it so that the works being translated already have a fanbase, however small, which indicates demand for single issues as these international fans prefer to keep up to date with domestic releases of their favorite mangas.[97]

However, neither model eliminates the main problem of online piracy – market loss because of illegal, free content. Presuming some fan translation groups seek to obtain a license for their translations, the translated work would have to be sold to recoup the licensing fee, let alone turn a profit. Therefore, the creation of a large-scale licensing would create a new market for manga sales and could even reduce infringement, but would not eliminate the desire for free content that can only be obtained through online piracy.

V. Conclusion

The complex relationship between international law, the Japanese publishing industry, mangakas, and fans of anime and manga, has made the issue of fan-made translations a problem that impact global markets.[98] While Japan's copyright reforms challenging online piracy in order to protect their IP has certainly been to the benefit of copyright owners, it leaves the core of the international problem unaddressed and instead relies on international cooperation for a relatively niche concern.[99] As such, rather than relying solely on stricter enforcement, Japan should implement a solution, such as adopting a licensing framework that allows for regulated fan translations, that allows for the industry to expand into a previously-untapped market. This solution would balance the copyright owners' rights with the needs of an ever-growing international consumer base.

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97 Tremblay, *supra* note 10, at 327; *See generally,* Simone Schroff, *Where to Draw the Line: The Difference Between a Fan and a Pirate in Japan*, 26 INT'L J. CULTURAL POL'Y 433-445 (Apr. 19, 2019).

98 Onemu, *supra* note 2, at 3.

99 Mormon, *supra* note 80.

THE INTERNATIONAL LEGAL SYSTEM AS A FOURTH BRANCH OF GOVERNMENT: ARTICLE 51 AS A POTENTIAL CHECK ON EXECUTIVE BRANCH MILITARY AUTHORITY

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I. Introduction

In February 2026, the United States launched "major combat operations in Iran."[1] The year before, the U.S. military conducted strikes on three Iranian nuclear facilities.[2] In some ways, this was not unexpected. President Donald Trump imposed substantial economic pressure on Iran during his first term.[3] Between 2017-2021, the United States and Iran also traded military attacks: in June 2019, "Iranian forces [shot] down a [U.S.] military drone."[4] Less than a year later, in January 2020, the United States—again at the direction of President Trump—killed senior Iranian military official, Qassem Soleimani after which "Iran responded with a dramatic attack on Al Asad Air Base" by launching "ballistic missiles."[5]

Washington articulated geostrategic and military reasons to justify the February 2026 war and the June 2025 strikes.[6] The Trump administration has also submitted letters after the fact notifying Congress of the attacks on Iran.[7] However, experts have questioned

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[1] *Read Trump's Full Statement on Iran Attacks*, PBS (Feb. 28, 2026), https://www.pbs.org/newshour/world/read-trumps-full-statement-on-iran-attack. A month earlier, a U.S. operation "capture[d]" Nicolás Maduro from Venezuela. Michael Schmitt, Ryan Goodman & Tess Bridgeman, *International Law and the U.S. Military and Law Enforcement Operations in Venezuela*, JUST SECURITY (Jan. 5, 2026), https://www.justsecurity.org/127981/international-law-venezuela-maduro/#:~:text=By%20exercising%20enforcement%20jurisdiction%20there,on%20other%20countries'%20sovereign%20prerogatives; Regina Garcia Cano, Konstantin Toropin & Eric Tucker, *US Plans to 'Run' Venezuela and Tap its Oil Reserves, Trump Says, After Operation to Oust Maduro*, ASSOCIATED PRESS (Jan. 3, 2026), https://apnews.com/article/venezuela-us-explosions-caracas-ca712a67aaefc30b1831f5bf0b50665e.

[2] John B. Bellinger, III, *Does Trump Have the Authority to Strike Iran?*, Council on Foreign Relations, (June 22, 2025), https://www.cfr.org/expert-brief/does-trump-have-authority-strike-iran.

[3] *See, e.g.*, Office of the Spokesperson, *Maximum Pressure Campaign on the Regime in Iran*, DEP'T OF STATE (Apr. 4, 2019), https://2017-2021.state.gov/maximum-pressure-campaign-on-the-regime-in-iran.

[4] *US-Iran Standoff: A Timeline of Key Events*, Al-Jazeera (Sept. 25, 2019), https://www.aljazeera.com/news/2019/9/25/us-iran-standoff-a-timeline-of-key-events.

[5] Colonel Scott A. Hodges, *The Killing of Qassem Soleimani*, JAG REPORTER (Oct. 29, 2020), https://www.jagreporter.af.mil/Post/Article-View-Post/Article/2539536/the-killing-of-qassem-soleimani.

[6] Tyler McBrien, *U.S. Submits Article 51 Letter on 'Operation Epic Fury' to UNSC*, LAWFARE (Mar. 7, 2026), https://www.lawfaremedia.org/article/u.s.-submits-article-51-letter-on--operation-epic-fury--to-unsc; WATCH: President Trump addresses nation after US bombs Iranian nuclear sites, YOUTUBE (June 21, 2025), https://www.youtube.com/watch?v=39YG5HApDhE; *Iran's Nuclear Facilities Have Been Obliterated—And Suggestions Otherwise Are Fake News*, WHITE HOUSE (June 25, 2025), https://www.whitehouse.gov/articles/2025/06/irans-nuclear-facilities-have-been-obliterated-and-suggestions-otherwise-are-fake-news.

[7] Olivia Manes, *White House Submits Iran War Powers Report to Congress*, LAWFARE (Mar. 3, 2026), https://www.lawfaremedia.org/article/white-house-submits-iran-war-powers-report-to-congress; Jeannie Suk Gersen, *Trump, Congress, and the War Powers Resolution*, NEW YORKER (June 28, 2025), https://www.newyorker.com/magazine/2025/07/07/trump-congress-and-the-war-powers-resolution; Robert Jimison, *Senate Blocks War Powers Resolution to Limit Trump's Ability to Strike Iran Again*, NEW YORK TIMES (June 27, 2025), https://www.nytimes.com/2025/06/27/us/politics/trump-war-powers-iran-strike.html; Brian Finucane, *The Trump Administration's Flawed War Powers Report on Iran and the Need for a Congressional Rebuttal*, JUST SECURITY (June 24, 2025), https://www.justsecurity.org/115398/trump-justification-attacking-iran-congressional-rebuttal; Charlie Savage, *Was Trump's Iran Attack Illegal? Presidential War Powers, Explained*, NEW YORK TIMES (June 23, 2025), https://www.nytimes.com/2025/06/23/us/politics/trump-iran-war-powers-constitution.html.

the President's authority to carry out these strikes without a greater role from Congress in authorizing them.[8]

President Trump is not the first U.S. president to justify military strikes against U.S. adversaries in the Middle East on the basis of self-defense. During the Biden administration, the United States conducted "strikes" against "facilities used by groups affiliated with Iran's Islamic Revolutionary Guard Corp's Quds Force."[9] But the nature of this strike vis-à-vis Iran was unprecedented. Prior to this administration, the United States had never before launched direct military strikes on Iran proper from U.S. soil.[10] Thus, this could represent an expansion of the Executive Branch's asserted authority in national security affairs beyond what was previously imaginable.

However, the Trump administration did not end its justification of the recent strikes with the notification to Congress. The U.S. ambassador to the UN submitted an Article 51 letter justifying the March 2026 war.[11] And, "[i]n a letter to the UN Security Council dated June 27, 2025, the United States presented its international legal justification for its June 22nd strikes on the Iranian nuclear facilities at Fordow, Natanz, and Isfahan."[12] There is a pattern of U.S. presidents justifying their attacks under international law, particularly by citing to Article 51, which has been ongoing since at least the 1980s.[13] Second-term President Trump did not buck the trend. By publicly providing an international-law rationale—valid or not—the office of the U.S. president validated international law.[14]

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[8] Bellinger, *supra* note 1; Scott Bomboy, *Does the War powers Resolution Debate Take on a New Context in the Iran Conflict?*, NAT'L CONST. CENTER (Mar. 3, 2026), https://constitutioncenter.org/blog/does-the-war-powers-resolution-debate-take-on-a-new-context-in-the-iran-conflict.

[9] Joseph Clark, *U.S. Strikes Targets in Iraq and Syria in Response to Deadly Drone Attack*, Dep't of Defense (Feb. 2, 2024), https://www.defense.gov/News/News-Stories/Article/article/3665734/us-strikes-targets-in-iraq-and-syria-in-response-to-deadly-drone-attack.

[10] Finucane, *supra* note 6.

[11] McBrien, *supra* note 7.

[12] Brian Finucane, Assessing the U.S. Article 51 Letter for the Attack on Iran: Legal Lipstick on the Use of Force Pig, JUST SECURITY (July 3, 2025), https://www.justsecurity.org/116153/article-51-united-states-letter-iran-nuclear; Savage, *supra* note 6.

[13] Letter from Samantha J. Power, Representative of the United States, United Nations, to Ban Ki-moon, Secretary-General, United Nations (Sept. 23, 2014) (on file with author); Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L.J. 455 (2016); Stephen W. Preston, *The Legal Framework for the United States' Use of Military Force Since 9/11*, DEP'T OF DEFENSE (Apr. 10, 2015), https://www.defense.gov/News/Speeches/Speech/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911; Thomas Yoxall, *Iraq and Article 51: A Correct Use of Limited Authority*, 25 INT'L LAWYER 967 (1991); *Rescue Attempt for American Hostages in Iran Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on the Operation*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/rescue-attempt-for-american-hostages-iran-letter-the-speaker-the-house-and-the-president; *see also* Office of the Historian, *Memorandum of a Conversation, Department of State, Washington, February 28, 1957, 3:05pm*, DEP'T OF STATE, https://history.state.gov/historicaldocuments/frus1955-57v17/d167 (clarifying that Article 51 requires an actual attack and not just the threat of one as a "justification for self-defense" in the context of discussions over Israel's plan to leave Sharm-el-Sheikh and the Gaza Strip).

[14] *See generally*, Oona A. Hathaway, How the Erosion of U.S. War Powers Constraints Has Undermined International Law Constraints on the Use of Force, 14 HARV. NAT'L SEC. J. 227 (2023); Oona A. Hathaway, *How to Revive Congress's War Powers*, YALE L. & ECON. RSCH. PAPER (Sept. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436924; Brian Finucane, *An Unserious Justification for an*

This Essay argues that by touting international-law rationales as justifying U.S. military action, the Executive Branch is setting up what has the *potential* to be a robust check on its powers beyond the three branches of the U.S. government: the international legal system. It is not the first to address whether Article 51 realistically constrains presidential uses of military force.[15] Scholars have considered (and agreed) that international law can "indicate[] constraint."[16] Yet others have considered the importance of public explanations when engaging in international law activity.[17] And, there is a body of scholarly literature addressing when the action *itself* is covert or secretive (rather than the post-hoc justification).[18] In the context of existing scholarship on similar and related issues, this Essay takes on a very narrow question: whether the authoring of Article 51 letters serves as a real check on Executive Branch exercises of military force, in light of the more extreme uses of military force in recent months.[19]

In Part I, this Essay describes how U.S. presidents, including but not limited to President Trump, have relied on Article 51 to justify expansive military activities abroad. Part II highlights some of the imperfections of Article 51 as an international legal tool. And

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Unnecessary War: Assessing the U.S. 'Article 51' Letter to U.N. on Iran War, JUST SECURITY (Mar. 18, 2026), https://www.justsecurity.org/134290/us-article-51-letter-united-nations;

[15] Oona A. Hathaway, *How the Erosion of U.S. War Powers Constraints Has Undermined International Law Constraints on the Use of Force*, HARV. NAT'L SEC. J. 337, 344-59 (2023); *see also* Curtis A. Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 723 (2016) ("In turn, presidents, eventually came to read Article 51 of the Charter to authorize broad uses of force for the defense of citizens abroad, with executive branch lawyers approaching this issue in ways that paralleled the domestic legal framework.").

[16] Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT'L L.J. 49, 52 (2016); *see* Rebecca Ingber, *Insidious War Powers Status Quo*, 133 YALE L.J. 747, 760-63 (2024); *see also* Deborah N. Pearlstein, *Ratcheting Back: International Law as a Constraint on Executive Power*, 26 CONST. COMMENTARY 523, 550 (2010) ("For international law, the realist explanation offers another example of the ways in which international law, while often lacking in institutional enforcement mechanisms, may well shape state conduct nonetheless."). *But see* Arthur M. Weisburd, *Executive Branch and International Law*, 41 VAND. L. REV. 1206, 1206-07 (1988) (addressing "whether the federal courts have the authority to compel the President to adhere to rules of customary international law" but arguing that "the President is not bound by international law"); Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J. OF L. & PUB. POL'Y 73, 75 (2007) ("This Article advances the position that the Constitution does not require the President to obey international law.").

[17] Harold Hongju Koh, *The Legal Adviser's Duty to Explain*, 41 YALE J. INT'L L. 129, 130 (2016) ("To participate in a system of international law, nations owe each other explanations of why their national conduct comports with global norms and follows not from mere expedience but from a sense of legal obligation (opinio juris). By laying out her government's legal theory in public, the legal adviser shoulders the nation's responsibility to give its citizens, the media, legal commentators, and legislators, as well as the international legal community, a fuller opportunity to assess the legal theory offered to authorize a given action and to test the government's present and future actions in light of that theory.").

[18] Alexandra H. Perina, *Black Holes and Open Secrets: The Impact of Covert Action on International Law*, 53 COLUM. J. OF TRANSNAT'L L. 507, 510-511 (2015).

[19] There is a built-in assumption to my argument, which is that because Article 51 is a public process, it is possible to engage in public reason-giving and it is not necessary to engage in secret-giving for reasons, for example, of classified government operations. Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 616 (2020). In that instance, Professor Deeks has explained the virtues of secret reason-giving. *Id.* In particular circumstances where secrecy is necessary, "secret reason-giving is consistent with the idea that it is possible to further the rule of law within the executive branch, even in the relatively unregulated national security context." *Id.*

Part III argues that even if Article 51 can be a flimsy justification for potentially egregious violations of international law and domestic U.S. law, the attempt to provide a public justification is better than no justification at all. [20] In the face of valid counterarguments, addressed in Part III, this Essay contends that a public justification is a positive development because it supports rule-of-law norms at home and abroad. In this way, Article 51 can serve as another check on the Executive Branch.

II. Article 51 and U.S. Presidents' Reliance on Article 51 to Conduct Military Strikes in the Middle East

Article 51 is a provision of the U.N. Charter that gives countries the right to self-defense in response to an attack.[21] The full provision is short. It does not contain definitions and it does not clarify the meaning of key terms.[22] It begins by stating: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[23] The second sentence of the provision requires notification of the UN Security Council when a member state seeks to exercise its right to self-defense: "Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[24]

What constitutes an "armed attack" has been defined narrowly by the International Court of Justice, despite the increased use of Article 51 justifications by U.S. presidents.[25] "As the Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it is necessary to distinguish 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.'"[26] In the first decade following the founding of the United Nations, Article 51, while "frequently mentioned in the Security Council," was only "appli[ed] or interpret[ed] . . . in one case, a decision calling upon Egypt to terminate restrictions on the passage of ships through the Suez

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[20] The Supreme Court has recently been criticized for adjudicating so many issues through its Emergency Docket and also, for not providing public and reasoned opinions for its decisions. *See generally*, *Justice Jackson on Supreme Court's Emergency Docket*, C-Span (Apr. 13, 2026), https://www.c-span.org/program/public-affairs-event/justice-jackson-on-supreme-courts-emergency-docket/677797. This undermines rule-of-law norms by shrouding Supreme Court decisionmaking and preventing the public from understanding *why* the Court is ruling in a particular way.

[21] U.N. Chart., art. 51.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See generally* Steven Ratner, *Self-Defense Against Terrorists: The Meaning of Armed Attack*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER: MEETING THE CHALLENGES (2013); Oona A. Hathaway, *How the Expansion of "Self-Defense" Has Undermine Constraints on the Use of Force*, (Sept, 18, 2023), https://www.justsecurity.org/88346/the-expansion-of-self-defense.

[26] Case Concerning Oil Platforms (Islamic Republic of Iran v. United States), Judgment, 2003 I.C.J. 161, ¶ 51 (Nov. 6).

Canal."[27] In the past decade, Article 51 has been relied upon extensively by the United States and other countries to justify their military actions abroad.[28] For example, Israel referred to Article 51 as a legal justification for its military campaign against Gaza.[29]

Article 51 has been cited as a legal justification in at least four different scenarios: strike in response to strikes, war in response to a strike, war in response to an invasion, and "anticipatory self-defense."[30] "Article 51 has been invoked on at least 78 occasions, a marked increase compared to previous years."[31] "The United States ha[d] reported the most often pursuant to Article 51—on seventeen occasions,"[32] between 1951 and 2021.[33] A Harvard database found that the United States was the author of twenty-six Article 51 "communications" between 1950 and 2018, out of a total of 433 listed instances.[34]

Reliance on Article 51 to justify U.S. military actions is bipartisan.[35] In January 2024, under then-President Joseph Biden, the United States conducted a drone strike

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[27] U.N. Charter; Thomas K. Plofchan Jr., Article 51: Limits on Self-Defense, 13 MICH. J. INT'L L. 336 (1992).

[28] Hathaway, *supra* note 19.

[29] Ismail Patel, *Israel-Palestine War: Israel's Claim of 'Self-Defense' Has Zero legal Legitimacy*, MIDDLE EAST EYE (Nov. 21, 2023), https://www.middleeasteye.net/opinion/israel-palestine-war-claim-self-defence-zero-legal-legitimacy.

[30] Letter from Ambassador Kelly Craft, U.S. Permanent Representative, United Nations, to Dang Dinh Quy, President, United Nations Security Council (Jan. 8, 2020) (on file with author); Patel, *supra* note 23; https://www.justsecurity.org/88346/the-expansion-of-self-defense; Yoxall, *supra* note 12, at 1; Michael N. Schmitt, *Russia's 'Special Military Operation' and the (Claimed) Right of Self-Defense*, LIEBER INSTITUTE: WEST POINT (Feb. 28, 2022), https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/#:~:text=The%20day%20Russia%20launched%20its,speech%20Putin%20had%20made%20to.

[31] Security Council Report, *In Hindsight: The Increasing Use of Article 51 of the UN Charter and the Security Council*, UNITED NATIONS (Sept. 30, 2025), https://www.securitycouncilreport.org/monthly-forecast/2025-10/in-hindsight-the-increasing-use-of-article-51-of-the-un-charter-and-the-security-council.php. The article discusses recent instances of Israeli and American invocations of self-defense, as well as examples of other countries invoking Article 51. *Id.* The cited U.S. instances include the September 2 "strike against a vessel purportedly involved in drug trafficking in the Caribbean Sea . . . ." *Id.* "In his war powers resolution report to Congress, US President Donald Trump directly invoked the right of self-defence and the unwilling or unable doctrine . . . ." *Id.* Others have discussed other countries' use of military force in light of Article 51. *See, e.g.*, Michael Schmitt, *Striking Hamas in Qatar: "Unwilling or Unable"?*, JUST SECURITY (Sept. 16, 2025), https://www.justsecurity.org/120727/israel-airstrike-hamas-qatar-doha.

[32] *A Historical Overview of Reporting Under Article 51 on Actions Taken in Self-Defence (With Table)*, (Mar. 1, 2021), https://www.scprocedure.org/chapter-7-section-12b; *see also Letters Citing Article 51 Sent to the Council in 2014 and 2015*, (Dec. 17, 2015), https://www.scprocedure.org/chapter-7-section-12; *Reporting to the Council in 2016-2017 Pursuant to Article 51 on Actions Taken in Self-Defence*, (Dec. 31, 2017), https://www.scprocedure.org/chapter-7-section-12g; *In 2018-19, Cleavages Widen Over Self-Defence Reported to the Council Under Article 51 (With Table)*, (Nov. 15, 2019), https://www.scprocedure.org/chapter-7-section-12i.

[33] *Reporting to the Security Council Pursuant to Article 51 of the UN Charter*, (Feb. 27, 2021), https://www.scprocedure.org/_files/ugd/54a569_f4260d6b84a44b52989d5e5fea04b556.pdf. The White House has enumerated a few instances in which it invoked Article 51, including 9/11. *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Relations*, WHITE HOUSE, (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

[34] Program on International Law and Armed Conflict, *Quantum of Silence: Inaction and Jus Ad Bellum*, HARVARD L. SCH., https://pilac.law.harvard.edu/quantum-of-silence.

[35] *See* Oona A. Hathaway, *Trump's Strikes on Iran Were Unlawful. Here's Why That Matters*, NEW YORK TIMES (June 23, 2025), https://www.nytimes.com/2025/06/23/opinion/international-world/trump-iran-strikes.html (highlighting distinctions between President Trump and President Bush in their engagement with Congress and the UN Security Council prior to engaging in military action).

against an Iranian-backed militia leader in Baghdad.[36] The Pentagon's press secretary held a press briefing in which he noted that "U.S. forces took necessary and proportionate action against . . . a Harakat-al-Nujaba leader" who was "actively involved in planning and carrying out attacks against American personnel."[37] He also noted that the strike was conducted in "self-defense."[38] Even though during this press briefing, the Pentagon did not cite any legal authorities to support the military's strike, the Pentagon had previously "defended the legality" of strikes against Iranian-backed militia facilities by citing Article 51 of the UN Charter.[39]

A month earlier in December 2023, the United States conducted strikes against facilities used by Iran-affiliated groups in Iraq.[40] In a letter to the House and President pro tempore of the Senate, then-President Biden explained that Iran-affiliated militias had conducted attacks against U.S. personnel and facilities in Iraq and Syria, and that he had directed U.S. strikes in order to deter and prevent future attacks.[41] The president explained that this action was consistent with international law and the United States' right to self-defense under Article 51 of the UN Charter.[42] This was not the first time that President Biden's administration justified U.S. military action against Iran-affiliated militia groups in the Middle East by citing the right to self-defense under Article 51.[43] The United States also provided Article 51 rationales for various strikes in October and November 2023 against Iranian-associated groups.[44]

Other presidential administrations have also cited Article 51 when conducting military operations abroad.[45] During his first term, President Trump did not dismiss the

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[36] Nancy A. Youssef & Michael R. Gordon, *U.S. Killing of Militia Leader Marks Bid to Stop Attacks on its Forces in Iraq*, WALL STREET J. (Jan. 4, 2024), https://www.wsj.com/world/middle-east/u-s-strike-kills-iran-backed-militia-leader-in-iraq-71256676; Alissa J. Rubin & Eric Schmit, *Iraq Condemns U.S. After Drone Strike in Baghdad*, NEW YORK TIMES (Jan. 4, 2024), https://www.nytimes.com/2024/01/04/world/middleeast/us-drone-strike-baghdad-iraq.html.

[37] Pat Ryder, *Pentagon Press Secretary Maj. Gen. Pat Ryder Holds a Press Briefing*, DEP'T OF DEFENSE (Jan. 4, 2024), https://www.defense.gov/News/Transcripts/Transcript/Article/3631953/pentagon-press-secretary-maj-gen-pat-ryder-holds-a-press-briefing.

[38] *Id.*

[39] Dan De Luce, Mosheh Gains, Charlene Gubash & Kristen Welker, *Biden Orders Airstrikes in Syria, Retaliating Against Iran-Backed Militias*, NBC NEWS (Feb. 25, 2021), https://www.nbcnews.com/news/us-news/biden-airstrikes-syria-retaliating-against-iran-backed-militias-n1258912; Ryder, *supra* note 27.

[40] Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution (Public Law 93-148), WHITE HOUSE (Dec. 27, 2023).

[41] *Id.*

[42] *Id.*

[43] Letter from Linda Thomas-Greenfield, Representative of the United States, United Nations, to Dame Barbara Woodward, President, United Nations Security Council (Feb. 27, 2021) (on file with author).

[44] C. Todd Lopez, *AC-130 Strikes Iranian-Backed Militants Following Missile Attack*, DEP'T OF DEFENSE (Nov. 21, 2023), https://www.defense.gov/News/News-Stories/Article/Article/3596477/ac-130-strikes-iranian-backed-militants-following-missile-attack; *Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution (Public Law 93-148)*, WHITE HOUSE (Nov. 14, 2023); *Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution (Public Law 93-148)*, WHITE HOUSE (Nov. 22, 2023); John Bellinger, *President Biden's Inaugural War Powers Report*, LAWFARE (Mar. 1, 2021), https://www.lawfaremedia.org/article/president-bidens-inaugural-war-powers-report.

[45] Nectar Gan, *Who was Qasem Soleimani, the Iranian Commander Killed by a US Airstrike?*, CNN (Jan. 3, 2020), https://www.cnn.com/2020/01/03/asia/soleimani-profile-intl-hnk/index.html; Letter to the Speaker of the

notion of justifying his actions on the basis of Article 51 authorities. In January 2020, the United States—under President Donald Trump—conducted a "targeted killing" of Qassem Soleimani, head of the Revolutionary Guards' Quds Force in Iran.[46] In a letter to the UN Security Council, the United States cited Article 51 in justifying the strike, and noted that it was conducted "in response to an 'escalating series of armed attacks in recent months' by Iran and Iranian-backed forces on U.S. personnel."[47] And, under President Obama, the United States also cited Article 51 when taking military action against ISIL in Syria.[48] At that time, Washington highlighted that the "government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks."[49]

III. Article 51 is an Imperfect Legal Tool, Internationally, and Domestically

While the United States may rely on Article 51 to justify Executive Branch action, other sovereign nations, including U.S. adversaries, can also rely on Article 51 authorities to justify their actions. In a bilateral military conflict in which both countries contest which country initially acted in self-defense,[50] Article 51 is pliable such that it does not provide clear guidance regarding which state invoked legitimate Article 51 justifications, and which did not.

For example, the United States has not been the only state to cite Article 51 in justifying its military actions in the Middle East.[51] In response to the U.S. strike on Soleimani, Iran conducted a missile attack against U.S. troops in Iraq.[52] Iran's then-foreign minister publicly justified this attack by stating that "Iran took [and] concluded proportionate measures in self-defense under Article 51 of the UN Charter."[53] Therefore, while the United States has been able to, at least attempt, to legally justify its actions using

House and President pro tempore of the Senate consistent with the War Powers Resolution (Public Law 93-148), WHITE HOUSE (Dec. 27, 2023); Letter from Samantha J. Power, Representative of the United States, United Nations, to Ban Ki-moon, Secretary-General, United Nations (Sept. 23, 2014) (on file with author).

[46] Gan, *supra* note 35; STEPHEN P. MULLIGAN & JENNIFER K. ELSEA, UPDATED: RECENT U.S. AIRSTRIKES: LEGAL AUTHORITIES AND QUESTIONS, CONG. RSCH. SERV., LSB10391 (Feb. 18, 2020); Hadley Baker, *U.S. and Iran Submit Article 51 Letters on Use of Force*, LAWFARE (Jan. 9, 2020), https://www.lawfaremedia.org/article/us-and-iran-submit-article-51-letters-use-force.

[47] Baker, *supra* note 36; Durward Johnson, *The UN Soleimani Report and the U.S. Article 51 Notification*, LIEBER INSTITUTE: WEST POINT (Sept. 24, 2020), https://lieber.westpoint.edu/un-soleimani-report-u-s-article-51-notification; Letter from Ambassador Kelly Craft, U.S. Permanent Representative, United Nations, to Dang Dinh Quy, President, United Nations Security Council (Jan. 8, 2020) (on file with author).

[48] Letter from Samantha J. Power, Representative of the United States, United Nations, to Ban Ki-moon, Secretary-General, United Nations (Sept. 23, 2014) (on file with author); Preston, *supra* note 12; Goldsmith, *supra* note 12.

[49] Letter from Samantha J. Power, Representative of the United States, United Nations, to Ban Ki-moon, Secretary-General, United Nations (Sept. 23, 2014) (on file with author).

[50] Hadley Baker, *U.S. and Iran Submit Article 51 Letters on Use of Force*, LAWFARE (Jan. 9, 2020), https://www.lawfaremedia.org/article/us-and-iran-submit-article-51-letters-use-force.

[51] David Choi, *Iran Claims its Missile Strike Against US Troops Was Made in 'Self-Defense' After Trump's 'Cowardly' Attack*, BUSINESS INSIDER, (Jan. 7, 2020), https://www.businessinsider.com/iran-missile-strike-self-defense-trump-attack-iraq-2020-1.

[52] *Id.*; *Video Shows 2020 Iranian Missile Attack on US Forces at Iraqi Base*, BBC (Mar. 2, 2021), https://www.bbc.com/news/av/world-middle-east-56249923.

[53] Choi, *supra* note 40.

Article 51, its adversaries have also been able to do so when conducting attacks against the United States. [54]

In addition, citing Article 51 does not terminate all questions that might be asked of the Executive Branch when conducting military action abroad;[55] it is not an automatic "get-out-of-an-explanation-card."[56] The recent U.S. military operations in the Middle East have been scrutinized and criticized.[57] The legality of the U.S. strike against Soleimani was questioned, including Washington's reliance on Article 51 to justify the strike.[58] One expert wrote that "[i]f the Trump administration believed that Soleimani was planning imminent attacks against U.S. forces or U.S. interests, the strike would be lawful under Article 51 of the UN Charter . . . although other governments might not agree."[59] He continued to argue that "[i]f the Trump administration justifies the strike as an action in self-defense, the United States was required by Article 51 to promptly report the action to the Security Council" but at that time, it had "yet to do so."[60] Another analysis of the strike highlighted the United States's responsibility to have informed the UN Security Council immediately after the strike, if the United States had conducted the strike against Soleimani in self-defense "executed preemptively."[61]

Under the Biden administration, the United States conducted a counterterrorism operation against al-Qaeda's leader Ayman al-Zawahiri.[62] The White House, Department

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[54] *Id.*; Letter to the Speaker of the House and President pro tempore of the Senate consistent with the War Powers Resolution (Public Law 93-148), WHITE HOUSE (Dec. 27, 2023).

[55] A former U.S. government official wrote an article following the U.S. strikes in Iran in June 2025, in which he explained: "Having helped draft such letters on the use of force to the Security Council, I find the explanation inadequate. The pertinent international law argument advanced by the United States in this so-called 'Article 51 letter' is unconvincing. The other legal claims and references presented by the United States are legally truly irrelevant. Executive branch lawyers need to do more on the front end to shape use of force decisions by the President to ensure they comply with both domestic and international law." Brian Finucane, *Assessing the U.S. Article 51 Letter for the Attack on Iran: Legal Lipstick on the Use of Force Pig*, JUST SECURITY (July 3, 2025), https://www.justsecurity.org/116153/article-51-united-states-letter-iran-nuclear; *see also* Scott R. Anderson, *Going to War With Iran*, LAWFARE (June 20, 2025), https://www.lawfaremedia.org/article/the-law-of-going-to-war-with-iran.

[56] *Cf. West Virginia v. Env't Protection Agency*, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting) (referring to "get-out-of-text-free cards").

[57] Scott R. Anderson, *The Law of Going to War with Iran, Redux*, LAWFARE (Mar. 3, 2026), https://www.lawfaremedia.org/article/the-law-of-going-to-war-with-iran--redux.

[58] John B. Bellinger III, *Does the U.S. Strike on Soleimani Break Legal Norms?*, COUNCIL ON FOREIGN RELATIONS (Jan. 6, 2020), https://www.cfr.org/in-brief/does-us-strike-soleimani-break-legal-norms#:~:text=Bush%2C%20Obama%2C%20and%20Trump%20administrations,defense%20to%20prevent%20imminent%20attacks; Merrit Kennedy & Jackie Northam, *Was it Legal for the U.S. to Kill a Top Iranian Military Leader?*, NAT'L PUB. RADIO (Jan. 4, 2020), https://www.npr.org/2020/01/04/793412105/was-it-legal-for-the-u-s-to-kill-a-top-iranian-military-leader; Elliot Setzer, *White House Releases Report Justifying Soleimani Strike*, LAWFARE (Feb. 14, 2020), https://www.lawfaremedia.org/article/white-house-releases-report-justifying-soleimani-strike.

[59] Bellinger, *supra* note 45.

[60] *Id.*

[61] Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why it Matters*, JUST SECURITY (Jan. 8, 2020), https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters.

[62] Jim Garamone, *U.S. Drone Strike Kills Al-Qaida Leader in Kabul*, DEP'T OF DEFENSE (Aug. 2, 2022), https://www.defense.gov/News/News-Stories/Article/Article/3114362/us-drone-strike-kills-al-qaida-leader-in-kabul.

of Defense, and Department of State statements after the U.S. strike did not cite Article 51 or self-defense as a justification, however, the strike was "almost certainly . . . considered by the administration to fall within the Article 51 letter filed with the UN shortly after the attacks."[63] However, experts noted that the strike against Zawahiri occurred "more than two decades after the 9/11 attacks," thus undermining potential U.S. legal justifications under Article 51 to characterize the strike as a response to an armed attack.[64] Ultimately, the trend of U.S. presidents relying on Article 51 does not justify future presidents doing so, nor does it justify the more unprecedented instances of military action authorized in the past year.[65]

IV. U.S. Presidents' Reliance on Article 51 Supports Rule-of-Law Norms in the United States

Article 51 does not require "reports," but "common practice has been for member states to report under Article 51 through a letter to the Council President that later becomes a public document . . . ."[66] By offering a public-facing explanation through an Article 51 letter, the Executive Branch supports rule-of-law values by emphasizing the importance of

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[63] *Id.*; Anthony J. Blinken, *The Death of Ayman Al-Zawahiri*, DEP'T OF STATE (Aug. 1, 2022), https://2021-2025.state.gov/the-death-of-ayman-al-zawahiri/; *Background Press Call by a Senior Administration Official on a U.S. Counterterrorism Operation*, WHITE HOUSE (Aug. 1, 2022), https://bidenwhitehouse.archives.gov/briefing-room/press-briefings/2022/08/01/background-press-call-by-a-senior-administration-official-on-a-u-s-counterterrorism-operation; *Top Experts Raise Questions Regarding Legal Basis of Zawahiri Strike*, JUST SECURITY (Aug. 4, 2022), https://www.justsecurity.org/82584/top-experts-raise-questions-regarding-legal-basis-of-zawahiri-strike; C. Todd Lopez, *AC-130 Strikes Iranian-Backed Militants Following Missile Attack*, DEP'T OF DEFENSE (Nov. 21, 2021), https://www.defense.gov/News/News-Stories/Article/Article/3596477/ac-130-strikes-iranian-backed-militants-following-missile-attack.

[64] *Top Experts Raise Questions*, *supra* note 50; Craig Martin, *What Was the International Legal Basis for the Strike on al-Zawahiri?*, JUST SECURITY (Aug. 9, 2022), https://www.justsecurity.org/82605/what-was-the-international-legal-basis-for-the-strike-on-al-zawahiri.

[65] One of the issues with Article 51 is that it is a tool that can be leveraged to justify over-broad invocations of self-defense under international law. *See, e.g.*, Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It*, 4 REGENT J. INT'L L. 149 , 149 (2006). In fact, "the United States has reflexively relied on 'collective self-defense' in an array of circumstances that similarly push far beyond the historic boundaries of Article 51." Oona A. Hathaway, *How the Expansion of "Self-Defense" Has Undermined Constraints on the Use of Force*, JUST SECURITY, (Sept. 18, 2023), https://www.justsecurity.org/88346/the-expansion-of-self-defense; *see also* Jack Goldsmith, *Is the U.N. Charter Law?*, LAWFARE (Apr. 16, 2018), https://www.lawfaremedia.org/article/un-charter-law (noting that Article 51 has come "to be seen as permitting self-defensive actions by states in (various modes of) *anticipation* of armed attacks").

[66] Security Council Report, *In Hindsight: The Increasing Use of Article 51 of the UN Charter and the Security Council*, UNITED NATIONS (Sept. 30, 2025), https://www.securitycouncilreport.org/monthly-forecast/2025-10/in-hindsight-the-increasing-use-of-article-51-of-the-un-charter-and-the-security-council.php. Historically, "member states would sometimes request a meeting so they could provide an oral report regarding action taken in self-defence." *Id.*; *see also A Historical Overview of Reporting Under Article 51 on Actions Taken in Self-Defence (With Table)*, (Mar. 1, 2021), https://www.scprocedure.org/chapter-7-section-12b. Others have noted that "nothing in Article 51 requires a state's report to be written or explicitly styled as pursuant to Article 51, and it has been at least suggested that oral statements might satisfy the requirement." Alexandra H. Perina, *Black Holes and Open Secrets: The Impact of Covert Action on International Law*, 53 COLUM. J. OF TRANSNAT'L L. 507, 523 (2015).

providing legal justifications for their actions.[67] Even though this risks the counter-productive effect of justifying illegal uses of force (since there is no mechanism to penalize the Executive Branch for illegitimate reasoning), it is still preferable that the Executive Branch attempt to provide an explanation than not provide an explanation at all. If there is no explanation, then legal experts and the public do not have a basis on which to refute the Executive Branch's justification for its action and engage in discourse about the military action and its legality—they are reduced to hypothesizing or speculating.

It is most preferable that the Executive Branch act legally in the first instance as well as provide a justification for its action. A secondary preference might be that the Executive Branch act legally even if it does not provide a justification.[68] If we are in an altogether different scenario, in which the Executive Branch does *not* act legally, do we prefer that they provide a justification, or not, of their action? That is the question that this Essay wrestles with.

If we assume that we cannot prevent the Executive Branch's illegal action from occurring—the ideal scenario—then we must choose between two worse options: the Executive Branch acts illegally and provides a justification, and the Executive Branch acts illegally and provides no justification. This Essay argues that providing a justification is the better option.

This is because regardless of whether the Executive Branch provides an explanation for its action, the *existence* of the action "risk[s] the perception that new customary international law is being created," even though it is true that "[c]ustomary international law cannot overcome the U.N. Charter's text."[69] Given the risk of states perceiving that new customary international law is being developed, it is better that countries—including the United States—provide contestable explanations, rather than simply creating a record of unexplained and problematic behavior that potentially shapes other states' behavior.[70]

So, short of (actually and practically) abolishing the impermissible use of force, at least the Executive Branch can be held accountable, even if the justification risks

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[67] The United Nations itself recognizes the value of these public letters. "When detailed information is reported, Article 51 reports provide a means for Council members and the wider membership to evaluate and respond to claims that a member state is acting in self-defence. Together with the Article 51 report itself, these responses can be analysed and documented by academics, whose work can serve as a subsidiary means for assessing the scope of Article 51 in accordance with Article 38 of the ICJ statute." Security Council Report, *In Hindsight: The Increasing Use of Article 51 of the UN Charter and the Security Council*, UNITED NATIONS (Sept. 30, 2025), https://www.securitycouncilreport.org/monthly-forecast/2025-10/in-hindsight-the-increasing-use-of-article-51-of-the-un-charter-and-the-security-council.php.

[68] For example, if a country does not provide "written notification contemporaneous with the initiation of measures," that may undermine but does not foreclose invocation of self-defense. [68] Alexandra H. Perina, *Black Holes and Open Secrets: The Impact of Covert Action on International Law*, 53 COLUM. J. OF TRANSNAT'L L. 507, 524 (2015); *see also generally* Ashley S. Deeks, *The Substance of Secret Agreements and the Role of Government Lawyers*, 111 AJIL UNBOUND 474 (2018); Ashley S. Deeks, *A (Qualified) Defense of Secret Agreements*, 49 ARIZ. ST. L.J. 1 (2017).

[69] Madison Rinder, *The Illegality of Secret Consensual Military Interventions*, YALE J. OF INT'L L. 134, 151 & n.81(2026).

[70] *See, e.g.*, *Our Experts Decode The Putin Speech That Launched Russia's Invasion Of Ukraine*, ATLANTIC COUNCIL, (Feb. 22, 2023), https://www.atlanticcouncil.org/blogs/new-atlanticist/markup/putin-speech-ukraine-war.

perception that there is a legitimate legal rationale for illegal military action.[71] By putting an explanation out into the public arena, the Executive Branch opens itself up to democratically necessary public scrutiny. The provision of *an explanation* has never shielded the Executive Branch from criticism.[72] If the president never submits an Article 51 letter, he never provides a justification for his use of military force. This undermines the ability of scholars and practitioners to critique the Executive Branch *on its own terms*. Critics can posit what the various justifications might be, and how they would respond to the impermissible reliance on those justifications. But the Executive Branch can evade any real accountability by denying that some or all of those justifications were the real justifications, and thus limiting grounded and substantive critique of its actions.

Only a month after the June strikes on Iran, Justice Elena Kagan criticized the Supreme Court for not providing an explanation for actions that the Justices are taking "on an emergency basis."[73] Not only does the lack of reasoning hide the Court's decision-making from the public but it "make[s] it more difficult for lower court judges to understand how to apply the decisions."[74] Consistent decision-making by the Judiciary has the potential to break down when lower courts cannot understand why and how appellate courts want them to interpret the law in a specific way.

While the Executive Branch is not structured like the Judiciary with three "levels" of executive officials, the Executive Branch is still generally hierarchically structured. When the president and high-level officials in the Executive Branch provide written justification and articulate legal reasons for their actions, they explicitly and implicitly message to lower-level officials in the Executive Branch what legal rationales should be guiding their decisions. By publicly messaging that U.S. military action is in self-defense, presidential administrations are upholding their duties to the public to explain their actions while instructing and guiding their departments to comply with legal norms and rules when acting.

What is unique about presidential administrations' approach to authoring Article 51 letters, is that they are inviting the United Nations, other international bodies, and foreign countries to *also* comment on U.S. military actions abroad. Beyond supporting rule-of-law norms domestically and validating international law as a body of law, they are inviting the *global* public to hold them accountable. They are suggesting that the United States is actually accountable to the international legal system.

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[71] Ashley Deeks has explained various "virtues" of "public reason-giving:" "improving decisional quality," "promoting government efficiency," "constraining decision-makers," "strengthening decision-makers' legitimacy," and "fostering accountability." Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 626-33 (2020).

[72] *See, e.g.*, Brian Finucane, Assessing the U.S. Article 51 Letter for the Attack on Iran: Legal Lipstick on the Use of Force Pig, JUST SECURITY (July 3, 2025), https://www.justsecurity.org/116153/article-51-united-states-letter-iran-nuclear; Security Council Report, *In Hindsight: The Increasing Use of Article 51 of the UN Charter and the Security Council*, UNITED NATIONS (Sept. 30, 2025), https://www.securitycouncilreport.org/monthly-forecast/2025-10/in-hindsight-the-increasing-use-of-article-51-of-the-un-charter-and-the-security-council.php

[73] Abbie VanSickle, *Justice Kagan Urges Supreme Court to Explain Itself in Emergency Decisions*, NEW YORK TIMES (July 24, 2025), https://www.nytimes.com/2025/07/24/us/justice-kagan-supreme-court-emergency-decisions.html.

[74] *Id.*

American citizens have just as much access to these legal justifications as do global citizens. These Article 51 letters can play a dual role. They implicitly provide domestic legal legitimacy to U.S. presidents' actions.[75] The Constitution and the War Powers Resolution do not mention self-defense,[76] though many believe that the president does have the authority to "repel sudden attacks without first going to Congress."[77] By articulating U.S. military action as self-defense, the President is providing a justification that is intuitive for the American people to understand and support.[78]

Some may critique whether it is truly a positive development for international law—and domestic U.S. law—that presidents are relying on Article 51 justifications and letters to reinforce their military actions against U.S. adversaries. Do these letters really serve as a *constraint* on American presidents' actions, or are they justifying military activities inappropriately? If the Executive Branch provides an Article 51 explanation, that could be seen as stretching Article 51 to cover virtually all uses of international force so that the Article 2(4) general prohibition on force loses all meaning.[79] Do the justifications themselves pass muster—are U.S. strikes truly in self-defense?

Even if these questions are answered unfavorably for the president, it is notable that U.S. presidents are not compelled or required to provide these justifications. In fact, "the relevant practice has been notably inconsistent" as "[m]ember states do not always report action taken in the purported exercise of their right to self-defence, and when they do, the content of the reports can vary widely."[80] International law simply cannot be as robustly enforced as domestic American law—there is no global police force and the

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[75] *Cf. generally*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (evaluating the role of the AUMF in the War on Terrorism).

[76] U.S. CONST.; War Powers Resolution, YALE L. SCH.: LILLIAN GOLDMAN LAW LIBRARY, https://avalon.law.yale.edu/20th_century/warpower.asp.

[77] Heather Brandon-Smith, *The President's War Powers: Article II War Powers and the Authorizations for Use of Military Force*, FRIENDS COMM. ON NAT'L LEG. (Apr. 4, 2024), https://www.fcnl.org/warpowers#:~:text=To%20defend%20against%20a%20sudden,actual%20or%20imminent%20armed%20attack; The Amy Warwick, 67 U.S. 635, 648 (1862) ("The principle of self-defense is asserted; and all power is claimed for the President. This is to assert that the Constitution contemplated and tacitly provided that the President should be dictator."); Savage, *supra* note 7; Finucane, *supra* note 7.

[78] However, it is questionable how many individuals are aware of the Article 51 justifications for these U.S. military activities.

[79] And these problematic legal justifications could shape other states' understanding of what is permissible, making the use of force more likely. Customary international law develops in the following way: "two elements are required in sequence: a practice that is general, widespread, representative, consistent, and virtually uniform, followed by a general acknowledgment that such practice constitutes a legal obligation (opinio juris)." BRUCE CRONIN, PURGING THE ODIOUS SCROUGE OF ATROCITIES: THE LIMITS OF CONSENT IN INTERNATIONAL LAW 11 (2023). If "no consent" military interventions become "widespread" and "consistent," and states describe their interventions as "legal," this would not only constitute a breach of Article 2(4). This could also risk the perception that new customary international law is being created. This perception would erode the effectiveness of the U.N. Charter's prohibition on the use of force and could spur or encourage more illegal "no consent" military interventions.

[80] Security Council Report, *In Hindsight: The Increasing Use of Article 51 of the UN Charter and the Security Council*, UNITED NATIONS (Sept. 30, 2025), https://www.securitycouncilreport.org/monthly-forecast/2025-10/in-hindsight-the-increasing-use-of-article-51-of-the-un-charter-and-the-security-council.php.

International Court of Justice and International Criminal Court have limited jurisdiction.[81] The U.S. president is highly unlikely to be impeached or prosecuted or risk not being reelected because he has not provided an *international-law* justification for his military actions. So, when the president provides these explanations, he is implicitly acknowledging *additional* limits on their authority.

When the Executive Branch provides a voluntary legal explanation—on the basis of international law—for taking lethal military action, presidents are acknowledging that there are legal constraints on the use of military force, no matter how robust, and that they cannot act without any responsibility to other institutions. While perhaps the Executive Branch is unconstrained by Congress[82] or the Judiciary in engaging in foreign affairs, they are still touting their compliance with the international legal system. By *recognizing* that they are required to explain themselves to the international legal system, they give that system the chance, the opportunity, to serve as a check on the Executive.

Even those skeptical of whether the Trump administration—and former U.S. administrations—are simply trying to legitimate illegitimate military activity with token references to international law, such views rest on an unshakeable premise: President Trump and other administrations believe international law to be legitimating in the first place. If they did not believe it to be so, there is no reason why the United States, a global power, would submit an Article 51 letter when they can simply justify their actions to the American people and submit a report to Congress.

V. Conclusion

The 21st century has witnessed expansive Executive Branch power in foreign relations and national security coupled with weak and lackluster congressional and judicial constraints on the Executive Branch.[83] Some have highlighted the "breakdown of

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[81] *See* Juliette McIntyre, *How Does the International Court of Justice Differ from the International Criminal Court*, PURSUIT (Jan. 8, 2024), https://pursuit.unimelb.edu.au/articles/how-does-the-international-court-of-justice-differ-from-the-international-criminal-court.

[82] However, it is notable that even on the domestic front, the Trump administration letter regarding the recent Iranian strikes "suggested that he was closely informed by past executive practice." Jeannie Suk Gersen, *Trump, Congress, and the War Powers Resolution*, NEW YORKER (June 28, 2025), https://www.newyorker.com/magazine/2025/07/07/trump-congress-and-the-war-powers-resolution.

[83] *See, e.g.*, HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 2 (2024); U.S. CAPTURE OF VENEZUELA'S NICOLÁS MADURO: CONSIDERATIONS FOR CONGRESS, CONG. RSCH. SERV., IN12618 (Jan. 12, 2026); Jason Breslow, *Senate Republicans Block Venezuela War Powers Resolution*, NAT'L PUB. RADIO (Jan. 14, 2026), https://www.npr.org/2026/01/14/g-s1-106093/senate-war-powers-venezuela; H.*Con.Res.38 - Directing the President pursuant to section 5(c) of the War Powers Resolution to remove United States Armed Forces from unauthorized hostilities in the Islamic Republic of Iran*, CONGRESS.GOV, https://www.congress.gov/bill/119th-congress/house-concurrent-resolution/38; *S.J.Res.59 - A joint resolution to direct the removal of United States Armed Forces from hostilities against the Islamic Republic of Iran that have not been authorized by Congress*, CONGRESS.GOV, https://www.congress.gov/bill/119th-congress/senate-joint-resolution/59; *see also* Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1682 (2017) (highlighting "two related problems of our contemporary governmental landscape: presidential overreaching and legislative inaction").

international law" and general concerns with its enforceability. [84] In spite of all of this, U.S. presidents who have been in power since at least 2008, across the political spectrum, *continue* to cite to Article 51 to justify their military actions abroad. These justifications may be insignificant or inadequate (or both), suggesting that they are just "icing" after the "cake" has "already" been "frosted."[85] And yet recent concerns with the Supreme Court demonstrates that by simply providing a rationale and articulating that rationale in international-law terms, the Trump administration and former presidential administrations can support rule-of-law norms. The proactive and voluntary nature of U.S. presidents providing Article 51 letters for military attacks abroad suggests that the Executive Branch does not conceive of its authority as entirely unbounded by the law.

Perhaps over time, through the continued promulgation of Article 51 letters written by U.S. presidents—and other countries—sovereign nations will develop a robust body of "letter-law." "Letter law" would essentially be "caselaw" in which the primary form of material would be Article 51 letters instead of cases. This "letter law" in which U.S. presidents and others cite to Article 51 to justify attacks will help the United States domestically on the one hand, and international institutions and foreign sovereigns on the other hand, develop a sense of what is a legitimate Article 51 justification. It may become clear which Article 51 letters pass muster and which do not, enabling international institutions in the future to rely on "letter law" to hold countries—including the United States—accountable, and serve as a real check on the Executive Branch's military actions abroad. This would allow for Article 51 to serve as a true, not just a potential, check on Executive Branch uses of military force.

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[84] Oona A. Hathaway, *War Unbound*, FOREIGN AFFAIRS (Apr. 23, 2024), https://www.foreignaffairs.com/ukraine/war-unbound-gaza-hathaway; *see generally* Richard A. Martin, *Problems in International Law Enforcement*, 14 FORDHAM INT'L L.J. 519 (1990).

[85] *Cf.* Van Buren v. United States, 593 U.S. 374, 394 (2021).

Reaction Paper to the International Law Commissions' Work on the Settlement of Disputes to Which International Organizations Are Parties

Marco Antonio Castro González[a]

ABSTRACT

International organizations (IOs) have become increasingly significant actors in international relations and are now engaged in a wide range of activities, giving rise to potential disputes. The International Law Commission (ILC) is currently examining the settlement of disputes to which IOs are parties, and the Special Rapporteur has issued three reports addressing different categories of disputes. This paper reviews the ILC's work to date, with particular attention to disputes involving private parties, where IOs' jurisdictional immunities may conflict with access-to-justice guarantees. In this regard, the Special Rapporteur's third report proposes Draft Guidelines 7 to 11, which specifically address the settlement of disputes between IOs and private parties. This article argues for a balanced immunity-access approach where immunity is respected, but only where IOs provide an independent, impartial, reasoned, and binding alternative forum. Where no such forum exists, domestic courts may exercise jurisdiction to avoid denial of justice. This article proposes model revisions to the Draft Guidelines and grounds its approach in the ECtHR proportionality analysis (Waite & Kennedy), post-2009 UN internal justice reforms, and comparative jurisprudence from a range of States.

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I. Introduction

a. Relevance of International Organizations in the International Legal System

International organizations (IOs) possess a distinct legal personality,[1] separate from their members,[2] with their own governance structure and organs capable of expressing the organization's will.[3] As such, IOs participate in the international community, exercising rights and assuming obligations independent of their members.

As noted by legal scholar Carla Ferstman, "the ability for international organizations to exist under international law, to bear international obligations, and responsibility for breaches is a function of international legal personality (*persona jure gentium*)."[4] This distinct legal personality (*volonté distincte*) enables IOs to enter into legal relationships with a broad range of counterparties. The International Court of Justice (ICJ) recognized this principle since its landmark *Reparation for Injuries Suffered in the Service of the United Nations* advisory opinion (1949), stating that the United Nations "was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane."[5]

Over time, IOs have become increasingly significant actors in international relations due to two key factors: their proliferation[6] and their expanding roles. First, the number of IOs has grown to over 400,[7] which means that their number is nearly double that of sovereign States. Second, while IOs historically operated in limited spheres, their roles and responsibilities have expanded substantially over time. IOs now actively engage in a wide range of activities such as economic governance, humanitarian aid, security, and peacekeeping, exerting direct influence and impact on many areas.[8] As the International Law Commission ("ILC" or "the Commission") has highlighted, "given the number of existing international organizations and their ever-increasing functions,"[9] legal issues involving IOs have become particularly relevant.

IOs' expanded roles have led to increasing interactions—and potential disputes—with a variety of actors, including States, other IOs, and private parties. The legal framework governing these interactions vary. Relationships with States or other IOs have generally been

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[1] Most IO´s constituent instruments establish their independent legal personality.

[2] ILC, First Report on the Settlement of International Disputes to which International Organizations are Parties, UN. Doc. A/CN.4/756, by August Reinisch, Special Rapporteur (hereinafter First Report), at 29, para. 49.

[3] José E. Alvarez, International Organizations as Law-makers (Oxford, Oxford University Press, 2005), at 6.

[4] Carla Ferstman, International Organizations and the Fight for Accountability (Oxford, Oxford University Press, 2017), at 13.

[5] International Court of Justice, Reparation for Injuries Suffered in the Service of the United Nations (1949) Rep, 174, 179.

[6] Catherine Brölmann and Janne Nijman, Legal personality as a fundamental concept of international law, Amsterdam Law School Legal Studies Research Paper No. 2016-43, at. 12.

[7] Antonio Remiro Brotóns, Derecho Internacional, Curso General. Tirant Lo Blanch (2010), at 146.

[8] Carla Ferstman, *supra* note 4, at 1.

[9] ILC, Draft Articles on the Responsibility of International Organizations with commentaries, Report of the International Law Commission on the work of its Sixty-Third session, UN doc. A/66/10, at 46, para. 1.

governed by international law,[10] while those involving private parties, such as employees, contractors and suppliers, are most often—but not exclusively—subject to domestic or private law.[11] Moreover, IO´s expanded roles impact private parties´ rights in ways that raise complex legal considerations. Although States are the only sovereign subjects of international law, IOs are increasingly assuming State-like or quasi-State functions. As Ferstman notes, IOs now "exercise control over individuals and societies, particularly in contexts of conflicts and transitions."[12] Similarly, Rishi Gulati observes that "IOs increasingly exercise administrative power over private persons . . . impacting their rights."[13] IOs' involvement in international activities such as sanctions, humanitarian aid, and development, has even led to concerns regarding human rights, further underscoring the need for effective dispute settlement mechanisms where IOs are involved.[14]

In this context, disputes to which IOs are parties have become a relevant issue with consequences for counterparties that involve other IOs, States and private parties, both under international and domestic law. The central question, therefore, is: what does international law provide regarding settlement of disputes to which IOs are parties?

The ILC has decided to address the issue by developing *Draft Guidelines on the Settlement of Disputes to which International Organizations are Parties*,[15] with the purpose of determining the availability and adequacy of the means for the settlement of disputes.[16] Importantly, the ILC's work aims to cover all kinds of disputes to which IOs are parties.[17] Therefore, this paper examines the entire body of work to date, placing particular focus on disputes involving private parties, since these disputes, on the one hand, appear more frequently in practice and, on the other hand, encompass a complex tension between IOs immunities *vis-à-vis* individuals' access to justice. Although questions of IO's responsibility and immunity are not central to this paper, these topics will be briefly referenced due to their relevance when examining private disputes.

b. Significance of Dispute Settlement Mechanisms in the International Legal System

Dispute settlement mechanisms are fundamental to upholding international responsibility, ensuring accountability, and resolving legal conflicts peacefully. Given

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[10] ILC, Second Report on the Settlement of Disputes to which International Organizations are Parties, UN. Doc. A/CN.4/766, by August Reinisch, Special Rapporteur, (hereinafter Second Report) at 6, para.13

[11] *Id*. at 7, paras.17-18

[12] Carla Ferstman, *supra* note 4, at 1.

[13] Rishi Gulati, Access to Justice and International Organizations, Coordinating Jurisdiction between the National and Institutional Legal Orders, (Cambridge University Press, 2022) at 1.

[14] Carla Ferstman, *supra* note 4, at 1.

[15] The work of the ILC on the topic, as well as this paper, focus on intergovernmental organizations, which have been defined by the ILC, in article (a) of the Articles on the responsibility of international organizations as: "an organization established by treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities". For the draft guidelines currently under discussion, as will be described later on this paper, although building upon the ARIO definition, incorporate some minor adjustments.

[16] ILC, Report on the Wok of Its Seventy-Fourth Session, UN Doc. A/78/10, at 40, para. 9.

[17] *Id*. at 39, para. 7.

contemporary challenges to international legal order, effective dispute resolution is essential for maintaining stability and reinforcing legal protections. As a consequence, the ILC has a crucial opportunity in advancing these principles by promoting legal certainty and strengthening frameworks for the peaceful settlement of disputes.

In the context of IOs' responsibility, some concerns arise regarding the lack of oversight over international bureaucracies and potential gaps in accountability. Therefore, addressing the issue of dispute settlement is crucial to strengthening the role of IOs within both the international community and domestic jurisdictions, ensuring fair and effective means of legal protection within the international legal framework.

The ILC's Special Rapporteur appointed to the topic, in his first report, highlighted that while Article 33 of the United Nations (UN) Charter encompasses a treaty-based obligation on Member States to pursue the pacific settlement of disputes through various means, including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, regional agencies or any other peaceful mean, these methods "are illustrative of a wider understanding of forms of dispute settlement generally available in international law."[18] Such dispute settlement methods "are regarded as the options available to dispute settlement in general."[19]

Indeed, Article 33 is now deemed to be part of customary international law. The ICJ confirmed that "the principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means, enshrined in Article 33 of the UN Charter, which also indicates a number of peaceful means which are available . . . has also the status of customary international law."[20] The ICJ further emphasized that there is "a principle of customary international law that prescribes the peaceful settlement of international disputes."[21] In this context, the Special Rapporteur has relied on the dispute settlement methods set out in Article 33 to guide the resolution of conflicts to which IOs are parties.

Despite its customary international law character, it should be noted that the provisions of the UN Charter, including Article 33, were originally conceived with sovereign States as their subjects. IOs, as distinct subjects of international law, do not fall within the intended scope of those norms. Accordingly, the automatic extension of these means for the settlement of disputes to IOs is not devoid of conceptual and practical challenges.

The Special Rapporteur argues "that the methods of dispute settlement mentioned therein—Article 33—are also available to international organizations was taken for granted by the ICJ in the *Reparations* case when it discussed the 'customary methods recognized by international law for the establishment, the presentation and settlement of claims' available to the UN."[22] While the ICJ did not explicitly transpose the means listed in Article 33 to IOS, it nevertheless stated in the *Reparations* case that "among these—customary —methods may be mentioned protest, request for an enquiry, negotiation, and frequent submission to an

[18] First Report, *supra* note 2, at 39, para 73.
[19] *Id*.
[20] International Court of Justice, Case concerning military and paramilitary activities in and against Nicaragua. (1986) at 145, para. 290.
[21] *Id*. at para. 291.
[22] First report, *supra* note 2.

arbitral tribunal or to the Court."[23] Notwithstanding this statement, the ICJ, although the principal judicial organ of the UN,[24] remains, in the exercise of its contentious jurisdiction, accessible only to States and not to IOs.[25] While the ICJ may issue advisory opinions concerning IOs, the ICJ´s lack of jurisdiction over contentious cases involving IOs limits their recourse to judicial settlement in the international. However, the fact that IOs are not entitled under the ICJ Statute to appear as parties in contentious proceedings does not preclude their participation in other international tribunals. This is the case, for example, with the International Tribunal for the Law of the Sea (ITLOS). Article 20 of the ITLOS Statute provides that "the Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."[26] By way of illustration, the European Community has appeared as a party in proceedings before ITLOS.[27]

Overall, the broad formulation of dispute settlement methods in Article 33 of the UN Charter accommodates different types of IOs. As reflected in the responses of States and IOs to the Special Rapporteur's questionnaire, the mechanism most commonly used by IOs closely align with those listed in Article 33[28] and are typically invoked pursuant to treaty provisions or institutional rules. This convergence in practice supports the Special Rapporteur's view that Article 33 may be applied analogously to both States and IOs. Extending its catalogue to IOs therefore promotes coherence and stability of the international legal order and reinforces the availability of rules-based procedures for the resolution of disputes.

II. Filling a Gap in the International Legal System With Regard to Disputes to Which International Organizations Are Parties

a. Previous Work of the ILC on IOs

IOs have been the subject of study of scholars as well as the ILC. In 1962, the ILC placed on its agenda the topic of relations between States and intergovernmental organizations, concentrating in particular on "the status, privileges and immunities of representatives of States to international organizations."[29] This work culminated in 1971 with the adoption of eighty-two draft articles, accompanied by commentaries, under the title *Draft*

[23] International Court of Justice, Reparation for Injuries Suffered in the Service of the United Nations (1949) Rep, 174, 177

[24] United Nations Charter, Article 92.

[25] International Court of Justice Statute, art. 34.

[26] Statute of the International Tribunal for the Law of the Sea, Article 20.

[27] *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union).*

[28] This is the accumulated written responses provided in writing by: Austria, Belgium, Chile, Cote d'Ivoire, Jordan, the Kingdom of the Netherlands, Morocco, Oman, Switzerland, United Kingdom of Great Britain and Northern Ireland: ILC, Settlement of disputes to which international organizations are parties, Memorandum by the Secretariat, UN Doc. A/CN.4/764.

[29] ILC, Summaries of the Work of the International Law Commission, Representation of States in their relations with international organizations (las visited: April 24, 2025): https://legal.un.org/ilc/summaries/5_1.shtml

articles on the representation of States in their relations with international organizations. On the basis of this work, the United Nations General Assembly (UNGA) convened the UN Conference on the Representation of States in their Relations with International Organizations in 1975, at which a convention on the subject was adopted, although it is still not in force.

In 1976, the ILC initiated work on the status, privileges and immunities of international organizations, their officials, experts, and other persons engaged in their activities who are not representatives of States. In 1992, however, the Commission decided to suspend consideration of the topic, arguing the lack of ratifications of the *Convention on the Representation of States in their Relations with International Organizations of a Universal Character*.[30] The ILC further observed that the status, privileges, and immunities were already largely regulated by existing legal instruments, noting in particular that, "for the UN and affiliated agencies, immunities are set out in the UN Charter, the CPIUN and similar treaties for the affiliated agencies."[31] By contrast, the immunities of other IOs are generally governed by their "constituent instruments, multilateral privileges and immunities instruments or bilateral headquarters or seat agreements, and in some instances, national legislation."[32] Therefore, both the ILC and the General Assembly concluded that there was no need to pursue the topic at that time.[33]

In 2002, the ILC decided "to pursue its work for the codification and the progressive development of the law of international responsibility"[34] of IOs. The ILC adopted in 2011, 67 *Draft Articles on the Responsibility of International Organizations* (ARIO), with commentaries. The ILC referred them to the UNGA recommending it to (i) take note of the draft articles in a resolution, and to annex them to the resolution; and (ii) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles."[35] That same year, the UNGA took note of the articles and annexed the text to the resolution. Since then, the UNGA has continued to consider the form that might be given to the draft articles. To date, no definite agreement has been reached on the treatment of the draft articles.

In this regard, Carla Ferstman has observed that, in developing the ARIO, "the Articles on the Responsibility of States (ARS) formed the basis for the text, with modifications introduced as required. Whilst this sped up the drafting, the method has also been criticized for not taking sufficient account of the differences between States and IOs, and of the diversity among different IOs."[36]

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[30] UNGA, "Report of the International Law Commission on the Work of its 44th Session (1992) GA res 47/33, UN Doc A/RES/47/33, para 7.

[31] Carla Ferstman, *supra* note 4, at 137

[32] ILC, Third Report on the Settlement of Disputes to which International Organizations are Parties, UN Doc. A/CN.4/782, by August Reinisch, Special Rapporteur (hereinafter Third Report), at 43, para. 114.

[33] ILC, Summaries of the Work of the International Law Commission, status, privileges and immunities of international organizations, their officials, experts, etc. (las visited: April 24, 2025): https://legal.un.org/ilc/summaries/5_2.shtml

[34] ILC, Draft Articles on the Responsibility of International Organizations with commentaries, Report of the International Law Commission on the work of its Sixty-Third session, UN doc. A/66/10, at 46, para. 1.

[35] ILC, Summaries of the Work of the International Law Commission, Responsibility of international organizations, (las visited: April 4, 2025): https://legal.un.org/ilc/summaries/9_11.shtml

[36] Carla Ferstman, *supra* note 4, at 9.

Similarly, as noted by Christiane Ahlborn, "although the reliance on the ASR allowed for the expeditious completion of the ARIO, it has nonetheless also resulted in substantial criticism by IOs, States, and scholars regarding the 'copy-paste approach' employed by the ILC."[37]

States in the Sixth Committee also expressed some concerns regarding the ARIO. For example, Austria observed that "as work on this topic has progressed, proposals for articles have increasingly raised doubts as to whether the principles of State responsibility apply to organizations without considerable further qualification."[38] Germany noted that "the law governing the responsibility of international organizations appears to be much harder to pinpoint than the one for States, as international organizations provide less 'general' practice, particularly on account of their limited and very different competencies."[39] Mexico also identified that "in some draft articles, however, it would appear that the particular characteristics of international organizations and the way in which they differ from States deserve greater attention, or rather, greater clarity."[40] The Netherlands, while supporting the work of the ILC on this topic, also noted that even though there are hundreds of IOs, only some twenty of them send their comments, limiting the access to actual practice.[41] Portugal argued that "the draft articles continue to follow too closely those of State responsibility, in a way that may cause the work of the Commission to deviate from what should be its main objective: to deal with the specific problems that the issue of the responsibility of international organizations entails."[42] The Republic of Korea, identified that "it is difficult to understand some of the draft articles, as they are based on the scarce practice of international organizations."[43]

Some IOs[44] expressed similar concerns with regard to the ARIO, in particular, "the excessive alignment of the draft articles with the articles on responsibility of States."[45] They further expressed concern because "the draft articles are based on a very limited body of

[37] Christiane Ahlborn, The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations -an appraisal of the copy-paste approach" (2012) ACIL Research Paper No 2012-14 (SHARES Series). At 1.

[38] ILC, Responsibility of International Organizations, comments and observations received from Governments and International Organizations, UN doc. A/CN.4/636, at 107, para.1

[39] *Id*. at 108

[40] *Id*. at 108, para. 4.

[41] *Id*. at 109, para 1.

[42] *Id*. at 110, para 1.

[43] *Id*.

[44] Comprehensive Nuclear-Test-Ban Treaty Organization, International Civil Aviation Organization, International fund for Agricultural development, International Labor Organization, International Maritime Organization, International Organization for Migration, International Telecommunication Union, United Nations Educational, Scientific and Cultural Organization, United Nations, World Trade Organization, World Intellectual Property Organization, World Meteorological Organization.

[45] ILC, Responsibility of International Organizations, comments and observations received from internation al organizations, UN doc. A/CN.4/637 at 137. Other concerns expressed: "the uncertainty as to the scope of the draft articles, in particular with regard to the responsibility of States vis-à-vis that of international organizations; the ambiguous interplay of the *lex specialis* principle with the role devoted to the "rules of the organization" and the appearance of not having sufficiently taken into account the different types of existing international organizations with very diverse structures, functions and mandates; the limited attention paid to the special situation of international organizations in relation to the obligation to compensate; and the solutions proposed in respect of ultra vires acts of an agent or organ of an international organization." *Id*.

practice . . .; they take limited account of the special situation of international organizations compared with that of States in regard to responsibility under international law in general and, more particularly, to reparation,"[46] stating that one viable approach to the draft articles would be to treat them as standard clauses and annexes to other instruments.[47] Other organizations[48] further emphasized that the draft articles rely excessively on the articles on responsibility of States, and do not reflect the special characteristics[49] and specificities of the wide range of IOs.[50]

As is evident, significant concerns have been raised regarding the ARIO. Many IOs consider that the draft articles fail to reflect the special characteristics of different types of IOs and therefore result in a set of rules not applicable in practice.

b. Introducing the Topic into the ILC´s Current Work

While IOs have been examined from various perspectives, with varying degrees of success, the settlement of disputes to which IOs are parties has received only limited attention. For this reason, in 2016 Sir Michael Wood proposed the topic *Settlement of International Disputes to Which International Organizations are Parties*, which was subsequently incorporated into the ILC´s programme of work in 2022.

As Sir Michael Wood noted in his proposal, "already in 2002, the Commission's Working Group on the responsibility of international organizations had mentioned 'the widely perceived need to improve methods for settling . . . disputes concerning the responsibility of international organizations.'"[51] The ILC further observed in the ARIO that there has been a "limited use of procedures for third-party settlement of disputes to which international organizations are parties."[52]

As a consequence, the topic of *Settlement of International Disputes to Which International Organizations are Parties*, as initially proposed in 2016, addresses a systemic gap in the international legal order. As will be explained later, following the debate at its seventy-fourth session in 2023,[53] the ILC revised the original formulation of the topic to clarify that it encompasses all types of disputes involving IOs,[54] including those of a private law character, which constitute a significant portion of such disputes.[55] Accordingly, the

[46] *Id.*
[47] *Id.*
[48] European Union, North Atlantic Treaty Organization, International Institute for the Unification of Private Law, Organization for Economic Co-operation and Development, International Monetary Fund, the World Bank.
[49] The principle of specialty of IOs was stated by the ICJ in its advisory opinion Legality of the Use by a State of Nuclear Weapons in Armed Conflict, where the Court considered that IOs have limited powers that derive from their constituent instruments, as opposed to the general competence possessed by States.
[50] ILC, A/CN.4/637, *supra* note 45, at 137-141.
[51] 2016 recommendation of the Working-Group on the long-term programme of work (see syllabus: A/71/10, Annex A.
[52] ILC, Draft Articles on the Responsibility of International Organizations with commentaries, Report of the International Law Commission on the work of its Sixty-Third session, UN doc. A/66/10, at 46, para. 5.
[53] Report of the International Law Commission on the work of its seventy-fourth session, Official Records of the General Assembly, Seventy-eight session, Supplement No. 10 (A/78/10)
[54] Second Report, *supra* note 10, at 3, para. 2.
[55] First Report, *supra* note 2 at 12, para. 22.

topic currently under consideration by the ILC is entitled *Settlement of Disputes to Which International Organizations are Parties*.

The ILC observed that, unlike disputes involving States, there are no well-established mechanisms for resolving disputes between IOs and other actors, including private persons. As noted above, this situation gives rise to a complex relationship between the jurisdictional immunities of IOs, on one hand, and access to justice, on the other. This legal uncertainty places increasing pressure on IOs´ immunities, as domestic courts may tend to question whether such broad immunities remain justified in the absence of adequate dispute-settlement procedures. Accordingly, the development of clear and reliable guidelines is of critical importance.

While dispute-settlement mechanisms between States and other subjects of international law are generally well established, comparable frameworks for disputes involving IOs remain underdeveloped. In this context, the topic of *Settlement of Disputes to which International Organizations are Parties* may assist in filling a systemic gap in the international legal order.

Given the mixed results of the previous ILC work on IOs, the endorsement and, if adopted, success of this topic by States and IOs remain uncertain. It should be noted, however, that the ILC´s expected output is not a binding set of draft articles or a treaty, but rather non-binding guidelines (soft-law) intended to inform practice, carrying at least the authority of Article 38(1)(d) of the ICJ Statute and benefiting from ILC´s institutional influence.[56] As the Special Rapporteur explained in his first report,

> "the diversity of IOs and the diverse legal embeddedness of their legal relationships with other entities through constituent instruments and headquarters agreements, as well as other treaty and/or contractual arrangements, implies that adopting a uniform outcome, in particular in the form of draft articles, might not be appropriate… rather, it appears that the Commission´s major contribution in this area could be to analyze the s*tatus quo* and to make careful weighted recommendations for the settlement of disputes that are apt to be taken into consideration by international organizations generally."[57]

Consistent with this approach, the ILC emphasized that the guidelines are meant "to direct States, international organizations and other users to answers that are consistent with existing rules or that seem most appropriate for contemporary practice.[58] While this approach has received support from several States in the Sixth Committee,[59] it should nevertheless be noted that some States[60] have "suggested

[56] For an insightful analysis on the authority of the work of the International Law Commission see: L.B. Fernando, Reflections of Customary International Law: The authority of codification conventions and ILD Draft Articles in International Law.

[57] First Report, *supra* note 2, at 14, para. 27.

[58] ILC, Report on the Wok of Its Seventy-Fourth Session, at 40, para. 9. UN Doc. A/78/10.

[59] Austria, Chile, Czech Republic, Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway, and Sweden), El Salvador, India, Guatemala, Romania, and Vietnam. See Second report on the settlement of disputes to which international organizations are parties, by August Reinisch, Special Rapporteur, A/CN.4/766, at 4, para 4.

[60] Belarus, Cameroon, and Russian Federation. See Second report on the settlement of disputes to which international organizations are parties, by August Reinisch, Special Rapporteur, A/CN.4/766, at 4, footnote 16.

that the Commission should assess the possibility of formulating a set of draft articles that could serve as the basis for an international treaty."[61] Although, in light of prior outcomes, such a result may be difficult to achieve, the option should not be excluded.

In any event, it is important for international law, as a comprehensive legal system, to take into account the relationships in which its subjects, such as IOs, participate, and to reflect mechanisms through which disputes involving its subjects are properly addressed, in order to implement any responsibility arising from legal breaches. Any counterparty in a relationship with an IO must have access to remedies and dispute settlement mechanisms to address a breach. At the core of the topic, the balance between upholding the privileges and immunities of international organizations, compliance with international law, and the access to justice and remedies are important elements that will enhance the international legal order, as well as the role of IOs.

III. Current Work of the International Law Commission on the Topic: Settlement of Disputes to Which International Organizations are Parties

Originally proposed in 2016 by Sir. Michael Wood, the topic of *Settlement of International Disputes to Which International Organizations are Parties* was formally added into the ILC´s current programme of work in 2022, during its seventy-third session. At that time, the Commission appointed Mr. August Reinisch as Special Rapporteur.[62]

a. First Report

The Special Rapporteur´s first report was presented to the ILC plenary during its seventy-fourth session in 2023, where the first two draft guidelines were provisionally adopted. These guidelines delineated the scope of the topic and addressed key definitional issues concerning the terms *international organizations*, *disputes* and *dispute settlement*.[63] During this session, "the Commission also decided to change the title of the topic to *Settlement of Disputes to Which International Organizations are Parties*,"[64] with the aim of capturing any type of dispute where IOs may be involved in a dispute with States, other IOs, or private parties, arising under both international and domestic law.

Draft guideline 1, as adopted by the Commission at its seventy-fourth session, establishes the scope of the draft guidelines and provides that: *"The present draft guidelines concern the settlement of disputes to which international organizations are parties."*[65]

The revised title and broadened scope of the topic appears both appropriate and practically valuable.[66] By including not only disputes of an international legal character but

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[61] United Nations General Assembly, UN doc. A/CN.4/763 at 11, para. 35.

[62] ILC, Report of the International Law Commission at its Seventy-Third Session, UN Doc. A/77/10 at 342, para. 238.

[63] Second Report, *supra* note 10, at 3, para 1.

[64] *Id*. at 3, para 2.

[65] ILC, Report of the International Law Commission, Seventy-fifth session, A/79/10, at 18, para. 62.

[66] This approach, as will be explained in part III of this paper, has been adjusted to classify disputes between IOs according to the subjects involved rather than the applicable law.

also those arising under private law, particularly those involving private parties, the ILC reflects the realities of disputes involving IOs, as disputes with private persons are more frequent in practice.[67] Notably, the change in the title was met with general approval from most States, since most delegations considered the settlement of disputes of a private law character to be of high practical importance.[68] The acceptance of the change of the title encompassed several geographic regions and legal systems.

Draft guideline 2, as adopted by the ILC at its seventy-fourth session, addresses the relevant definitions for the topic. It starts with defining international organizations. "*Use of terms. For the purposes of the present draft guidelines: (a) International organization means an entity possessing its own international legal personality, established by a treaty or other instrument governed by international law, that may include as members, in addition to States, other entities, and has at least one organ capable of expressing a will distinct from that of its members.*"[69]

The definition of "international organization", however, raised a substantial debate within the ILC. It is worth recalling that the ILC initially defined "international organizations" in 1966 in its *draft articles on the law of treaties*, where it defined them as "*intergovernmental organizations*", primarily to distinguish them from non-governmental organizations.[70] The definition was subsequently employed in various international conventions. Yet, the ILC adopted a more nuanced and comprehensive definition in the ARIO (2011). The ARIO definition provided that they are "*an organization established by treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities*."[71]

During the ILC plenary debate at its seventy-fourth session (2023), there were members that supported maintaining the ARIO definition to ensure consistency with past work.[72] On the other hand, some members advocated for a new definition with refinements to account for evolutions in the definition since 2011.[73] The ILC decided to build upon the previous work of the ARIO, rather than departing from it, incorporating minor adjustments.[74]

The main elements from the ARIO definition were maintained, namely: i) the possession of international legal personality, ii) established by a treaty or other instrument governed by international law, iii) that may include as members, in addition to States, other entities, as may be the case of the World Trade Organization and the World Meteorological

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[67] Charles Jalloh. The International Law Commission´s Seventy-Fourth (2023) Session: General Principles of Law and Other Topics. The American Journal of International Law. Vol 118:1 (2023) at 134.

[68] Second Report, *supra* note 10, at 3, para 3. Among these delegations are included: Argentina, Austria, Cameroon, Chile, Colombia, Czech republic, Estonia (aligning with the European Union), Germany, Grece, Indonesia, Iran (Islamic Republic of), Netherlands (Kingdom of the), Philippines, Poland, Portugal, Romania, Slovakia, Slovenia, Thailand, Türkiye, and the European Union. See *Id*.

[69] ILC, Report of the International Law Commission, Seventy-fifth session, A/78/10, at 37, para. 48.

[70]A/78/10 at 40, para. 3.

[71] ILC, Draft articles on the responsibility of international organizations.

[72] Charles Jalloh. The International Law Commission´s Seventy-Fourth (2023) Session: General Principles of Law and Other Topics. The American Journal of International Law. Vol 118:1 (2023) at 135.

[73] *Id*.

[74] *Id*. at 136.

Organization, who have accepted certain territories as members.[75] The current work of the ILC added that IOs must have at least one organ capable of expressing a will distinct from their members, as an explicit reference to the generally accepted view that IOs must have at least one organ in order to perform the tasks and functions entrusted to the organization, as well as making decisions.[76] The ILC concluded "that a minimum of one organ is required to distinguish an organization from a mere treaty-based form of cooperation."[77] Whether this adjustment will have a practical difference remains an open question.[78]

Several delegations[79] in the Sixth Committee were of the view that reproducing the definition "contained in article 2 of the articles on the responsibility of international organizations was more appropriate,"[80] as it brings consistency to the international legal order. Other delegations encouraged the ILC "to consider whether the establishment of an international organization typically required a form of formal adherence, acceptance or ratification of its members to the constituent instrument."[81] A number of delegations[82] raised some concerns regarding the term "*other entities*" and "underscored the need for further clarification regarding whether the term excluded private entities and encompassedorganizations that operated without standard membership arrangements, such as the International Criminal Court and other international tribunals."[83] The phrase "*other entities"* may be replaced with a more specific formulation, such as "*other subjects of international law and territories*".

Draft guideline 2 also defines "dispute" for the purposes of the draft guidelines. (*b) "Dispute" means a disagreement concerning a point of law or fact in which a claim or assertion is met with refusal or denial.* This definition is based on the "Mavrommatis Palestine Concessions judgment and is sufficiently general to encompass legal disputes arising at the international level and under national law whether of a public or private law nature."[84] This definition has been backed by the ICJ in numerous cases.[85] During the debate in the Sixth-Committee, however, States raised important questions seeking further clarification as to whether the refusal or denial should be explicit[86] and whether the factual

75 ILC, Report of the International Law Commission, Seventy-fourth session, A/78/10, at 44, para. 9.
76 *Id*. at 45, para. 13.
77 *Id*. at 46, para. 14.
78 Charles Jalloh. The International Law Commission´s Seventy-Fourth (2023) Session: General Principles of Law and Other Topics. The American Journal of International Law. Vol 118:1 (2023) at 136.
79 Brazil, Cuba Czech Republic, Greece, Russian Federation, Singapore, and Slovakia (also Colombia). See Second report on the settlement of disputes to which international organizations are parties, by August Reinisch, Special Rapporteur, A/CN.4/766, at 4, footnote 26.
80 United Nations General Assembly, A/CN.4/763 at 9, para. 27.
81 *Id*. at 9, para. 29.
82 Argentina, Estonia (aligning with European Union), Greece, Iran (Islamic Republic of), Vietnam, and European Union. See Second report on the settlement of disputes to which international organizations are parties, by August Reinisch, Special Rapporteur, A/CN.4/766, at 5, footnote 30.
83 United Nations General Assembly, A/CN.4/763 at 9, para. 30.
84 ILC, Report of the International Law Commission, Seventy-fourth session, A/78/10, at 48, para. 23.
85 *Id*. at 49, para. 24.
86 Ireland, Slovakia, and Turkiye. See second report on the settlement of disputes to which international organizations are parties, by August Reinisch, Special Rapporteur, A/CN.4/766, at 5, footnote 33.

disagreements should relate to legal obligations.[87] A refinement of these two aspects may be beneficial to enhance the definition.

The same draft guideline 2 also defines "means of dispute settlement". *(c) "Means of dispute settlement" refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes*.[88] The reference to these means of dispute settlement, based on UN Charter Article 33, was briefly explained above in this paper. In any case, this provision is definitional in nature and aims to "list the available means of dispute settlement in international and national law."[89] This reference of general means of dispute resolution, with no substantial obligation, is consistent with the definitional nature of draft guideline 2. It is also clarified that the list does not imply an order in which dispute settlement means have to be resorted.[90]

b. Second Report

The Special Rapporteur´s second report, presented in 2024, "focused on international disputes between international organizations as well as between international organizations and States or other subjects of international law arising under international law. The report did not address disputes of a non-international character, which would be covered in the third report." [91] The report encompassed draft guidelines 3, 4, 5, and 6, which were provisionally adopted by the ILC at its seventy-fifth session (2024).

Draft guideline 3 is intended to define the scope of application of this section. Draft guideline 4 builds on the practice of dispute settlement, setting out that disputes between IOs or between IOs and States should be settled in good faith and in a spirit of cooperation by the means of dispute settlement referred to in draft guideline 2. Draft guideline 5 provides for the accessibility to the means of dispute settlement, including arbitration and judicial settlement. Draft guideline 6 focuses on arbitration and judicial settlement and rule of law requirements of independence and impartiality of adjudicators and due process.

c. Third Report

The Special Rapporteur´s third report was scheduled to be presented in 2025 for discussion at the ILC seventy-sixth session. However, due to the UN´s budget constraints its discussion in plenary was postponed to 2026 at the seventy-seventh session. This report deals with "disputes between international organizations and private parties" and proposes draft guidelines 7 to 11 to be considered by the Commission. Draft guideline 7´s purpose is to define the scope of application of this section. Draft guideline 8 has an analogous content to draft guideline 4 as it builds on the practice of dispute settlement, setting out that disputes between IOs and private parties should be settled in good faith and in a spirit of cooperation

[87] Singapore. See second report on the settlement of disputes to which international organizations are parties, by August Reinisch, Special Rapporteur, A/CN.4/766, at 5, footnote 33.

[88] ILC, Report of the International Law Commission, Seventy-fifth session, A/79/10, at 18, para. 62.

[89] ILC, Report of the International Law Commission, Seventy-fourth session, A/78/10, at 50, para. 29.

[90] *Id*. at 50, para. 32.

[91] ILC, Report of the International Law Commission, Seventy-fifth session, A/79/10, at 6, para. 16,

by the means of dispute settlement referred to in draft guideline 2. Draft guideline 9 refers to IO´s jurisdictional immunity and provides that, serving the purpose of ensuring their independent functioning, jurisdictional immunity should be respected. Draft guideline 10 provides for access to justice, indicating that arbitration, judicial settlement or other reasonable alternative means of dispute settlement should be made more widely accessible. Draft guideline 11 refers to procedural fairness and human rights guarantees, contemplating that adjudicatory dispute settlement mechanisms must conform to procedural rule of law and respect human rights, including independence and impartiality of adjudicators and due process. Each of these guidelines will be analyzed throughout this paper.

The Special Rapporteur suggests that draft guidelines 7 through 11 be adopted by the Commission and presented to the Sixth Committee for comments. "The draft guidelines should be finalized in 2027 after second reading."[92]

As a general observation, it is worth noting that during the ILC´s Seventy-Fifth Session (2024), the Commission considered a memorandum prepared by the Secretariat, which compiled the written responses of States and IOs to the questionnaire prepared by the Special Rapporteur. These responses were intended to inform and provide guidance on the practice relevant to the Commission´s work on the topic. However, as of 1 September 2023, only 10 States and 17 IOs had submitted their written replies.[93] More positively, 48 delegations addressed the topic during the Sixth Committee debate on the ILC´s 2023 report.[94]

IV. Types of Disputes to Which International Organizations Are Parties

In his second report, the Special Rapporteur distinguished disputes involving IOs as international or non-international, according to the applicable law.[95]

However, as the Special Rapporteur observed, "the distinction between international and non-international disputes, although useful for analytical purposes, can pose challenges and complexities."[96] For instance, disputes involving IOs before national courts often implicate jurisdictional immunity and require the application of international law alongside private or domestic law. A dispute initially governed by domestic law -such as contractual or tort claim- may acquire an international dimension if a court denies immunity in breach of an international obligation, or conversely, if immunity is upheld and the claimant raises an international human rights claim based on access to justice. Similarly, a private-law dispute may become international through the exercise of diplomatic protection by the injured person´s State of nationality. Further complexity arises where IOs and States deliberately enter into contractual relationships governed by domestic law, as illustrated by "the contract-based arbitration between the United Nations Office for Project Services and a Peru municipality which concerned a private law contract."[97] These examples demonstrate

[92] Third Report, *supra* note 32, at 97, para. 270.

[93] ILC, Settlement of disputes to which international organizations are parties, Memorandum by the Secretariat, UN Doc. A/CN.4/764.

[94] Second Report, *supra* note 10, at 3, para 3.

[95] *Id*. at 10, para 25.

[96] *Id*. at 7, para 19.

[97] *Id*. at 7, footnote 57.

that the boundary between international and non-international disputes is often blurred and may involve an overlap of legal regimes.

It is also possible for disputes between an IO and a private person to be governed by international law. Moreover, it has been argued that international human rights and humanitarian law may apply to such relationships,[98] even in the absence of an express treaty obligation, through the operation of customary human rights standards.[99] Accordingly, relations between IOs and private parties are not necessarily governed exclusively by domestic law or law of a private character.

Correspondingly, during the Sixth Committee debate on the Commission´s report on its Seventy-Fifth session, some delegations expressly acknowledged the difficulties in distinguishing between "*international*" and "*non-international*" disputes.[100]

Accordingly, the ILC concluded that "a sharp distinction between international disputes and non-international ones is often not feasible."[101] For this reason, "in 2024, the Commission decided to distinguish between different types of disputes to which international organizations are parties according to the parties involved and not the applicable law."[102] As a result, the topic is now approached by distinguishing. On the one hand, disputes between IO´s and between IO´s and States, and, on the other hand, disputes between Io´s and private parties, including both natural and legal persons.

In his third report, the Special Rapporteur stresses that although questions of applicable law are central to the merits of dispute settlement, they fall outside the Commission´s remit and are instead for the parties or adjudicators to determine in specific cases.[103] The Commission´s focus on identifying different types of disputes involving IOs, and on assessing the availability and adequacy of dispute-settlement mechanisms, is both constructive and appropriate, particularly given the fundamental differences between the parties involved in such disputes.

a. Disputes Between IOs, and Between IOs and States: Draft Guidelines 3-6

The Special Rapporteur noted that "on the basis of the information provided by States and international organizations in response to the Special Rapporteur´s questionnaire, it appears that disputes between international organizations are rare."[104] On the other hand,

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[98] E.g. August Reinisch, "Securing the Accountability of International Organizations"; Mathew Parish, "An essay on the Accountability of International Organizations; Carla Ferstman, "International Organizations and the Fight for Accountability: The Remedies and reparations Gap; Stian Oby Johansen, "The Human Rights Accountability mechanisms of International Organizations"; Rishi Gulati, "Access to Justice and International Organizations: Coordinating Jurisdiction between the National and Institutional Legal Orders"; Kristina Daugirdas, "How and Why International Law Binds International Organizations".

[99] Third Report, *supra* note 32, at 11, para 15.

[100] Third Report, *supra* note 32, at 4, para 4. Delegations included: Guatemala and the Russian Federation. See *id*.

[101] ILC, Report of the International Law Commission, Seventy-fourth session, A/78/10, at 39, para. 7.

[102] Third Report, *supra* note 32, at 9, para 11.

[103] *Id*. at 11, para. 16.

[104] Second Report, *supra* note 10, at 6, para. 15.

"disputes between international organizations and States arise more frequently."[105] These types of disputes generally involve headquarters issues, withdrawal issues, and aspects of regional economic integration.

Draft guideline 3 specifies: *"This Part addresses disputes between international organizations as well as disputes between international organizations and States.*"

The ILC modified the original draft guideline proposed by the Special Rapporteur, which addressed "international disputes to which IOs are parties."[106] The revised formulation, as has been noted, reflects the conceptual shift toward classifying disputes according to the nature of the parties involved, rather than the distinction between international and non-international disputes. Argentina and Greece took note of the shift, while Denmark (on behalf of the Nordic countries—Denmark, Finland, Iceland, Norway, and Sweden) and Mexico expressed their explicit support for this adjustment.[107]

These types of disputes are generally (but not always) governed by international law instruments, such as treaties or other international agreements, as well as customary international law or any other applicable source governing the relationship between IOs and other subjects of international law. They are typically settled through diplomatic means and usually involve negotiation.[108]

Disputes between IOs and between IOs and States as practice dictates, are settled by means freely chosen by the parties, namely negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or resort to regional agencies. The draft guideline, however, does not address disputes between IOs and other subjects of international law.

This draft guideline also leaves open the question regarding the international legal personality of IOs vis-à-vis non-member States. The wording of the guideline may suggest no distinction between member States and non-member States. International practice, as reflected since the Reparation for Injuries Suffered in the Service of the United Nations advisory opinion of the ICJ, supports the view that IOs possess general international legal personality. However, the absence of an explicit clarification in the guideline may create a potential normative gap: it remains unclear whether, and to what extent, non-member States are bound to recognize and engage with such personality in dispute settlement contexts. This gap may have concrete implications for the availability of dispute settlement mechanisms, the recognition of standing, and the legal basis of claims in disputes involving non-member States. As such, the guideline´s current formulation risks undermining legal certainty in those situations where the legal relationship between parties is most attenuated.

Draft guideline 4 states: "*Disputes between international organizations or between international organizations and States should be settled in good faith and in a spirit of cooperation by the means of dispute settlement referred to in draft guideline 2, subparagraph (c), that may be appropriate to the circumstances and the nature of the dispute*." This guideline reflects practice on the issue and the frequent recourse to negotiation and other diplomatic means.

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[105] *Id*. at 6, para 16.
[106] *Id*. at 85, para 247.
[107] Third Report, *supra* note 32, at 5, fns. 9-10.
[108] Second report, *supra* note 10, at 12, para. 33.

Several States and entities, including the European Union, Brazil, Mexico, Estonia, Bulgaria, Sierra Leone, India, and Chile, have expressed support for draft guideline 4 and its emphasis on the principles of good faith and a spirit of cooperation.[109] India noted that these principles provide a robust foundation for addressing disputes between IOs themselves and IOs and States.[110] Chile further underscored that this provision clearly shows that good faith and a spirit of cooperation are underlying obligations that should be the guide for dispute resolution.[111]

The European Union especially commended "that the wording ensured sufficient flexibility to take into account the situation of regional integration organizations."[112] In addition, Denmark, on behalf of the Nordic countries, as well as Romania, the Philippines, and Greece also "showed appreciation for the fact that no particular means of dispute settlement were prioritized,"[113] which is consistent with the principle of the parties´ autonomy.

While draft guideline 4 has been welcomed for its flexible and cooperative tone, the broad terms of good faith and a spirit of cooperation require greater specificity or illustrative guidance to enhance their practical application. As currently formulated, these concepts remain aspirational and may offer limited assistance should a complex dispute arise. Nonetheless, the guideline does align with the general tendency of IOs and States, which tend to favor negotiation and other non-adversarial means for resolving such disputes. As the Special Rapporteur noted, "many international organizations, but also States, seem to prefer informal dispute settlement techniques, in particular negotiations, in cases of disagreement or disputes."[114]

In spite of this preference for negotiation and informal dispute settlement, the Special Rapporteur noted in his second report that "there are relatively few publicly known cases of disputes in which settlement was attempted or actually reached in this way."[115] This raises the question whether the notions of good faith and a spirit of cooperation will provide practical tools for IOs and States in resolving their disputes, and what the practical implications of these notions will be.

Moreover, draft guideline 5 recommends the use of binding mechanisms for the settlement of international disputes to which international organizations are parties, stating: "*The means of dispute settlement, including arbitration and judicial settlement, as appropriate, should be made more widely accessible for the settlement of disputes between international organizations or between international organizations and States.*" The formulation of this guideline reflects a mixture of codification and progressive development of the law. These mechanisms have been used by IOs and other subjects of international law for settling their disputes, and it seems a positive approach to recommend further use of binding mechanisms in a context of legal certainty. In the Sixth Committee, States also

[109] Third Report, *supra* note 32, at 5, fn. 11.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] *Id*. at 6, para. 5.
[114] Second Report, *supra* note 10, at 12, para. 33.
[115] *Id*.

demonstrated overall support for draft guideline 5 and its commentaries, although some expressed concern with the specific mention of judicial settlement and arbitration.[116]

Although some delegations questioned the specific mention of judicial settlement and arbitration in the Sixth Committee debate in 2024,[117] these mechanisms have been used and provide clear legal outcomes grounded in international law,[118] enhancing predictability and consistency. The use of the term "should", however, implies desirability, but does not indicate any requirement to resort to those mechanisms, which is consistent with actual practice, the limited use of these means, and the principle of parties´ autonomy. As the Special Rapporteur notes in his second report: "the limited practice of arbitration as a means of dispute settlement of international disputes to which international organizations are parties stems from the fact that arbitration clauses are not very frequently provided for and that agreements to submit an existing dispute to an arbitral tribunal appears to be rare."[119] Therefore, the practical application of the provision remains uncertain, as practice involving arbitration and judicial means remains limited.

In any case, it is reasonable and legally consistent to conclude that any binding mechanism must comply with the principles of adjudication. In this regard, draft guideline 6 states: "*Dispute settlement and rule of law requirements. The means of adjudicatory dispute settlement made available should conform to the requirements of the rule of law, including independence and impartiality of adjudicators and due process.*" Again, it is not clear if this guideline reflects codification or progressive development. The hybrid approach suggests that existing practice requires conformity with the rule of law, including independence and impartiality of adjudicators and due process. This guideline should apply to any kind of dispute to which IOs are parties; that is, disputes between IOs, IOs and States and other subjects of international law, and IOs and private parties.

b. Disputes Between IOs and Private Parties: Draft Guidelines 7-11

Draft guideline 7: "*Disputes between international organizations and private parties. This Part addresses disputes between international organizations and private parties.*"

As highlighted by the Special Rapporteur in his third report, such disputes typically involve contractual disputes with service providers and suppliers stemming from the procurement activities of international organizations, lease agreements, as well as various commercial agreements. They may also stem from employment-like relations with non-staff members, such as consultants, or tort or delictual claims."[120] Moreover, relationships between international organizations as employers and private parties as employees or staff

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[116] *Id*. at 7-8, para. 6.

[117] Denmark (on behalf of the Nordic Countries: Denmark, Finland, Iceland, Norway and Sweden), China, Argentina, Bulgaria, Colombia. See. Special Rapporteur Third Report on the settlement of disputes to which international organizations are parties, at 7, footnote 18, UN Doc. A/CN.4/782 (2025).

[118] In particular, Italy. See *Id*.

[119] Second Report, *supra* note 10, at 18.

[120] Third Report, *supra* note 32, at 9, para 12.

members[121] constitute “the most frequent type of disputes with private parties in practice.”[122] These disputes often implicate contractual issues, domestic law, the internal rules of the international organization, and international law.

Beyond contractual and tort relationships, interactions between international organizations and private persons may also engage international human rights.[123] “Claims for harm suffered by private persons may be based on human rights or the internal laws of international organizations, raising broader issues of accountability.”[124]

International law recognizes, on one hand, the jurisdictional immunity of international organizations, and on the other, individual´s right of access to justice. As the Special Rapporteur notes, disputes between IOs and private parties “are embedded in the need to find an appropriate balance of competing policy demands such as jurisdictional immunity and access to justice.”[125] The resulting tension presents a challenge for international law (and the ILC) to determine the appropriate balance between these two established rights.

Moreover, the relationships between international organizations and private parties involve distinct legal and practical dynamics compared to those between international organizations and States or other international organizations, where diplomatic practices are more entrenched. Private parties lack the diplomatic leverage and institutional capacity of States and IOs. These asymmetries require closer scrutiny under international law. As theNetherlands observed in its response to the Special Rapporteur´s questionnaire, “there might be a perceived imbalance between the international organization on the one hand and the private party on the other.”[126]

In this context, a central question arises: how does international law reconcile two established legal rights: on the one hand, the jurisdictional immunity of international organizations, and on the other, the right of private parties to access justice?

The jurisdictional immunity of international organizations is generally grounded in international treaties (i.e. constituent instruments, multilateral privileges and immunities instruments or bilateral headquarters or seat agreements) and, in some instances, in national laws.[127] As States incorporate international treaty obligations into domestic law, these immunities may also find expression in national legal systems.[128] However, “whether and, if so, to what extent international organizations enjoy such immunity also as a matter of unwritten (customary) international law remains controversial”.[129]

The rationale for granting immunities and limiting the judicial accountability of international organizations was originally to ensure their independence from State influence

[121] Third Report on the settlement of disputes to which international organizations are parties, at 9, para 13, UN Doc. A/CN.4/782 (2025).
[122] Third Report, *supra* note 32, at 10, para 15.
[123] Third Report, *supra* note 32, at 9, para 13.
[124] *Id*.
[125] Third Report, *supra* note 32, at 77, para. 204.
[126] ILC, Settlement of disputes to which international organizations are parties, Memorandum by the Secretariat, A/CN.4/764 at 23.
[127] Third Report, *supra* note 32, at 43, para. 114.
[128] *Id*. at 45, para. 119.
[129] *Id*. at 43, para. 114.

and to preserve their capacity to engage in often difficult circumstances.[130] The notion of "functional" immunity, designed to allow international organizations to carry out their functions and fulfill their purposes, gained ground with the adoption of the UN Charter, especially its Article 105(1).[131]

Conversely, the right of individuals to access justice is rooted in international human rights instruments and national constitutions.[132] This right has been described as deriving from "customary international law notions of due process and the avoidance of denial of justice… it has become a traditional part of many international human rights instruments, as well as national fundamental rights guarantees."[133] Although most human rights treaties do not contain an explicit right of access to courts, several foundational instruments "like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights provide for due process and fair trial guarantees."[134]

In practice, some disputes between international organizations and private parties, especially those involving employment matters, are settled through internal administrative mechanisms. Certain organizations have established adjudicative bodies or administrative tribunals to resolve such disputes.[135] However, not all international organizations have such mechanisms,[136] and where they do exist, their jurisdiction may not extend to non-staff members or contractors.[137] Furthermore, the adequacy of these internal systems in guaranteeing due process has been questioned. Notably, the United Nations Administrative Tribunal (UNAT), established in 1949, was abolished following the highly critical findings of the 2006 Report of the Redesign Panel on the UN System of Administration of Justice. It was subsequently replaced by the two-tiered UN internal justice system consisting of the UN Dispute Tribunal and the UN Appeals Tribunal.[138]

Beyond IO´s internal tribunals, access to arbitration and judicial settlement mechanisms remains limited to private parties. Arbitration requires the consent of the parties and is typically allowed by express contractual provisions. Meanwhile, "national courts are regularly prevented from adjudicating disputes brough against international organizations as a result of the jurisdictional immunity routinely accorded to international organizations."[139] Moreover, "international courts and tribunals are rarely available for the settlement of disputes between international organizations and private parties because they often possess only limited jurisdiction."[140]

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[130] Carla Ferstman, *supra* note 4, at 1.

[131] Third Report, *supra* note 32, at 44, para. 116.

[132] *Id*. at 55, para. 143.

[133] *Id*. at 56, para. 144.

[134] *Id*. at 56, para. 145.

[135] Carla Ferstman, *supra* note 4, at 100.

[136] Some examples of IOs that have their internal adjudicative bodies include: UN, Council of Europe, European Union Organization of American States, World Bank, Inter-American Development Bank, Asian Development Bank, African Development Bank.

[137] Third Report, *supra* note 32, at 75, para. 194.

[138] *Id*. at 73, para. 191.

[139] *Id*. at 77, para. 203.

[140] *Id*.

As a consequence, given that the mechanisms accessible for dispute resolution between IOs and private parties are not always available or adequate, it is essential for international law to address both the availability and the effectiveness of such means. Ensuring fair and reliable avenues for implementing international organization´s accountability remains a critical concern.

In parallel, the ARIO, regardless of their current status as binding law or their acceptance as customary international law, establish a substantive framework governing the responsibility of international organizations for internationally wrongful acts, particularly in relation to States and other international organizations. However, this framework, even though it does not refer to the availability and adequacy of dispute settlement mechanisms, largely excludes private parties, leaving them without a clear substantive base in cases of harm arising from breaches of international law.

As Carla Ferstman reflects, the DARIO "make clear that international organizations are responsible for internationally wrongful acts attributable to them and are obliged to afford reparation for injuries caused. Yet, the DARIO only covers the invocation of responsibility by States or international organizations; responsibility towards individuals harmed by a breach is not considered in the text. The failure to spell out clear rules on this issue mirrors largely the gaps in international law".[141] These normative gaps result in the lack of access to remedies and reparation for injured individuals.[142]

Rishi Gulati similarly critiques the current state of international law, arguing that "we live in a 'denial of justice age' when it comes to the individual pursuit of justice against IOs."[143] He employs the concept of "denial of justice" to describe the circumstance of persons who are not provided with reasonable means of dispute settlement, nor afforded the right to access a court or obtain a fair trial.[144] Notable examples of "denial of justice" situations involving individuals include the victims of the cholera epidemic introduced in Haiti by UN peacekeepers in 2010, and the victims of the Srebrenica genocide for which the UN assumed moral responsibility."[145] As a consequence, legal scholars have concluded that "normatively, there has been insufficient consideration of individuals´ ability to obtain reparation from international organizations."[146]

This legal uncertainty surrounding the availability of dispute settlement mechanisms for private parties places increasing pressure on the doctrine of jurisdictional immunity. Domestic courts have begun to question whether IOs should continue to enjoy broad or absolute immunities, particularly when no adequate alternative mechanisms for redress are available. During the debate in the Sixth Committee on the ILC´s report on the work of its Seventy-Fifth session in 2024, "several delegations[147] highlighted the risk that

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[141] Carla Ferstman, *supra* note 4, at 2.

[142] *Id*. at 3.

[143] Rishi Gulati, Access to Justice and International Organizations, Coordinating Jurisdiction between the National and Institutional Legal Orders. Cambridge University Press (2022) 1.

[144] *Id*.

[145] *Id*.

[146] Carla Ferstman, *supra* note 4, at 1.

[147] In particular, Colombia, Malaysia, and Guatemala. See third Report on the settlement of disputes to which international organizations are parties, by August Reinsch, Special Rapporteur, A/CN.4/782, at 4, fn. 8.

the jurisdictional immunity enjoyed by international organizations may result in a denial of justice."[148]

Several delegations in the Sixth Committee emphasized the need to strike a balance between the privileges and immunities of international organizations and the need for justice and the right to remedy.[149] Other delegations similarly stressed that "immunities of international organizations should not lead to denial of justice."[150]

Chile's submission to the Special Rapporteur´s questionnaire provides a particularly detailed reflection on this issue. Chile acknowledged the existence of disputes between international organizations and private parties arising from the jurisdictional immunities of organizations and recognized that such immunities rise can impede third parties´ right of access to justice, given that the most frequent application of these immunities is a barrier or impediment to the exercise of judicial or adjudicatory jurisdiction."[151] Chile further cited Article 27 of the Vienna Convention on the Law of Treaties, as a customary codified rule, noting that while treaty obligations regarding privileges and immunities must be respected, this does not negate the obligation to uphold "the fundamental obligation to respect the rights at play in conflicts between an organization and a third party, such as the rights to due process and effective judicial protection . . . The difficulty lies in achieving compliance with the international obligations in dispute, i.e. recognizing the immunities from jurisdiction established at treaty level, while also protecting the human or fundamental rights of third parties."[152] Chile also highlighted the inconsistency in its national jurisprudence, which "has gone in a zigzagging and somewhat contradictory direction; the immunity of international organizations from jurisdiction has been accepted almost without limit in some cases, while in others it has not been accepted at all."[153]

It is in this context that some States have expressed reluctance to extend jurisdictional immunities to IOs without clearer safeguards for the rights of private parties. Although there is a substantial and extensive body of case law affirming the immunities of international organizations, this paper, as does the Special Rapporteur´s analysis in his third report, focuses primarily on cases where courts have denied such immunity, often in response to concerns about access to justice, due process, and the absence of alternative remedies.[154]

It is important to note that although immunity provisions generally allow for the possibility of waivers, international organizations rarely exercise this option in practice. For instance, in its response to the Special Rapporteur´s questionnaire, the UNOPS affirmed that "the established practice of the United nations is not to appear in local courts."[155] Similarly, the World Food Program (WFP) stated that "WFP does not have a practice of waiving its

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[148] Third Report, *supra* note 32, at 4, para. 97.

[149] Second Report, *supra* note 10, at 3, para. 3. Among the delegations referencing this "delicate balance" were the Netherlands, Austria, Belarus, Cameroon, Czech republic, India, Italy, Malaysia, Mexico, and Slovakia. See *id*.

[150] United Nations General Assembly, A/CN.4/763 at 7, para. 23.

[151] ILC, Memorandum by the Secretariat, Settlement of dispute to which international organizations are parties, at 10.

[152] *Id*.

[153] ILC, Memorandum by the Secretariat, Settlement of dispute to which international organizations are parties, at 15.

[154] Third Report, *supra* note 32, at 46, para. 122.

[155] Questionnaire. P. 137.

immunity form legal process."[156] In this context, while national courts typically require an express waiver from international organizations in order to proceed with adjudication,[157] certain national courts have, at times, declined to uphold immunity based on a restrictive immunity standard, as well as on the right of individuals to access justice. These judicial responses often arise from the perceived imbalance between immunities and the fundamental right of individuals to access justice, particularly in the absence of effective alternative remedies.

The approaches adopted by national courts to deny jurisdictional immunity to international organizations are mainly based on (i) a restrictive immunity standard, upholding the immunity to activities related to IO´s function and its official capacity, and (ii) the individual´s fundamental right of access to justice.

The first approach for denying IOs immunity is based on the nature of the relationship underlying the dispute, particularly when these are deemed commercial. As noted by the Special Rapporteur, "in practice, the jurisdictional immunity of international organizations may not always be absolute."[158] This approach is normally grounded on national laws. US and Italian Courts have been prominent in applying this approach. In the United States, the Court of Appeals for the 3rd Circuit (1998) found "that the immunity conferred by the IOIA (International Organizations Immunities Act) would change with the law of foreign sovereign immunity, leading to a denial of immunity for a commercial transaction with a private party."[159] More recently, in *Jam v. International Finance Corporation* (2019), the US Supreme Court clarified that the IOIA merely confers the same restrictive immunity as that enjoyed by foreign States.[160] However, the Supreme Court distinguished this from the immunity granted to the United Nations under the General Convention on the Privileges and Immunities of the United Nations, which was held to be absolute.[161] Italian courts have similarly denied jurisdictional immunity to IOs in disputes arising from purely commercial matters, including lease and employment disputes.[162]

The reliance on a restrictive, State-like conception of immunity, where immunities do not generally extend to non-governmental or commercial acts, can also be found in the jurisprudence of States like Greece, France, Spain, Russia, Israel, Nigeria, Kenya, Malaysia, and Mexico.[163] This broad endorsement of the restrictive immunity standard suggests a gradual erosion of the traditional doctrine of absolute immunity in practice.

Employment disputes have also prompted national courts to assert jurisdiction, thereby restricting the scope of immunity granted to international organizations. The rationale for this restricted immunity standard rest on the view that employment relationships fall outside the bounds of the functional immunity of international organizations, and drag also analogies with State and diplomatic immunity, where immunity is not extended to

[156] Questionnaire. P. 138.
[157] Third Report, *supra* note 32, at 48, para. 125.
[158] *Id*. at 51, para. 97.
[159] *Id*. at 51, para. 133.
[160] *Id*. at 52, para. 133.
[161] *Id*.
[162] *Id*. at 52, para. 134.
[163] *Id*. at 53, para. 136.

activities unrelated to the exercise of State sovereign or official functions.[164] Courts in Italy, Russia, and Bangladesh have provided notable examples of this rationale.[165]

The other significant basis to deny international organization´s jurisdictional immunity is the fundamental right of individuals to access justice. As the Special Rapporteur has noted, "an additional tendency, eroding the broad jurisdictional immunity of international organizations, stems from the fact that national courts are increasingly caught between their obligation to grant immunity to international organizations, on the one hand, and to provide access to justice to private parties, on the other hand… Some national courts have accorded precedence to this obligation and denied the immunity of international organizations where no alternative form of dispute settlement was considered to be available."[166]

A leading case in this regard is *Waite and Kennedy v. Germany*, decided by European Court of Human Rights (ECtHR), where the Court "recognized that [civil] claims against international organizations involved the right of access to court under Article 6 of the ECHR. . . [and it] held that while this right of access to justice might be limited for legitimate purposes, like protecting the independent functioning of an international organization, such limitation was only legitimate and permissible if it also was proportionate."[167] Crucially, the Court introduced the proportionality test, which assesses that in order to grant immunity to international organizations "depended upon the availability of reasonable alternative means."[168] This proportionality test remains "a relevant factor and sometimes even a requirement for the grant of jurisdictional immunity to international organizations."[169]

This standard has been applied in several national jurisdictions, including Belgium, Russia, and France, where courts have examined whether "reasonable alternative means" have been provided including, *inter alia*, guarantees of independence and impartiality, public hearings and the issuance of written reasoned judgments.[170] Nevertheless, it should also be noted that other States, such as the United Kingdom and the Netherlands, have taken a more cautious approach. In this sense, the ECtHR in *Stichting Mothers of Srebrenica v. The Netherlands* held that the mere absence of an alternative remedy does not automatically constitute an *ipso facto* violation of the right of access to court.[171]

Several national constitutions enshrine the right of access to justice. The German Constitutional Court, for example, has held that the immunity of an international organization does not violate the constitution, provided that the organization offers an adequate alternative remedy.[172] Similarly, the Italian Supreme Court has emphasized that the constitution "requires that the legitimate interests of citizens should be afforded judicial protection."[173] Courts in other jurisdictions, such as the Swiss Federal Supreme Court, a French Appellate Court, and the Supreme Courts of Uruguay and Argentina, have taken

[164] *Id*. at 54, para. 140.
[165] *Id*., at 55, para. 141.
[166] *Id*. at 55, para. 143.
[167] *Id*. at 57, para. 147.
[168] *Id*.
[169] *Id*.
[170] *Id*. at 60-61, para. 155-158.
[171] *Id*. at 63, para. 161.
[172] *Id*. at 58, para. 150.
[173] *Id*. at 59, para. 151.

comparable positions, affirming that IOs enjoy immunity only as long as a procedure for the settlement of disputes with private parties existed.

In Central America, Guatemala appears to adopt a particularly restrictive approach to jurisdictional immunity, showing a strong inclination to deny such immunity to international organizations. While the Guatemalan Constitutional Court recognized the principle of immunity in 1993 in the case involving the Instituto de Nutrición de Centro América y Panamá,[174] subsequent decisions by the Supreme Court have increasingly refused to uphold immunity, especially in labor disputes. These rulings are grounded in constitutional provisions asserting the supremacy of labor constitutional rights over immunity claims.

In 2011, for instance, the Supreme Court ruled that Organización para las Migraciones could be held accountable for labor law-related claims because: "*Article 106 of the Constitution… establishes that the rights of workers are inalienable and that the stipulations that imply renunciation, reduction, distortion or limitation of the rights recognized in favor of the workers in the Constitution, in the Law, in the International Treaties ratified by Guatemala, in the regulations and other provisions related to work, shall be null ipso jure and shall not bind the workers.*"[175]

The Court reiterated this position in 2015 in a case involving Secretaría de Integración Económica Centroamericana, an organ of the Central American Integration System (SICA). While acknowledging that Article I of the Convention on Prerogatives, Immunities, and Franchises grants immunity to the Permanente Secretariat and its property, the Court nonetheless held that Article 106 of the constitution overrides such treaty-based immunity when labor rights are at stake.[176]

In 2016, the same Court once again denied immunity, this time to the Comisión Internacional contra la Impunidad en Guatemala. The Court held that: "*the plaintiff does not enjoy immunity from all legal action as it claims, since the exclusive jurisdiction of Labor and Social Security, by its nature, cannot be limited and its application does not infringe on any investiture.*"[177]

Most States in the Latin American region, however, continue to uphold IOs´ jurisdictional immunity, as exemplified by Costa Rica, México, and Perú.

Costa Rica has recognized such immunities even in the context of labor law disputes. In 2015, the Constitutional Chamber of the Supreme Court addressed the immunity of the Interamerican Development Bank (IDB), holding that the Bank is "an international organization whose actions are subtracted from the jurisdiction of the domestic courts of the Republic". The Court concluded that "the organization is removed from the jurisdictional protection exercised in the national territory."[178]

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[174] Constitutional Court, Guatemala. Judgment, judicial docket 61-93. Sept. 23, 1993. Personal translation from Spanish to English.

[175] Supreme Court of Justice, Guatemala. Judgment, judicial docket 1159-2010. Aug. 16, 2011. Personal translation from Spanish to English.

[176] Supreme Court of Justice, Guatemala, judicial docket 842-2014. April 8, 2015. P.5. Personal translation from Spanish to English.

[177] Supreme Court of Justice, Guatemala, judicial docket 2725-2015, 2727-2015, 2756-2015. Oct. 4, 2016. P.14. Personal translation from Spanish to English.

[178] Constitutional Chamber, Supreme Court of Justice, Costa Rica. Judgement, judicial docket 14-018608-0007-CO. March 13, 2015. Personal translation from Spanish to English.

In México, Junta Federal de Conciliación y Arbitraje issued a 2013 decision affirming the IDB´s immunity. It held that the Bank´s legal status is governed by its constituent instrument, an international treaty, which, under Article 133 of the constitution, ranks above federal legislation. The decision held that: *"the IDB, as an international organization, enjoys immunity from jurisdiction before any judicial or administrative body, recognized by Mexico under Article 11, Section I of such international treaty. Therefore… (it) enjoys immunity of jurisdiction that prevents national courts from exercising their jurisdiction over it… since the IDB is an organization of international public law created through an international treaty…, (it) has a legal system that fully regulates labor relations with all its officials, excluding the application of national law, so that the immunity granted to such international organization does not exempt it from the liability it is responsible for, but implies its subjection, for the prosecution of labor claims, to a specific forum that ensures equal treatment between officials and the organization."*[179]

Similarly, in Perú, the Supreme Court rendered a decision in 2018 affirming that the even though the IDB has an office in Perú, *"there is no evidence that the IDB has ... expressly submitted to the jurisdiction of the Peruvian courts; therefore, the IDB enjoys the immunities, exemptions and privileges established in said Treaty, and cannot be sued before Peruvian courts."*[180]

As evidenced by the comparative analysis above, national courts, aptly described by Chile as "zigzagging" in their jurisprudence, have adopted varying approaches to the jurisdictional immunity of international organizations in disputes involving private parties. Some courts have denied such immunity by invoking the rationale of State immunity, particularly its restrictive standard, which limits immunity to official acts and excludes commercial or private acts, including employment-related matters. Additionally, courts have drawn upon the right of access to justice of private parties, as enshrined in international human rights instruments and national constitutional frameworks, to justify the denial of IOs´ jurisdictional immunity. In Latin America, for instance, Guatemalan courts have explicitly relied on constitutional protections of labor rights to deny jurisdictional immunity to international organizations in employment disputes.

Conversely, there remains substantial jurisprudence from other national courts that continue to uphold IO´s immunity, often grounded in treaty obligations and deference to the functional independence of such entities. There is also a substantial jurisprudence of courts upholding immunity insofar as alternate reasonable means of dispute settlement are offered to the private party. Ultimately, national courts tend to resolve concrete cases based on their interpretation of applicable international legal standards, treaty commitments, and national law, especially constitutional law. Yet, despite these efforts, States still face significant challenges in identifying a clear international legal norm governing disputes between international organizations and private parties. The central question thus persists: what does international law provide in regard to the resolution of such disputes?

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[179] Junta Federal de Conciliación y Arbitraje de México, Junta Especial Número 14, file 480/2013. Nov. 12, 2013. Personal translation from Spanish to English.

[180] Corte Superior de Justicia de Lima, Cuarta Sala Civil, judicial docket 16238-2013-81-1801-JR-CI-06. September 12, 2018. Personal translation from Spanish to English.

In this context, proposed draft guideline 8 provides: "*Resort to means of dispute settlement. "Disputes between international organizations and private parties should be settled in good faith and in a spirit of cooperation by the means of dispute settlement referred to in draft guideline 2, subparagraph c, that may be appropriate to the circumstances and the nature of the dispute."*

As stated, national courts face significant challenges when adjudicating claims brought by private parties against international organizations as international treaties granting immunity to IOs face human rights commitments, both international and constitutional. In this context, international law should provide States, IOs, and private parties with clear, practical, and legally effective guidelines to such disputes in an environment of legal certainty.

Draft guideline 8, mirroring the language of draft guideline 4, underscores good faith and a spirit of cooperation as foundational principles and central values in international law that should guide dispute resolution, as Chile emphasized in its comment to draft guideline 4.[181] Nevertheless, the concept of good faith is not without complications. Legal systems differ significantly in their understanding and application of these principles. For instance, civil law systems tend to give it a more prominent and normative value, while common law systems often treat it with greater caution.

While good faith and a spirit of cooperation may be recognized as international law, their practical application in the context of dispute settlement remains ambiguous. If an international organization breaches a contractual obligation or causes harm through a tortious act involving a private party, the guideline provides that the parties "should" settle the dispute in good faith. However, the use of the term "should" introduces legal ambiguity and fails to close the normative gaps. Still, the provision has merit, as these principles may provide a normative framework conductive to amicable resolution. In fact, as the Special Rapporteur points in his third report, the inclusion of the principles of good faith and a spirit of cooperation in draft guideline 4 were appreciated and welcomed by some delegations in the Sixth Committee discussions.[182]

These principles do not meaningfully enhance legal certainty because they fail to specify concrete obligations or standards.

Consider the following question: if a labor law dispute arises between a private individual and an international organization, does good faith and a spirit of cooperation imply that domestic courts have jurisdiction to hear the case? Is there a difference, if it is a civil dispute involving tort claims?

One possible interpretative approach, grounded in Article 31 of the Vienna Convention on the Law of Treaties, is to treat good faith as a guiding principle for interpreting obligations. In this way, the principle would support an effort by both parties to resolve their dispute in a manner that respects the legal obligations and rights applicable at the time. This may mean acknowledging the jurisdiction immunity of an IO, while simultaneously ensuring that private parties´ right of access to justice is upheld.

The draft guideline also refers to the use of dispute settlement mechanisms listed in draft guideline 2, subparagraph c, i.e. negotiation, enquiry, mediation, conciliation,

[181] Third Report, *supra* note 32, at 5, fn. 11.

[182] *Id*. at 5, para. 5: e.g. the European Union, Brazil, Mexico, Estonia, Bulgaria, Sierra Leone, India, Chile.

arbitration, judicial settlement and other peaceful means of solving disputes. While this enumeration reflects the established methods of peaceful dispute resolution under international law and may be well received by States and international organizations because of its broadness and the applicability of the party´s autonomy principle, the breadth of the provision dilutes its practical usefulness. For the guideline to meaningfully address the systemic gap, greater clarity and specificity may add value for legal certainty purposes.

This guideline instructs that dispute settlement mechanisms should be "appropriate to the circumstances and the nature of the dispute." However, it appears to overlook the "perceived imbalance between the international organization on the one hand and the private party on the other."[183] One may question whether the diplomatic leverage and negotiation capacity of sovereign or institutional actors (such as States and other IOs), can be truly considered symmetrical to that of private parties. Typically, there are substantive underlying differences of power between an IO and a private person, including access to resources and access to legal mechanisms. This structural imbalance calls for greater scrutiny under international law, given that private parties differ fundamentally from States and international organizations in both function and capacity.

Moreover, the guideline leaves several questions unresolved. Does the immunity of international organizations influence the interpretation of what is "appropriate" to the nature of the dispute? Should disputes of different subject matter, such as labor-related issues versus commercial or other contractual claims, be treated differently under the guideline and the principles of good faith and cooperation? These distinctions could be critical in assessing the applicability and adequacy of dispute resolution mechanisms.

In light of these ambiguities, it remains uncertain whether this draft guideline can serve as a practical and reliable tool for international organizations, private parties, and States. The draft´s reliance on broad principles and open-ended mechanisms, while normatively appealing, may ultimately undermine the legal certainty that the guideline seeks to establish. As such, the guideline´s capacity to provide concrete guidance in resolving disputes between IOs and private parties remains uncertain.

Draft guideline 9 states: "*Jurisdictional immunity of international organizations. "The jurisdictional immunity of international organizations serving the purpose of ensuring their independent functioning should be respected.*"

As discussed, the jurisdictional immunity of IOs is widely recognized in international law, primarily serving two main purposes: to secure their independent functioning and to prevent national courts to interfere with their activities.[184] This rationale is well captured in the assertion that "immunities are understood to be the main, and perhaps the only way in which to protect their independence and enable them to carry out their functions."[185] Echoing this view, legal scholar Alice Ehrenfeld has noted that "it would be a serious burden to the organization to defend itself in the local courts of the diverse countries in which it operates or maintains an office. There is also the real possibility of a local

[183] ILC, Settlement of disputes to which international organizations are parties, Memorandum by the Secretariat, A/CN.4/764 at 23.

[184] Third Report, *supra* note 32, at 78, para. 212.

[185] Carla Ferstman, *supra* note 4, at 140.

prejudice against certain programs or a lack of understanding on the part of the local courts of the organization´s substantive immunities from certain local laws."[186]

IOs' jurisdictional immunity is grounded in international law instruments, particularly their constituent instruments, multilateral, and bilateral treaties. The ECtHR has also highlighted that "the immunity from jurisdiction commonly accorded by States to international organizations under the organizations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organizations."[187]

In line with core principles of international law, particularly *pacta sunt servanda* and the observance of international treaties, States are bound to respect their treaty obligations and may not invoke the provisions of their internal law as a justification for the failure to comply with such obligations. Provided a treaty accords immunity to an IO, this must be respected as a matter of international law, supported by widespread State practice and well-established principles and customary international law.

However, as was mentioned before, jurisdictional immunity has increasingly come under scrutiny, especially from private parties seeking to assert their rights and claims against IOs, since the assertion of jurisdictional immunity may constitute a procedural block to obtain a remedy.[188] This has sparked a broader debate over how to reconcile IOs immunity with the right of access to justice. As the UN Preparatory Commission on Privileges and Immunities recognized: "any excess or abuse of immunity and privilege is detrimental to the interest of the international organization itself as it is to the countries that are asked to grant such immunities."[189] Several States have likewise voiced concerns about "the potential existence of conflictual obligations with regard to immunities and human rights."[190]

The Special Rapporteur has rightly observed that "access to justice is particularly relevant in the context of private parties because it is not only a rule of law demand but also embedded as a human rights guarantee. It can also be grounded in the customary international law principles prohibiting a denial of justice and it is often expressly provided for in treaties obliging international organizations to make effective dispute settlement available."[191] He also points out in its second report that: "as already recognized by the International Court of Justice in its advisory opinion in the Effect of Awards case, such a need to provide for means of settlement of disputes with private parties may also stem from human rights considerations."[192]

The right of access to justice, as previously discussed, is grounded in international treaties and international customary law, as well as general principles of law recognized in several domestic constitutional laws. Importantly, this right derives from "customary international law notions of due process and the avoidance of denial of justice. . . ."[193] While not always explicitly stated as a right of access to court, several foundational instruments

[186] Alice Ehrenfeld, "United Nations Immunity Distinguished from Sovereign Immunity (1958), at 90.
[187] European Court of Human Rights, Waite and Kennedy v. Germany APP 26083/94 (1999), para. 63.
[188] As was the case in the UN cholera epidemic in Hati.
[189] Carla Ferstman, citing Anthony Miller. P. 141.
[190] United Nations General Assembly, A/CN.4/763 at 7, para. 23.
[191] Third Report, *supra* note 32, at 81, para. 222.
[192] Second Report, *supra* note 10, at 9, para. 23.
[193] Third Report, *supra* note 32, at 56, para. 144.

"like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights provide for due process and fair trial guarantees."[194] In this context, the right of access to justice or the avoidance of denial of justice may take the form of appropriate dispute settlement means made available to private parties. The term "*appropriate*" has been interpreted in practice and jurisprudence to mean more than a mere availability of any forum. It implies that the mechanism must meet core requirements of due process, including independence and impartiality of adjudicators. A pertinent example, as also commented above, is the UNAT, established in 1949, which was abolished after criticism raised by the 2006 Redesign Panel report. It was subsequently replaced with a more robust two-tiered UN internal justice system consisting of the UN Dispute Tribunal and the UN Appeals Tribunal.[195] This development reflects a broader shift toward ensuring that internal mechanisms of IOs meet basic standards of due process.

In *Waite and Kennedy v. Germany* (1999), the ECtHR underscored that granting IOs immunity is acceptable only if "reasonable alternative means" exist to protect the rights of private parties. "For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."[196] The Court considered that the ESA Convention expressly provides for various modes of settlement of private-law disputes, in staff matters as well as in other litigation, including a recourse to the ESA Appeals Board, which is independent of the Agency and therefore, complies with the requirements.

Multiple treaties reinforce this principle. For instance, the Article 29 of the 1946 Convention on the Privileges and Immunities of the United Nations obliges the UN to "make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private character to which the United Nations is a party; (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General". Similar provisions are found in the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (Article IX, Section 31), the 1949 Agreement on Privileges and Immunities of the Organization of American States (Article 12), and the 1951 Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff.

Thus, while immunity shields IOs from national jurisdiction, it does not exempt them from the obligation to provide appropriate dispute settlement means. These mechanisms must satisfy rule of law standards of independence, impartiality and due process.

It is worth emphasizing that, according to the practice of States and IOs, as well as treaty provisions, the right of access to justice should not be understood necessarily as access to a national court or a judicial settlement *per se*. As it has been analyzed, the right of access to justice may well be identified as access to an IO internal adjudicative system. Yet, any

[194] *Id*. at 56, para. 145.
[195] *Id*. at 73, para. 191.
[196] European Court of Human Rights, Waite and Kennedy v. Germany APP 26083/94 (1999). Para. 67, 68.

dispute settlement mechanisms should be constituted in accordance with the rule of law and the criteria of due process, including independence, impartiality and fairness.[197]

As outlined by Rishi Gulati, "if a dispute resolution mechanism lacks independence from other organs of an IO, it can hardly be concluded that the forum can be objectively impartial."[198] With respect to the fairness criteria, Rishi Gulati asserts that an IO´s internal adjudicative system should comply with criteria of equal access to the administration of justice, equality of arms, right to an oral hearing, right to appeal, right to a reasoned resolution and right to justice without undue delay.[199]

The 2012 UNGA Declaration on the Rule of Law affirms that "the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy of their actions."[200] The UNGA also recognized "that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law."[201]

In line with this, the ICJ has recognized that imbalances inherent in IO-staff disputes can be corrected through appropriate procedures, holding that "any absence of equality between staff members and the Secretary-General inherent in terms of Article 66 of the Statute of the Court is capable of being cured by the adoption of appropriate procedures which ensure actual equality in the particular proceedings."[202] The Court has reiterated that "the principle of equality of the parties follows from the requirements of good administration of justice."[203]

These principles are also reflected in the jurisprudence of national courts. As Austria has indicated, "for disputes between international organizations and private parties, headquarters agreements obligate the international organizations to make provisions for the appropriate settlement of disputes arising from contracts or other issues of a private law character as well as of disputes with officials or experts on missions, who by reason of their official position, enjoy immunity if such immunity has not been waived."[204]

Belgium's courts have established a similar approach to upheld IOs jurisdictional immunities provided that the IO offers the private party appropriate means for the settlement of disputes. While in 2010 the trial Court ordered the IO to pay financial compensation to the private entity, in 2016 the Brussels Court of Appeals held that the IO enjoyed immunity from jurisdiction. In 2018 the Belgian Court of Cassation "established that an international organization could not avail itself of its immunity from jurisdiction in a dispute with an individual unless it offered that individual an alternative means of redress that would ensure

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[197] Rishi Gulati, at 41.

[198] *Id*. at 53.

[199] *Id*. at 56.

[200] General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1, para. 2. (30 November 2012).

[201] *Id*.

[202] International Court of Justice, in Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, Advisory Opinion, at 180, para. 35.

[203] *Id*. para. 34.

[204] ILC, Memorandum by the Secretariat, Settlement of dispute to which international organizations are parties, at 13.

that the individual´s rights guaranteed under the (European Convention on Human Rights), in particular its article 6, paragraph 1, and right access to a court for complaints concerning rights and obligations of a civil character are respected."[205] In the case in question, provided that the agreement between the IO and the private party contained an arbitration clause that assured the private party´s fundamental rights, including the right to a fair trial, the Court of Cassation upheld the IO immunity from jurisdiction.

In labor disputes, Belgium´s Court of Cassation "decided that an international organization´s immunity from jurisdiction may be set aside if the organization has not arranged a clean appeal procedure and the official is deprived of access to a court owing to the immunity from jurisdiction."[206] An internal system that included an appeal board, composed by independent members, following an adversarial method of procedure, and the possibility if the private party being assisted by a representative of his/her choosing, with decisions taken by a majority, delivered in writing and accompanied by reasons, was considered as an appropriate and clean appeal procedure that provided no reason to set aside the organization´s jurisdictional immunity.[207] The reasoning, which was upheld by the ECtHR, appears to support a consistent principle: the jurisdictional immunity of international organizations should be respected to the extent that the private party is offered appropriate means of dispute settlement that conforms to human rights standards of, *inter alia*, fair and impartial procedures.

In this context, the Special Rapporteur identified that "a proper balance between the interest of organizations in securing their independent functioning through jurisdictional immunity and the interest of private parties in access to effective remedies must be struck."[208]. A proper balance requires a dual-obligation approach: IOs must retain jurisdictional immunity, but only where they provide an independent, impartial, reasoned, and binding alternative forum.

The proposed draft guideline 9´s approach to recognize IO´s jurisdictional immunity serving the purpose of ensuring their independent functioning seems appropriate and follows international law, as it aims to reinforce the notion of complying with international obligations. However, it could be also appropriate to add that, while respecting jurisdictional immunity, IOs must also commit themselves to providing access to appropriate dispute settlement means to private parties, in the terms addressed in proposed draft guideline 11 (conforming to the requirements of the rule of law, as well as human rights requirements including independence and impartiality of adjudicators and due process), in order to also respect any private person´s right of access to justice and to avoid the denial of justice. This will be consistent with international treaties, human rights standards and general principles of law contained in national constitutions. Hence, adding the provision of making available appropriate means of dispute settlement *vis-à-vis* upholding IOs´ jurisdictional immunity would not be incompatible with the current state of the law.

In conclusion, the dual international obligations approach, i.e. respecting jurisdictional immunity on the one hand, and respecting the private party´s right of access to

[205] *Id*. at 14.
[206] *Id*.
[207] *Id*.
[208] Third Report, *supra* note 32, at 80, para. 218.

justice on the other, allows the two international obligations to coexist. It will not be incompatible with the current state of international law to provide that: the jurisdictional immunity of international organizations serving the purpose of ensuring their independent functioning should be respected. The immunity of international organizations from jurisdiction may be set aside only when the organization has not made available to the private party any other means of dispute settlement conforming with the requirements of the rule of law, as well as human rights requirements including independence and impartiality of adjudicators and due process.

Draft guideline 10: "*Access to justice. "Arbitration, judicial settlement or other reasonable alternative means of dispute settlement shall be made more widely accessible for the settlement of disputes between international organizations and private parties*."

This guideline concretely addresses the access to justice right that has been discussed. However, standing alone, its formulation may lack sufficient clarity on how this right is to be reconciled with the jurisdictional immunity of IS, as recognized in draft guideline 9. Read in isolation, draft guideline 10, as formulated, might even appear to contradict the principle of immunity established in the previous guideline. For instance, does the reference to judicial settlement imply that IOs must submit to national courts, thereby waiving their immunity?

The Special Rapporteur´s third report clarifies that this is not intended. Rather than contradicting draft guideline 9, draft guideline 10 is meant to complement it by ensuring that, even where jurisdictional immunity is upheld, IOs provide effective means for dispute settlement. Yet, this potential tension between the two proposed guidelines, one providing for respecting jurisdictional immunity and the other making more widely accessible arbitration and judicial forums, might require greater precision in the formulation and ordering of the draft text.

As discussed, international law supports both the immunity of IOs, as necessary for their independent functioning, and the right of private parties to access justice, grounded on treaty law, customary international law, human rights instruments, general principles od domestic constitutional laws. The key issue is thus not the existence of immunity *per se* but whether IOs have established appropriate dispute settlement mechanisms to uphold the rule of law. These mechanisms must guarantee independence and impartiality of adjudicators, due process, and effective remedies.

Draft guideline 10 lists arbitration and judicial settlement, placing arbitration first. While this sequencing or ordering could imply a preference, such a hierarchy is not clearly supported by consistent jurisprudence or practice. It can be recalled that the Special Rapporteur observed that "the overall of the practice of settling disputes between IOs and private parties has demonstrated that all means of dispute settlement mentioned by draft guideline 2(c) are used. While IOs often seem to favor consensual forms of dispute settlement falling short of binding third-party adjudication, private parties appear to prefer having recourse to arbitration or adjudication. The confidential nature of many dispute settlement mechanisms makes it difficult to assess how frequent they are actually used."[209]

Given this context, it is difficult to justify a hierarchy or preference among the available forms of dispute resolution. More importantly, the essential issue is not the specific

[209] Third Report, *supra* note 32, at 77, para. 202.

forum or form of dispute settlement, which can be any of the listed means in draft guideline 2(c), consistent with the principle of autonomy of the parties, recognized by most nation legal systems.[210] Rather than the order or the specific forum or form of dispute mechanism, the essential point is its compliance with the principles of due process and fair trial. As a consequence, the legitimacy of any dispute settlement mechanism, whether arbitration, judicial settlement, an internal administrative tribunal, or any other, ultimately depends on its compliance with core notions of due process and fair trial.

Moreover, the current placement of guideline 10 after the provision on jurisdictional immunity may unintentionally convey that immunity is a more fundamental concern than access to justice. This order could be reconsidered. Given that much of the relevant case law and legal debate has focused on whether immunity impedes access to a remedy, it may be more normatively balanced to address access to justice before reiterating IOs´ jurisdictional immunity. This would align the guidelines with the principle that the right of immunity exists *vis-à-vis* on the existence of alternative appropriate dispute settlement means.

There can also be considered cases in which IOs either lack an internal dispute resolution mechanism or maintain mechanisms that fall short of the international standards and the requirements of rule of law, including independence and impartiality of adjudicators and due process. In such cases, access to arbitral or judicial settlement should be regarded as necessary avenues to avoid denial of justice, rather than discretionary alternatives.

In light of the above, and building upon the proposed reformulation of draft guideline 9, this draft guideline could be reformulated as follows: "An international organization may establish an internal adjudicative mechanism to resolve disputes with private parties, provided that such mechanism meets fundamental rule of law standards, as well as human rights requirements, including independence and impartiality of adjudicators and due process. Where no such mechanism is available, or where the mechanism fails to meet these essential guarantees, private parties are entitled to pursue their claims through judicial settlement or arbitration."

It is further recommended that this guideline be placed before the guideline on jurisdictional immunity, in order to affirm the complementary nature of immunity in relation to the right of access to justice.

Draft guideline 11: "*Dispute settlement and procedural rule of law as well as human rights requirements. The means of adjudicatory dispute settlement made available shall conform to procedural rule of law as well as human rights requirements, including the independence and impartiality of adjudicators and due process."*

This guideline constitutes a valuable complement to draft guideline 6, as it expands upon the requirement to provide dispute settlement mechanisms that not only exist in form but also adhere to international standards of the procedural rule of law and human rights, particularly when such mechanisms involve private parties.

As discussed, the right of individuals to access justice is grounded not only in general principles of law reflected in national constitutions but also in customary international law and widely ratified human rights instruments.[211] This right embodies "customary international law notions of due process and the avoidance of denial of justice .

[210] *Id*. at 78, para. 206.

[211] Third Report, *supra* note 32, at 55, para. 143.

. . it has become a traditional part of many international human rights instruments, as well as national fundamental rights guarantees."[212]

Within this normative framework, the right of access to justice is effectively realized, in part, through the availability of appropriate means of dispute settlement. As mentioned, widely accepted international treaties, including the CPIUN, the CPISA, the Agreement on Privileges and Immunities of the Organization of American States, and the NATO Status Agreement, explicitly require IOs to make such mechanisms available.

Further evidence of these requirements can be found in institutional reforms. The redesign of the UNAT in the early 2000s was aimed precisely at ensuring that the UN´s internal dispute settlement system adhered to international standards of due process. Similarly, in *Waite and Kennedy v. Germany*, the ECtHR emphasized that a material factor in determining whether granting immunity to an IO is permissible under Article 6 of the European Convention on Human Rights "is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."[213]

Reinforcing this approach, the 2012 UNGA Declaration on the Rule of Law affirms that "the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs,"[214] and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions by being accountable to just, fair, and equitable laws.[215]

National courts have likewise affirmed this view. As discussed earlier, courts have generally upheld the jurisdictional immunity of IOs where a fair and appropriate dispute resolution system that complies with due process is in place. For instance, systems that employ an adversarial procedure, allows the parties to be represented, issue written decisions backed by a majority, and maintain impartiality have been deemed sufficient to preclude setting aside immunity.[216]

Legal scholars further support these standards, noting that independence and impartiality are core components of any dispute settlement system. Expressing this view, Rishi Gulati commented that "if a dispute resolution mechanism lacks independence from other organs of an IO, it can hardly be concluded that the forum can be objectively impartial."[217] Furthermore, Io´s internal adjudicative systems should comply with fairness criteria of equal access to the administration of justice, equality of arms, right to an oral hearing, right to appeal, right to a reasoned resolution and right to justice without undue delay.[218]

Draft guideline 11 thus serves an essential role in indicating the qualitative attributes that any adjudicatory mechanism must possess to meet both procedural rule of law and human rights standards. It articulates the expectation that IOs must not only provide

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[212] *Id*. at 56, para. 144.

[213] European Court of Human Rights, Waite and Kennedy v. Germany APP 26083/94 (1999). Paras 67, 68.

[214] General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1, para 2. (30 November 2012)

[215] *Id*.

[216] ILC, Memorandum by the Secretariat, Settlement of dispute to which international organizations are parties, at 13

[217] Rishi Gulati, at 53.

[218] *Id*. at 56.

mechanisms for resolving disputes with private parties but also ensure that they adhere to procedural rule of law and human rights requirements.

Nevertheless, the formulation "*procedural rule of law as well as human rights requirements*" as currently framed in the draft guideline may be overly broad and potentially ambiguous, as there can be many such requirements. Given the wide array of procedural rule of law as well as rights recognized under human rights instruments, the formulation may lead to some uncertainty regarding which procedural rule of law requirements, or which human rights requirements must be observed in practice. For greater clarity, the guideline could build up on jurisprudence and practice, to specify, on the one hand, the procedural rule of law requirements and, on the other, the core human rights principles.

In this context, the provision may provide: The means of adjudicatory dispute settlement made available shall conform to procedural rule of law as well as human rights requirements. These include, at minimum, the independence and impartiality of adjudicators, due process, an adversarial procedure, and the right to a written reasoned decision, issued without undue delay.

V. Concluding Observations

The topic of IOs has long presented challenges for the ILC, given the vast diversity in their mandates, structures, roles, and legal capacities. The experience with the ARIO, which faced criticism and endorsement challenges, illustrates the delicacy of this terrain. Against this backdrop, the ILC´s decision to examine the issue of the settlement of disputes to which IOs are parties represents a constructive and forward-looking contribution to the codification and development of international law. The choice to adopt soft-law guidelines as a final outcome, while cautious, appears well-suited to the sensitivity of the subject and may help preempt some of the challenges faced by previous work.

As discussed, the ILC decided to approach the topic distinguishing between the parties involved in disputes. The Special Rapporteur first addressed disputes between IOs and States, which were covered in draft guidelines 3 to 6. This part, while important, appears relatively uncontroversial. As commented, disputes between IOs are less frequent in practice. Disputes between IOs and States, although more frequent, have generally been settled through direct negotiations, mediations, conciliation and, in some cases, arbitration.

The more complex part of the ILC´s work concerns disputes between IOs and private parties, covered in draft guidelines 7 to 11. These disputes are more frequent in practice and raise deeper legal and policy challenges, most notably, the tension between IO´s jurisdictional immunity and the private parties´ right of access to justice. National courts jurisprudence on this matter has been inconsistent and zigzagging, reflecting a lack of consensus on how to reconcile these competing legal rights.

Draft guidelines 9 to 11, as proposed by the Special Rapporteur, directly address to core legal issues: jurisdictional immunity of IOs, access to justice of private parties, and procedural rule of law and human rights requirements, respectively. In addressing these issues, the Special Rapporteur has undertaken a thorough and commendable analysis of national and international jurisprudence, as well as relevant treaties, customary international law, and general principles derived from national constitutional traditions. This body of law underscores "the need to find an appropriate balance of competing policy demands such as jurisdictional immunity and access to justice,"[219] as the Special Rapporteur aptly describes.

This balance may best be conceptualized as a dual international obligation approach, where both rights can coexist. To achieve this, the draft guidelines should strive for greater precision and clarity. Doing so would provide practical guidance to IOs, States, and private parties alike, while also reducing the current legal uncertainty surrounding these topics. Given what the jurisprudence of national courts shows, it is important for the actors involved (IOs, States, and private persons) to pinpoint to clear norms of international law that guide their approach to the jurisdictional immunity of IOs and the right of private parties to access justice.

IOs play an important role in global governance, and their legitimacy partly depends on their adherence to legal standards that protect the rule of law, and the rights of all parties, including private individuals. These draft guidelines represent a significant step toward ensuring that legitimacy by affirming two important international obligations in parallel, i.e. the jurisdictional immunity of international organizations and the right of private parties to access justice. Striking an effective balance between these two obligations is not only a legal necessity but also a fundamental condition for reinforcing trust in the international legal order.

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[219] Third Report, *supra* note 32, at 77, para. 204.

IS LIBERAL DEMOCRACY STILL VIABLE IN THE ERA OF ENVIRONMENTAL EMERGENCY?

Damla Ipek

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.

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1. Introduction

> *What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such… that is the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.*[1]
>
> \- Francis Fukuyama

Francis Fukuyama's famous assertion that history ended with the triumph of liberal democracy as a "universal value" seems increasingly at odds with the ever more frequent observation of a gradual movement away from democratic institutions, and a movement closer to authoritarianism, a phenomenon collectively called "democratic backsliding."[2] While Fukuyama himself has since revisited his post-Cold War thesis—acknowledging its oversimplification, him and others maintain that democracy, despite its contemporary challenges, remains the most resilient and desirable political system.[3] However, while liberal democracies have historically demonstrated adaptability, the climate crisis poses a unique and urgent challenge that tests their very capacity to respond with the urgency required.[4] The very mechanisms that make liberal democracies resilient—such as consensus-building and the safeguarding of diverse viewpoints—can impede swift, decisive action.[5] This creates a critical tension: While rapid, science-based measures are necessary to tackle the climate crisis, such actions must also preserve democratic legitimacy and adhere to constitutional principles.

This paper investigates whether contemporary liberal democracy can respond to environmental emergency and concludes that while liberal democracies are not inherently incapable of responding to the climate crisis, they do suffer from structural limitations that can hinder effective climate action. By examining deliberative democracy, fixed constitutional commitments, and guarantor institutions, this paper investigates a combination of democratic systems that can be utilized to reform the current liberal democratic system, while addressing environmental emergencies and simultaneously preserving democratic legitimacy. While recognizing the delicate interconnections of environmental boundaries, such as the impact of nitrogen-phosphorus boundary transgressions on marine CO_2 absorption,[6] the focus will remain on CO_2-emissions. This paper establishes a conceptual

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1 Fukuyama, F. *The End of History and the Last Man* (1992).

2 Fukuyama, F. (1992); Sen, A. K. "Democracy as a Universal Value" (1999); Hyde, S. D. "Democracy's Backsliding in the International Environment" (2020); Mounk, Y. *The People vs. Democracy* (2018).

3 Fukuyama, F. *Identity: Contemporary Identity Politics and the Struggle for Recognition* (2018).

4 Dahl, R. A. *On Democracy* (1998); Ejsing, M.; Tønder, L.; Brandt Jensen, I. H.; Hansen, J. "Do we have time for democracy?" (2024).

5 Held, D. & Fane-Hervey, A. "Democracy, Climate Change and Global Governance" (2009).

6 Rockström, J. et al "A Safe Operating Space for Humanity" (2009); Arrhenius, S. *On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground* (1896).

foundation by defining liberal constitutional democracy, followed by a brief examination of democratic backsliding, which complicates the capacity of democratic systems to respond effectively to crises. Then, the paper assesses whether contemporary democracy is fundamentally incapable of addressing the climate crisis. The investigation begins with a review of the history of modern environmental law, highlighting its successes and limitations in curbing carbon dioxide emissions (CO_2-emissions). From there, the discussion turns to key barriers to effective climate action in democracies, including the influence of short-term electoral cycles, political polarization, and the power of interest groups. It criticizes the ‘technocratic temptation,' the argument that technocratic governance – characterized by decision-making driven by expertise and technical knowledge – may be better suited to address the complexities of climate change, noting its inherent drawbacks. Finally, three promising models for strengthening environmental governance are explored: deliberative democracy, fixed constitutional commitments, and guarantor institutions. This paper rejects the notion that any one of these alternatives demonstrates the one perfect solution. Determining a perfect approach falls outside the scope of this paper and may not be possible. Instead, this paper’s objective is to demonstrate that democratic solutions exist, and in combination merit serious consideration, as democracies have the capacity to innovate and reform while balancing environmental sustainability with core democratic principles.

II. From Ideals to Realities: Democracy Under Strain

a. What is a liberal constitutional democracy?

While the term “constitutional” undoubtedly refers to the rule of law, meaning “a level of integrity of law and legal institutions,”[7] the definitions of democracy and liberalism are more contested. Liberalism traditionally emphasizes individual rights and personal freedom.[8] It emerged as a response to political oppression and it was particularly shaped by reactions to the French Revolution and imperialism.[9] Initially, it focused on economic freedom and minimal state intervention, with the free market seen as key to individual fulfillment.[10] However, the term “liberalism” has evolved significantly over time.[11] In the 19th century, it was associated with a hands-off government approach, but under the administration of Franklin D. Roosevelt during the “New Deal,” it shifted towards supporting increased government intervention in economic and social affairs.[12] Today, the term encompasses a broad spectrum of political ideologies, from free-market to extensive government intervention advocates, making its application less clear.[13] Therefore, this paper will not focus on the term “liberal” itself, but rather on the broader principles it represents. Democracy refers to a form of statehood which regulates activities, provides welfare and

[7] Ginsburg, T. & Huq, A. Z. *How to Save a Constitutional Democracy* (2018).

[8] *Brown*, G. W., McLean, I. & McMillan, A. *A Concise Oxford Dictionary of Politics & International Relations* (2018).

[9] Wissenburg, M. *Green Liberalism* (2003).

[10] Wissenburg, M. „Liberalism“ in: *Political Theory and the Ecological Challenge* (2010).

[11] Freeden, M. *Liberalism* (2015).

[12] Wall, W. L. „The New Deal” (2016).

[13] Freeden, M. (2015).

ensures order, peace, and justice in society, while aligning its actions with the preferences of its citizens.[14] Derived from the Greek term *demokratia* ("rule by the people"), democracy enables citizens to collectively shape the laws that govern them.[15] Democracy's long history has led to confusion and debate, as the term "democracy" has held different meanings for different people across various times and contexts.[16] As Landemore describes, in ancient Greek society, the concept of democracy entailed citizens meeting in public spaces to deliberate on the laws, while for Icelandic Vikings, democracy was a summer gathering, where they discussed until all agreed.[17] Contemporary liberal democracies exhibit notable distinctions from these historical forms of governance. At their core, liberal democracies rely on an electoral system, where periodic, free, and fair elections allow citizens to choose their leaders, with the losing side peacefully conceding power.[18] A democracy thrives when there is widespread enthusiasm for its success, especially after periods of totalitarian rule, as various groups are more likely to work together to create a political agenda that addresses their concerns.[19] In the democratic process, issues are often initially raised by experts, with broader public support growing as the issue becomes more tangible.[20] This is most effective when the issue is well understood by a significant portion of voters, and when the benefits of the solution are seen as part of a shared public good.[21]

b. What is democratic backsliding?

Democratic backsliding refers to a gradual erosion of democratic institutions in countries that once embraced them, often driven by populist movements, declining institutional trust, and growing inequality.[22] This phenomenon is evident globally, including in countries previously considered resistant to such transformations, such as the United States and wide parts of Europe.[23] In these democracies, this decline is particularly concerning, given their historical significance as champions of democracy and their widely acknowledged democracy-building activities abroad, as any deterioration in their democracies could have repercussions beyond their borders.[24] Backsliding is often gradual, making it difficult to pinpoint a clear moment of change.[25] Unlike abrupt shifts through

[14] Locke, J. *Two Treatises of Government* (1689); Bäck, H. & Hadenius, A. "Democracy and State Capacity: Exploring a J-shaped Relationship" (2008).

[15] Lafferty, W. M. & Meadowcroft, J. "Democracy and the Environment" in: *Democracy and the Environment*" (1996); Brown, G. W., McLean, I. & McMillan, A. (2018); Held, D. *Models of Democracy* (2006).

[16] Dahl, R. A. (1998).

[17] Landemore, H. *Open Democracy* (2020).

[18] Ginsburg, T. & Huq, A. Z. (2018).

[19] Crouch, C. *Post-Democracy* (2004).

[20] Lafferty, W. M. & Meadowcroft, J. (1996).

[21] Lafferty, W. M. & Meadowcroft, J. (1996); Paehlke, R. "Environmental Challenges to Democratic Practice,' in: *Democracy and the* Environment" (1998).

[22] Ginsburg, T. & Huq, A. Z. (2018); Maggo, R. & Kumari, S. "The Rise of Populism in Central and Eastern Europe" (2023); Crouch, C. (2004).

[23] Levitsky, S. & Ziblatt, D. *How Democracies Die* (2018); Hyde, S. D. (2020); Waldner, D. & Lust, E. "Unwelcome Change" (2018); Bermeo, N. "On Democratic Backsliding" (2016).

[24] Bush, S. S. *The Taming of Democracy Assistance* (2015); Kelemen, R. D. "The European union's authoritarian equilibrium" (2020); Cooley, A. "Authoritarianism Goes Global" (2015).

[25] Mudde, C. & Rovira Kaltwasser, C. *Populism* (2017).

military coups d'état, "democratic backsliding today begins at the ballot box," meaning there is no definitive moment, such as an easily perceptible declaration of martial law or the abrogation of the constitution, to mark the moment,[26] except, perhaps, for some more recent examples, such as a brief martial law declaration in South Korea in December 2024, which was swiftly rescinded amid political backlash.[27] This slow progression may not immediately trigger widespread concern within society, leading to the dismissal of critics as 'alarmists' and to merely a few citizens seeking to defend democracy.[28]

A constitutional crisis arises when the integrity of a constitution is at risk of failing in its primary function of managing disputes within the realm of regular political processes, as opposed to collapsing.[29] 'Constitutional rot' occurs when democratic institutions erode over time, as leaders disregard fair competition, erode trust, and manipulate constitutional frameworks to perpetuate their hold on power, leading to a deterioration of democratic governance.[30] This gradual decline is often driven by 'constitutional hardball,' a term coined by Mark Tushnet, where political actors exploit formal rules, while breaking unwritten norms and traditions that uphold democratic fairness.[31] They manipulate legal structures and weaken checks on power, while leaving the system to look in 'good enough health' to outsiders.[32] As citizens, particularly marginalized groups, disengage, the foundations of democracy weaken, potentially allowing political actors to exploit this to consolidate power.[33] Scheppele notes: 'New autocrats look like democrats playing hardball, not like dictators playing softball.'[34] These developments test current democratic models' ability to respond, as when democratic institutions weaken, their ability to address complex, long-term challenges likely equally deteriorates.

III. Is Democracy as We Know It Unable to Halt the Climate Crises?

For the past 10,000 years, the Earth's environment has remained relatively stable during the Holocene, enabling human civilizations to flourish.[35] However, the Enlightenment era's exploitative view of nature, paired with the Industrial Revolution's technological advancements, led to the Anthropocene, where human activities became the primary drivers of global environmental change.[36] For the first time in the 3.5-billion-year history of life on

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[26] Levitsky, S. & Ziblatt, D. (2018); Ginsburg, T. & Huq, A. Z. (2018).

[27] Wong, T. & Armstrong, K. "South Korea President Apologises for Martial Law Declaration" (2024).

[28] Dunlap, R. E. „Climate Change Skepticism and Denial" (2013); Levitsky, S. & Ziblatt, D. (2018); Ginsburg, T. & Huq, A. Z. (2018); Lührmann, A. & Lindberg, S. I. "A third wave of autocratization is here" (2019).

[29]Ackerman, B. *We The People: Foundations* (1991); Balkin, J. M. "Constitutional Hardball and Constitutional Crises" (2008).

[30] Balkin, J. M. (2008).

[31] Tushnet, M. "Constitutional Hardball" (2004).

[32] Scheppele, K. L. "Autocratic Legalism" (2018); Waldner, D. & Lust, E. (2018); Landau, D. & Dixon, R., *Abusive Constitutional Borrowing* (2021).

[33] Landau, D. "Abusive Constitutionalism" (2013).

[34] Scheppele, K. L. (2018).

[35] Rockström, J. et al (2009).

[36] Derham, W. *Physico-Theology* (1713); Lindvall, D. "Democracy and the Challenge of Climate Change" (2021); Rockström, J. et al (2009).

the planet, a single species has caused widespread disruption to global ecological systems.[37] Though evidence does not show that non-democratic regimes fared any better in terms of environmental protection during their industrialization, the close connection between democratization in the 19th and 20th centuries and carbon emissions is undeniable.[38] However, the effects are highly susceptible to myopic behavior, complicating the perception of the crisis's severity, with some psychologists even positing that humans lack the general psychological tools to perceive the immediacy.[39] Despite overwhelming scientific evidence and an ever-growing public outcry, political systems across the globe seem paralyzed and unable to address the climate crisis at the corresponding scale of governance.[40] The severity of the environmental crisis, combined with the lack of democratic mechanisms to meet these urgent needs, can exacerbate authoritarian responses and suppress inclusive, participatory solutions in the face of impeding catastrophes.[41] The tension between long-term solutions needed for climate action and the short-term, reactive nature of democratic governance raises the question, if democracy can confront the climate emergency. To attempt the task of answering this conundrum, this question will be split into three parts: (1) What structural features of liberal democracies hinder effective climate action?; (2) Do authoritarian alternatives offer a viable solution? (For the purposes of this paper, technocracy is discussed as authoritarian); (3) How can democratic institutions be reformed to better address environmental emergencies?

This section examines whether democracy's inherent characteristics hinder urgent action, or if practices within democratic systems are outdated, and need reimagining. It will trace the roots of environmental governance, highlight barriers contemporary democracies face in addressing climate change, and explore technocratic alternatives, ultimately concluding that technocratic approaches must be rejected.

a. The Birth of Modern Environmental Law

To understand why democracies struggle to respond effectively to the climate crisis today, it is essential to look back at the development of modern environmental law. This historical perspective highlights both the achievements of collective action and the structural weaknesses of existing governance systems.

By the 1960s, the consequences of climate change were undeniable: rivers ignited,[42] smog caused casualties,[43] and species went rampantly extinct.[44] This era marked a pivotal moment, as public awareness of environmental degradation grew, prompting the establishment of laws and institutions that remain influential today. The impetus for change caused the inception of Green political parties and environmental non-governmental

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[37] Alberro, H. "Valuing Life Itself" (2020).
[38] Lindvall, D. (2021).
[39] Lindvall, D. (2021).
[40] Mert, A. "Democracy in the Anthropocene" in: *Anthropocene Encounters* (2019).
[41] Mert, A. (2019).
[42] Adler, J. H. "Fables of the Cuyahoga" (2002).
[43] Bell, M. L.; Davis, D. L. & Fletcher, T. "A Retrospective Assessment of Mortality from the London Smog Episode of 1952" (2004).
[44] Carson, R. *Silent Spring* (1962).

organizations, as well as the development of international environmental treaties and frameworks.[45] International action on carbon emissions roughly began with the 1992 Rio Earth Summit, which established the United Nations Framework Convention on Climate Change (UNFCCC) and the principle of "common but differentiated responsibilities," placing the responsibility for emissions reduction on industrialized nations.[46] The 1997 Kyoto Protocol set emissions reduction targets for developed countries, but excluded major developing countries and allowed mechanisms like emissions trading and carbon sinks, diluting its impact.[47] The most significant breakthrough came with the 2015 Paris Agreement.[48] By signing it, the international community committed to participating in climate change mitigation and ultimately eliminating greenhouse gases from the atmosphere. Unlike Kyoto, it required all nations to submit "emissions reduction plans" in form of "nationally determined contributions," albeit leaving them non-binding, relying on transparency and periodic review.[49] Despite these measures, global emissions continue to rise, exposing the gap between pledged targets and tangible actions. At present, no industrialized nation is on course to fulfill its mitigation obligations,[50] and the United Nations predicts that global warming could reach 4.5°C by 2100.[51] Consequently, while environmental law has made progress, it has failed to address deeper flaws within legal frameworks.

A key flaw in current environmental governance is the view of Earth as an object, rather than a living, interconnected entity.[52] This view stems from humans not perceiving themselves as stewards of the Earth—it is seen as external to them, as something they can exploit.[53] Democracies, with their strong emphasis on private property rights and individual freedom, enable unchecked consumption, intensifying environmental pressures without sufficient regulation.[54] Embracing differences and moving away from hierarchical identities could develop new ways of engaging with the environment based on respect and cooperation, rather than exploitation and control.[55] A shift in mindset is essential, as exploiting the environment jeopardizes both human liberties and the ability to fully access fundamental rights, such as healthcare, education, and employment.[56] While environmental law once showcased the power of collective action in democracies, the climate crisis presently reveals how institutions, which once led environmental justice efforts, are constrained by those same institutions.

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45 Stockholm Declaration (1972); Dobson, A. *Environmental Politics* (2016).

46 Rio Declaration (1992).

47 Kyoto Protocol (1997); MacLellan, L. "Is the Paris Climate Agreement legally binding?" (2021).

48 Paris Agreement (2015); Austrup, D. "Realist Climate Action" (2024).

49 Falkner, R. "The Paris Agreement and the New Logic of International Climate Politics" (2016).

50 Climate Action Tracker (2024); Austrup, D. "Realist Climate Action" (2024).

51 Wallace-Wells, D. *The Uninhabitable Earth* (2019); IPCC (2021); UNEP (2022).

52 Plumwood, V. *Feminism and the Mastery of Nature* (2002); Bosselmann, K. "'Human Rights and the Environment' in: *Governing for the Environment*" (2001).

53 Latour, B., Milstein, D., Marrero-Guillamón, I. & Rodriguez-Giralt, I. "Down to earth social movements" (2018); Dunlap, R. E. (2013).

54 Neumayer, E. "Do Democracies Exhibit Stronger International Environmental Commitment?" (2002).

55 Plumwood, V. (2002).

56 UN Human Rights Council (2018).

b. Democratic Delays: Barriers to Climate Action

As democratic institutions struggle to respond to the climate crisis, they are hindered by a host of structural barriers. These barriers often conspire to slow progress, fostering a political culture that is more responsive to immediate concerns than to the existential challenge posed by climate change.[57]

i. Institutional Capture and Polarization through Interest Groups

A key barrier in addressing the climate crisis is 'institutional capture' – a phenomenon where powerful interests, often operating unconsciously, exert influence over institutions through shared perspectives, reliance on specific expertise, or professional networks, leading to policies that benefit a few at the expense of the public good.[58] As a result, even in democracies, the very institutions designed to protect the public good can become obstacles to the transformative action needed to confront the climate crisis. The pervasive belief that special interests dominate regulation, coupled with the perceived inability of governments to counteract this influence, erodes trust in governments and fosters doubt about the political system's capacity to address climate challenge.[59]

Another significant challenge for democracies is growing political polarization, driven partly by well-funded interest groups that spread misleading information and frame climate change as an ideological issue, not a scientific one.[60] Elites, driven by their own interests, may amplify these divisive narratives to further entrench their power, resulting in a misalignment between public opinion and policy outcomes. Citizens, unable to see a unified or clear path forward, become disillusioned with democratic solutions when they witness decisions fail to reflect the urgency of the climate crisis.[61] The prevalence of interest groups can hinder the provision of public goods, as politicians often have to prioritize policies that serve narrow interests of well-organized small interest groups.[62] Furthermore, intense competition among such groups frequently results in a decision-making gridlock, delaying both the implementation and effectiveness of initiatives.[63] To overcome these barriers, democracies must strengthen institutional transparency, prioritize public over special interests, foster civic engagement, and create policy frameworks that align with the urgency of the climate crisis.

ii. Inertia of the Status Quo

The inertia of the status quo is yet another formidable barrier to effective climate action. As Martin Luther King Jr. warned, when laws and systems designed to establish justice fail to do so, they become 'dangerously structured dams' blocking social progress.[64] This stagnation is evident in many democratic systems, where entrenched political norms

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[57] North, D. C. *Institutions, Institutional Change and Economic Performance* (1990).
[58] Novak, W. J. "'A Revisionist History of Regulatory Capture' in: *Preventing Regulatory Capture*" (2013); Moss, D. A. & Carpenter, D. "'Introduction' in: *Preventing Regulatory Capture*" (2013).
[59] Moss, D. A. & Carpenter, D. (2013).
[60] Dunlap, R. E. (2013).
[61] Levy, R. "Fixed Constitutional Commitments" (2022); Mounk, Y. (2018).
[62] Held, D. & Fane-Hervey, A. (2009); Olson, M. *The Rise and Decline of Nations* (1982).
[63] Held, D. & Fane-Hervey, A. (2009); Midlarsky, M. "Democracy and the Environment" (1998).
[64] King Jr., M.L. "Letter from a Birmingham Jail" (1963).

and bureaucratic processes resist change, even in the face of overwhelming evidence of the need for urgent action. To overcome this inertia and to be capable of responding to the changing needs of society, governance must be dynamic and adaptable. Addressing the climate crisis requires a shift away from rigid, outdated frameworks and towards more flexible, forward-thinking policies that prioritize long-term sustainability over short-term political considerations.

iii. Lack of Representation in Climate Justice

The exclusion of marginalized communities, particularly in the Global South, from decision-making reflects power imbalances rooted in colonialism and racial inequality. Despite contributing least to the crisis, these groups face disproportionate environmental burdens, such as exposure to hazardous conditions and limited access to adaptation resources.[65] When grievances are ignored and hope in traditional channels diminishes, movements—often Indigenous-led—resort to civil disobedience to demand structural change.[66] While democracy is inherently conflictual, involving negotiation and power struggles, an overemphasis on consensus can suppress dissenting and minority voices,[67] and while this paper focuses on the shortcomings of democracies regarding lack of representation, this is not to mean that non-democratic regimes fare better, as marginalized groups do face systematic disregard in non-democratic regimes.[68] This tension often drives movements toward disruptive forms of protest. Groups like "Extinction Rebellion" and 'Letzte Generation' argue that traditional methods fail against entrenched power structures, framing disruptive eco-sabotage tactics (such as 'tyre extinguishers') as uncompromising resistance and morally necessary in the face of ecological collapse.[69]

The "radical flank theory" explains how such radical actions expand the "Overton window" (the spectrum of politically acceptable ideas), by normalizing previously fringe positions and creating 'creative tension,' a concept developed by Dr. Martin Luther King Jr. to push for urgent political action and disrupt societal complacency and inertia.[70]
However, research highlights that while non-violent civil resistance, as seen in the United States' Civil Rights Movement[71] and in India's independence struggle,[72] has historically proven effective, violence undermines democratic processes and fosters authoritarian outcomes.[73]

Environmental justice must be reimagined to challenge entrenched systems of power and exclusion and acknowledge the disproportionate environmental burdens faced by marginalized communities.[74] As climate change is a global problem, a 'global deal' is

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[65] Austrup, D. (2024); IPCC (2022).
[66] Arendt, H. *Crises of the Republic* (1972).
[67] Held, D. (2006); Laclau, E. & Mouffe, C. *Hegemony and Socialist Strategy* (2014).
[68] Chadwick B. P. "Fisheries, Sovereignties and Red Herrings" (1995).
[69] Hallam, R. "'The Civil Resistance Model' in: *This is Not a Drill: The Extinction Rebellion Handbook*" (2019); Milstein, T., McGaurr, L. & Lester, L. "Make love, not war?" (2020); Malm, A. *How to Blow Up a Pipeline* (2021).
[70] King Jr., M. L. (1963).
[71] Morris, A. D. *The Origins of the Civil Rights Movement* (1984).
[72] Gandhi, M. *The Story of My Experiments with Truth* (1927).
[73] Malm, A. (2021); Hallam, R. (2019).
[74] Landemore, H. "No Decarbonization without Democratization" (2022).

needed.[75] Countries and regions often have divergent positions, interests and excuses in finding a solution, leading to intense debates over the allocation of costs and benefits.[76] Solutions like cap-and-trade policies, despite their predictable emission outcomes and effective mitigation incentives for production, also raise moral concerns about the unequal burden placed on developing countries.[77] For many developing countries, coal and other high-emission energy sources represent the most affordable form of energy, yet the trade-off is this: funds allocated to reducing greenhouse gas emissions such as CO_2 are funds that could otherwise be spent on improving education, healthcare, clean water, or fostering economic growth.[78] As developing countries have contributed less to historical emissions, they resist measures that could hinder their developmental progress, thereby redirecting responsibility, whereas developed countries are likely to push non-transformative solutions.[79] A holistic approach rooted in local environmental understanding and an unwavering commitment to justice are essential. Only an inclusive framework can produce solutions that are not only effective in mitigating climate change but also equitable, ensuring that the voices of the most vulnerable are finally heard in the pursuit of a sustainable future for all.[80]

iv. Short-termism

Short-term electoral cycles can prevent long-term solutions to pressing issues.[81] Politicians, focused on immediate voter approval, often neglect policies that address future generations' needs.[82] As voters struggle to comprehend the scale of the issue and the technical aspects of climate science, their ability to make informed decisions is compromised, leaving them susceptible to manipulated narratives that favor short-term economic interests over long-term environmental sustainability, especially when powerful interest groups fund false or misleading narratives, further clouding public comprehension and complicating decision-making.[83] Democracies must reform electoral incentives to prioritize long-term sustainability, invest in climate education to better inform voters, and counter the influence of short-term economic interests by implementing policies that align with the needs of future generations and foster transparent, science-based decision-making.

v. State-centrism

Lastly, democratic theories in international relations often remain constrained by nation-state frameworks, assuming governments adequately represent their populations in a

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75 Held, D. & Fane-Hervey, A. (2009).

76 Lamb, W. F., et al "Discourses of Climate Delay" (2020).

77 Held, D. & Fane-Hervey, A. (2009); Landemore, H. (2022).

78 Held, D. & Fane-Hervey, A. (2009).

79 Held, D. & Fane-Hervey, A. (2009); Lamb, W. F., et al (2020); Victor, D., et al. "The Geoengineering Option" (2009).

80 Pulido, L. & De Lara, J. "Reimagining 'justice' in environmental justice" (2018); Landemore, H. (2022).

81 Held, D. & Fane-Hervey, A. (2009).

82 Held, D. & Fane-Hervey, A. (2009).

83 Dryzek, J. S. & Niemeyer, S. "Deliberative Democracy and Climate Governance" (2019); Lindvall, D. (2021).

global system of state interactions.[84] However, this state-centric bias fails to address the complexities of transnational governance, particularly in environmental contexts, where polycentric, hybrid systems dominate.[85] Critics argue that these measures often legitimize existing power imbalances instead of rectifying them, marginalizing vulnerable groups and privileging elite actors like experts and international institutions.[86]

With a global democratic 'infrastructure gap,' core democratic principles (public accountability, minority protections, and widespread participation) have to be preserved as an interim solution.[87] However, democracy in the Anthropocene cannot remain tied to nation-state paradigms. Historically, democracy has evolved to suit new scales before, such as during the American and French Revolutions, where principles from ancient, small-scale democratic regimes were reimagined to meet the demands of larger nation-states.[88] Democracy in the Anthropocene faces another pivotal moment, requiring redefinition and innovation to address planetary challenges and transcend nation-state limitations.

These barriers, deeply embedded within the fabric of democratic governance, do not only hinder the development of robust climate policies but also contribute to a growing disillusionment with democratic processes. As institutional dysfunctions become more evident, citizens may lose faith in democracy's ability to address climate change. If left unaddressed, this disillusionment could erode trust in democratic systems and lead to the support of alternative forms of governance, notably technocratic solutions.

c. The Technocratic Temptation: Can Experts Solve the Climate Crisis?

The urgency of addressing climate change has fueled a tension between democratic governance and technocratic solutions.[89] As the Intergovernmental Panel on Climate Change highlights, the scope of climate change extends far beyond the natural world, with significant implications for human health, food security, water resources, and economic stability, which in turn jeopardizes the prosperity democracy relies on.[90] As democracy is dependent on economic development, and since economic growth and prosperity generally result in environmental pollution and ecological destruction, democracy is not necessarily protective of the environment.[91]

In light of looming crises, these advocates call for extensive policy reforms to ensure that society operates within 'ecological limits'[92] and they implore nations to adopt these climate mitigation strategies immediately.[93] They maintain that the degree to which the most severe repercussions of uncontrolled climate change will manifest tomorrow,

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[84] Mert, A. (2019).
[85] Mert, A. (2019); Bäckstrand, K. "Democratizing Global Environmental Governance?" (2006).
[86] Mert, A. (2019).
[87] Keohane, R. O. "Nominal Democracy?" (2016); Mert, A. (2019).
[88] Mert, A. (2019).
[89] Held, D. & Fane-Hervey, A. (2009).
[90] IPCC (2021); Paehlke, R. (1998).
[91] Desai, U. "Environment, Economic Growth, and Government," in: *Ecological Policy and Politics in Developing Countries* (1998).
[92] Shahar, D. C. "Rejecting Eco-Authoritarianism, Again" (2015).
[93] Rockström, J. et al (2009).

significantly hinges on the decisions made by governmental authorities today.[94] They maintain that the scale and immediacy of the environmental crisis necessitates centralized, expert-driven decision-making. In this framework, decisions are removed from the political arena and placed in the hands of experts who are presumed to act based on data and scientific knowledge and bypass traditional democratic deliberation. Can democracies function effectively while addressing such existential threats, or will the need for rapid action push governments toward technocratic, anti-democratic measures? This section examines technocracy as an authoritarian method and concludes that technocracy offers certain perks, but risks undermining democratic principles by limiting political participation to a knowledgeable elite.[95]

i. Eco-authoritarianism

The rise of ecologically-motivated authoritarianism—'eco-authoritarianism'—is explored in the works of thinkers like William Ophuls and Garret Hardin. Ophuls argued that an ecologically sustainable future would be more authoritarian, and that democracy and environmental values were inherently incompatible,[96] whereas Hardin expanded an idea that first appeared in a pamphlet by William Foster Lloyd in 1833 and described the 'tragedy of the commons': the dilemma that arises when individuals, each pursuing their own self-interest, exploit shared, finite resources and live 'without limit in a world that is limited.'[97] The conflict lies between short-term self-interest and the collective good. When individuals could benefit themselves, they often seize it, even if it means spreading the negative consequences across the broader population. This dynamic can be observed on a global scale. Although it is collectively rational for all countries to cooperate—such as by restricting emissions—each nation often chooses to act in their own self-interest, opting to 'free-ride' on the efforts of others.[98] Hardin contended this tragedy was not amenable to 'technical solutions,' and rather required behavioral changes, whereas he did not deem citizens in democracies as willing to voluntarily limit their privileges.[99] He and others attributed the ecological crisis to excessive autonomy and proposed governance responses to limit individuals in their personal freedoms, if harmful to the environment.[100] Restricting environmentally harmful activities is more challenging in democracies, where governments are bound to uphold citizens' individual rights. Autocratic regimes encounter fewer obstacles when imposing restrictions, allowing for more unilateral action.[101] The core argument put forth by this anti-democratic perspective is that effective climate policy necessitates a top-down approach to ensure swift execution of necessary actions.[102]

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94 Lieven, A. *Climate Change and the Nation State* (2021).

95 Brennan, J. *Against Democracy* (2016).

96 Ophuls, W. *Ecology and the Politics of Scarcity* (1977); Shahar, D. C. (2015).

97 Hardin, G. "The Tragedy of the Commons" (1968); Lloyd, W. F. "Two Lectures on the Checks to Population" (1833).

98 Gardiner, S. M. "A Perfect Moral Storm" (2006); Lamb, W. F., et al (2020).

99 Hardin, G. (1968); Heilbroner, R. L. *An Inquiry into the Human Prospect* (1974); Shahar, D. C. (2015).

100 Hardin, G. (1968).

101 Neumayer, E. (2002); Heilbroner, R. L. (1974); Gilley, B. "Authoritarian environmentalism and China's response to climate change" (2012).

102 Ahlers, A. L., & Shen, Y. "Breathe easy?" (2018).

The original eco-authoritarian proposals were rejected and revised, even by Ophuls and Heilbroner themselves, who agreed with their critics that they were unrealistic and too simplistic.[103] But interest has resurged more recently with Beeson's claim that authoritarian governments exhibit greater efficiency in addressing environmental challenges than democratic systems.[104] The key difference between earlier and newer versions of eco-authoritarianism is the distancing from central planning, as in the former Soviet Union, in favor of a model based on the People's Republic of China.[105] China's centralized decision-making authority is vested in competent officials to ensure effective environmental outcomes.[106] Shearman and Smith focus on Singapore as their model.[107] Drawing upon Plato's 'ship of state,'[108] they propose that a morally-governing trained elite, 'eco-elites,' could offer proficient leadership for societies facing ecological crises.[109] In general, in an eco-authoritarian state, the ideal is this: public participation is restricted to a group of scientific and technocratic experts, who possess unparalleled knowledge about climate change and can make prompt and nonpolitical decisions, when needed.[110]

ii. Why not endorse eco-authoritarianism, then?

The concept of eco-authoritarianism has been challenged by arguments suggesting democracies are better equipped to safeguard environmental quality, and some of the many compelling arguments will be explored in this section.[111]

First of all, unrestrained power always risks leading to despotism, which is problematic on its own, but bestowment of absolutism also does not guarantee that such a regime would prioritize environmental protection after coming to power.[112] Such leaders would lack public accountability and therefore they might have limited incentives to implement long-term policies.[113] The implication is that these eco-autocrats would potentially fail to resolve the crisis that would have justified their rise. Furthermore, while climate change may seem a singular issue solvable by climate experts, it intersects with various other areas—agriculture, education, and health, to name a few—requiring broader qualifications and cross-disciplinary cooperation.[114] Even exceptional leaders trained for tough decision-making in radically reformed universities, as loosely envisioned by Shearman

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[103] Heilbroner, R. L. *An Inquiry into the Human Prospect: Looked at Again for the 1990s* (1991); Ophuls, W. & Boyan Jr., A. S. *Ecology and the Politics of Scarcity Revisited: The Unraveling of the American Dream* (1992); Shahar, D. C. (2015).

[104] Shahar, D. C. (2015); Beeson, M. "The coming of environmental authoritarianism" (2010); Shearman,
D. J. C. & Smith, J. W. *The Climate Change Challenge and the Failure of Democracy* (2007).

[105] Locke (1689); Shahar, D. C. (2015).

[106] Lucky, M.C. „Knowledge-Making in Politics" (2024).

[107] Shearman, D.J.C. & Smith, J.W. (2007); Shahar, D. C. (2015).

[108] Plato *The Republic* (ca. 380 B.C.E.); Held, D. (2006).

[109] Shearman, D. J. C. & Smith J. W. (2007); Shahar, D. C. (2015).

[110] Heilbroner, R. L. (1974).

[111] Held, D. & Fane-Hervey, A. (2009); Holden, B. *Democracy and Global Warming* (2002).

[112] Shahar, D. C. (2015).

[113] Held, D. & Fane-Hervey, A. (2009).

[114] Landemore, H. (2022).

and Smith, would not be up for this task.[115] Even if the existence of such an eco-elite were possible, maintaining the quality of its rule over time would not be guaranteed.[116] Besides, technocrats rely on solid scientific evidence for effective legislation. In democracies, scientists and experts operate with freedom, which allows them to conduct research, share evidence, and collaborate internationally, all avenues largely inaccessible in autocratic systems.[117]

Another argument is that authoritarian regimes face a trade-off: "'independence from citizens' preferences (or) the effectiveness of their own administrations."[118] While it is conceivable for authoritarian regimes to attain the kind of separation from public sentiments advocated by eco-authoritarians, this independence would require measures that diminish their government officials' effectiveness.[119] Bäck and Hadenius "curvilinear J-shaped pattern" provides a similar argument: authoritarian systems, while administratively superior to semi-democracies, still fall short of the adaptive quality found in fully democratic states, where strong civil society ensured tailored policies and iterative feedback.[120]

Principle 10 of the Rio Declaration states that "environmental issues are best handled with the participation of all concerned citizens," and that "each individual shall have appropriate access to information concerning the environment that is held by public authorities . . . and the opportunity to participate in the decision-making process."[121] Besides clashing with Principle 10 of the Rio Declaration, technocratic governance fails to see the strength democracies gain by adhering to this principle. Democracy's strength lies in aligning the interests of citizens, politicians, and experts.[122] Freedoms of press, speech, and association foster a well-informed citizenry, enabling public access to ecological information, advocacy group mobilization, and pressure on policymakers.[123] Operating within a competitive political landscape, these policymakers are compelled to respond to demands, a dynamic ultimately reinforced by the freedom to vote, which serves as a powerful mechanism of accountability and change.[124] In contrast, when environmental warnings and public concerns clash with state agendas in non-democratic regimes, these might be suppressed.[125]

By focusing on the diverse range of citizen interests, democracy ensures that problems are addressed in a manner that reflects the various perspectives within society, therefore enhancing the overall quality of knowledge production and problem-solving within democracies: meaning the main argument of technocrats that the democratic concept hinders

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[115] Shearman, D. J. C. & Smith, J. W. (2007).
[116] Shahar, D. C. (2015).
[117] Held, D. & Fane-Hervey, A. (2009).
[118] Shahar, D.C. (2015).
[119] Shahar, D.C. (2015).
[120] Bäck, H. & Hadenius, A. (2008); Shahar, D. C. (2015); Ma, Y. & Xiang, W. "Enforcing Law Through Authoritarian Environmentalism?" (2023).
[121] Rio Declaration (1992).
[122] Held, D. & Fane-Hervey, A. (2009).
[123] Neumayer, E. (2002); Payne, R. A., "Freedom and the Environment" (1995); Held, D. & Fane-Hervey, A. (2009).
[124] Neumayer, E. (2002); Payne, R. A. (1995).
[125] Neumayer, E. (2002); Chadwick, B. P. (1995).

environmental solutions from happening and that technocrats are better equipped at handling the environmental crisis due to their knowledge can be invalidated.[126]

Taking a political shortcut and delegating the decision-making authority to qualified professionals may seem appealing, given the climate crisis's urgency, but it is not a viable course of action. It risks public resistance and undermining trust. This is a trend already observable, particularly among younger generations, where trust in the governments' ability to handle the climate crisis is comparably lower in contrast to older generations, making a stable future for democracy more uncertain already.[127] Rather, the crisis offers an opportunity to strengthen democratic governance by embracing innovative, inclusive decision-making processes.[128] The challenge is not whether democracy can survive environmental crises, but how it can evolve to meet the demands of climate change.

IV. Potential Solutions to Strengthen Democracy in Addressing Climate-Related Issues

After outlining democracy's current limitations in addressing climate change, and then dismissing technocracy as a viable solution, this section will explore democratic alternatives. The focus will first be on deliberative democracy, and then on the establishment of constitutional commitments, before turning to "guarantor" institutions.

a. Deliberative democracy

Deliberative democracy in form of "mini-publics" or Citizens' assemblies dates back to Ancient Greece, where free citizens engaged in collective decision-making through open debate in the Assembly, aiming for consensus and rational discourse to determine policies that affected the *polis*.[129] Citizens' assemblies today consist of randomly selected citizens, who deliberate on essential questions and offer recommendations to elected bodies. They bypass electoral politics' competitive nature and its incentives to opposition, making them particularly effective for controversial topics.[130] Deliberate democracy emphasizes thoughtful deliberation of preferences in transparent and public settings with the goal of transforming private preferences into publicly justifiable positions.[131] Proponents argue that there are no inherently correct values, suggesting instead that legitimacy arises when the perspectives withstand public justification through social interactions that consider and incorporate the perspectives of others.[132] They state that democracy's legitimacy derives from the quality of the deliberations that took place, even more than the voting process[133] and propose a shift in democratic practice, moving away from the notion of predetermined preferences, instead envisioning democracy as a dynamic learning process where individuals engage with a range of issues to develop well-informed, defensible positions.[134] Empirical

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[126] Lucky, M. C. (2024).

[127] Kwak, J., Tomescu-Dubrow, I., Slomczynski, K. M. & Dubrow, J. K. "Youth, Institutional Trust, and Democratic Backsliding" (2020); Landemore, H. (2022); Lucky, M. C. (2024); Mounk, Y. (2018).

[128] Mert, A. (2019).

[129] Held, D. (2006).

[130] Curato, N.; Hammond, M. & Min, J. B. *Power in Deliberative Democracy* (2019).

[131] Zwart, I. "Local Deliberation and the Favoring of Nature" (2007).

[132] Held, D. & Fane-Hervey, A. (2009).

[133] Dryzek, J. S. & Niemeyer, S. (2019).

[134] Dryzek, J. S. & Niemeyer, S. (2019); Held, D. & Fane-Hervey, A. (2009).

evidence supports this view, in demonstrating that individuals often revise their preferences when exposed to new information and meaningful debate.[135] The inherent uncertainty of environmental challenges could be countered by drawing upon diverse experiences, expertise, and widespread consultation.[136] The ideal outcome is that citizens enhance their knowledge and develop a genuine concern for the environment through active engagement, which fosters mutual learning and collaboration among individuals.[137]

But this idea has indisputable constraints. Deliberative democracy can take a considerable amount of time and the deliberations are vulnerable to selective picking and choosing by parliaments, upon which the implementation of Citizens' Assemblies remains dependent, as their authority is purely consultative, rather than binding.[138] Moreover, in instances of extreme complexity, particularly when the questions are broad and the time is limited, Citizens' Assemblies are at risk of manipulation.[139] Even with specification of their role and legitimacy, they are susceptible to a mere symbolic role, rather than a role as public policy instrument[140] and their leaders may be required to pursue policies that, while essential for reducing global warming, are potentially unpopular and run counter to the democratic preferences of their citizens.[141]

Some critics even doubt that deliberative democracy can conceivably work on the global level and limit it to local governance.[142] The main problem in this context is that deliberative methods cannot guarantee ambitious environmental outcomes, especially since the opinions on the ideal state of the environment, as well as its value, already diverge. Environmental outcomes are not always favored by the public. The question arises who would protect the environment if no one in the deliberation room cared about it. Two cases which show just how different the outcome for the environment in a deliberative arrangement can be, are the French Citizens' Convention and the Glenorchy City Council.

i. French Citizens' Convention

The French Citizens' Assembly on Climate convened in response to the Yellow Vests (or *gilets jaunes*) protests, which opposed, besides other objections, a fuel tax increase that disproportionately impacted urban working-class commuters while sparing affluent city residents.[143] The French Citizens' Convention demonstrated that ordinary citizens have the capacity to surpass experts and elected officials, particularly when it comes to questions of environmental protection. This case highlights how deliberative arrangements can encourage the prioritization of interests that would be beneficial to the natural environment (albeit these recommendations were not legally binding). The citizens took the expert recommendations into account but made them more compatible with social-justice goals, as illustrated by their fiscal solutions for lower-income households regarding their recommendations for

135 Held, D. (2006); Held, D. & Fane-Hervey, A. (2009).
136 Ejsing, M.; Tønder, L.; Brandt Jensen, I. H.; Hansen, J. (2024).
137 Curato, N.; Hammond, M. & Min, J. B. (2019).
138 Landemore, H. (2022); Held, D. & Fane-Hervey, A. (2009).
139 Girard, C. "Lessons from the French Citizens' Climate Convention" (2021).
140 Girard, C. (2021).
141 Held, D. & Fane-Hervey, A. (2009).
142 Keohane, R. O. (2016).
143 Landemore, H. (2022).

retrofitting housing for energy efficiency.[144] They also rejected certain expert recommendations, including the carbon tax, when they deemed it necessary. Their decision was influenced by their sentiment of considering it to be too unfair or controversial.[145] The success of this assembly can be attributed to various crucial elements, including the precise framing of the issue, the utilization of consensus-building techniques, and the involvement of citizens who were willing to both discuss and endorse favorable environmental results. In an era of diminishing trust, people are ever more unlikely to embrace climate change solutions proposed by distant politicians and experts who appear disconnected from their realities. Real-world deliberative procedures indicate that they are more inclined to support the suggestions of small representative groups, such as mini-publics, that resemble them in appearance and mindset.[146] In the French example, three out of five individuals considered the Convention to have the authority to put forward proposals on their behalf.[147]

ii. **Glenorchy City Council**

Ivan Zwart discusses Tasmania's Glenorchy City Council as an example of how inadequate ecological outcomes can arise when these factors are absent, raising doubts about the authenticity of deliberation in such cases. The Tasmanian Glenorchy City Council sought to eliminate backyard burning and proposed to provide a green waste service to alleviate the problem of burning garden material.[148] After forming a task force for this purpose, all Glenorchy citizens were invited to attend a meeting on waste issues, where they were provided with the necessary information regarding the proposal. The meeting resulted in most precincts' continuous support of backyard burning, despite their awareness of this being a form of environmental pollution.[149]

One important conclusion to be drawn from these findings is that favorable environmental outcomes are contingent upon more than just an argument asserting the importance of a healthy environment as a common interest and that deliberative arrangements do not automatically lead to favorable outcomes for the environment.[150] There is a disconnect between scientific knowledge, public opinion, and political action regarding climate change. This discrepancy shows the significance of environmental communication. Scholars explored how individuals comprehend environmental information and analyze how different perspectives and narratives shape environmental politics. Discourses, which encompass facts, frames, metaphors, and narratives, play a crucial role in generating shared understandings, while different discourses offer distinct interpretations of the world, leading to varying policy recommendations.[151] Consequently, discourses hold considerable power within the realm of environmental politics.[152]

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[144] Landemore, H. (2022).
[145] Landemore, H. (2022).
[146] Kersting, N. "Participatory Democracy and Sustainability" (2021).
[147] Landemore, H. (2022).
[148] Zwart, I. (2007).
[149] Zwart, I. (2007).
[150] Zwart, I. (2007); Lepori, M. "Towards a New Ecological Democracy" (2019).
[151] Ritter, E. & Thaler, G. M. "Technical reform or radical justice?" (2023).
[152] Ritter, E. & Thaler, G. M. (2023).

Therefore, even though deliberative democracy has obtained the most support of all the green democratic literature,[153] this proposal alone is insufficient for addressing climate change. Establishing a legal framework to define their position in the constitutional system could assist in controlling their utilization and preventing their abuse.[154]

b. Fixed Constitutional Commitments

Constitutional norms often exhibit a significant degree of indeterminacy, necessitating ongoing refinement through interpretation and specification.[155] This flexibility is intentional and prudent, as constitutions are designed to endure over time.[156] Abstraction and adaptability measures help to mitigate the risk of unforeseen consequences. Ron Levy proposes another solution, namely "fixed constitutional commitments." While most constitutional provisions that address the environment provide a general framework, their wording on environmental provisions is often intentionally vague to allow for the flexibility in interpretation outlined above.[157] He describes his idea as governments constructing their constitutions anew to include provisions for environmental protection, and imagines these as not merely aspirational goals for the future, but rather as binding obligations that require governments to take specific actions within a defined timeframe to meet certain standards.[158] Fixed commitments can enhance democratic values by addressing shortcomings in these processes during times of crisis. One notable example of a country with fixed constitutional commitments is Ecuador, which granted rights to nature in its constitution.[159] Article 71 of the Ecuadorian Constitution states that, "Nature or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."[160] While Ecuador has made important strides in legally recognizing the environmental rights of nature and including environmental protection into the constitution, the reality of enforcement and balancing economic growth with ecological sustainability remains challenging.[161] Constitutional commitments are an important starting point, but they can face practical and political barriers that prevent them from being fully realized in practice.[162] There is a pressing need to guarantee constitutional commitments, so that they do not remain merely rhetoric.[163] The constitutional character of norms is not defined merely by its inclusion in a constitutional code but by the extent to which the polity regards it as deeply entrenched, legally or politically. A truly constitutional norm demands protections that surpass ordinary political

[153] Barry, J. *Rethinking Green Politics* (1999); Kersting, N. (2021).

[154] Girard, C. (2021).

[155] Khaitan, T., "Guarantor Institutions"(2021).

[156] Khaitan, T. (2021).

[157] Levy, R. (2022).

[158] Levy, R. (2022).

[159] Constitution of Ecuador (2008); Peck, M. R., et al "The conflict between Rights of Nature and mining in Ecuador" (2024).

[160] Constitution of Ecuador (2008).

[161] Peck, M. R. (2024).

[162] Peck, M. R., et al (2024).

[163] Khaitan, T. (2021).

or legal processes, requiring significant effort or exceptional measures to alter or dismantle.[164]

c. Guarantor Institutions

Constitutional theory traditionally divides government functions into three distinct functions of government: the legislature, the executive, and the judiciary, each tasked with specific roles and designed to remain independent.[165] However, this framework has evolved significantly since the late nineteenth and early twentieth centuries, with the establishment of regulatory institutions, which often blur the lines between legislative, executive, and judicial functions, challenging the Montesquiean principle of separation of powers:[166] a diverse array of hybrid entities called the "fourth-branch."[167] While regulatory agencies in the United States are often referred to as "fourth branch" in academic discourse, they are, in fact, rather extensions of the executive branch, and will not be discussed further in this context.[168] This evolution in governance laid the groundwork for more specialized entities tasked with safeguarding critical constitutional norms. In particular, Hans Kelsen's seminal idea of constitutionalizing courts protecting the constitution as a distinct function, has expanded, influencing the establishment of institutions like Germany's Federal Constitutional Court.[169] By the late twentieth century, constitutional designers began to acknowledge that preserving democracy and constitutional commitments often required institutions beyond the judiciary, particularly in addressing complex, long-term challenges such as climate change.[170] Countries from the Global South were among the first to formally embed such institutions into their constitutional frameworks, even if they did not create them from scratch.[171]

In general, ensuring that commitments, such as binding environmental obligations, are upheld, require not only legislative action but also robust oversight mechanisms. For example, binding commitments to reduce carbon emissions require actors to act contrary to their immediate self-interests – a demand that exposes such commitments to political opportunism, short-term economic priorities, and bureaucratic inertia.[172] Khaitan posits that certain emerging institutions are specifically endowed with both the "material" and "expressive" capabilities to offer reliable and lasting assurance for those constitutional norms, which lack self-enforcement.[173] Guarantor institutions stand apart from ordinary

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[164] Khaitan, T. (2021).

[165] Tushnet, M. "Institutions Protecting Constitutional Democracy" (2020); Massachusetts Declaration of Rights (1780); *Kilbourn v Thompson* 103 U.S. 168, 190 (1881).

[166] Montesquieu, C. *The Spirit of Laws* (1748).

[167] Vibert, F. *The Rise of the Unelected* (2007) ; Khaitan, T. (2021).

[168] Tushnet, M. (2020); Strauss, P. L. "The Place of Agencies in Government" (1984); Ackerman, B. "The New Separation of Powers" (2000).

[169] Kelsen, H. "Wer soll der Hüter der Verfassung sein?" (1931); Tushnet, M. (2020); Basic Law for the Federal Republic of Germany (1949).

[170] Ackerman, B. (1991).

[171] Constitution of the Republic of South Africa 1996; Fombad, C. M. "'The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa,' in: *Separation of Powers in African Constitutionalism* (2016); Khaitan, T. (2021); Tushnet, M. (2020).

[172] Khaitan, T. (2021).

[173] Khaitan, T. (2021).

regulatory agencies, as they are recognized as constitutional entities in two significant ways: firstly, the norms they aim to uphold, and secondly, the institutions themselves must possess constitutional validity. Through this dual constitutional nature, "constitutional entrenchment," or in other words a degree of protection against altercations through standard political and legal mechanisms within the polity, must be ensured.[174] Only when both the norm and its institutional regulator are constitutionalized can they be considered a guarantor institution.[175] Failing to constitutionalize the enforcer of a constitutional norm would be a strategic misstep, as it would enable hostile actors, who may be unable to directly weaken or abolish the norm, to undermine its effectiveness by targeting or dismantling the enforcing institution.[176]

According to Khaitan, the effectiveness of guarantor institutions is linked to their "expertise, independence, and accountability."[177] Unlike integrity institutions, whose main task Ackerman sees in checking political corruption, guarantor institutions are equipped to manage both primary and secondary responsibilities and typically embody both expressive and material capacities.[178] This is crucial to their unique hybridity.[179] This hybrid functionality enables guarantor institutions to both shape public discourse and implement practical measures. For example, an independent environmental commission could articulate the constitutional importance of reducing CO_2-emissions, ensuring its prominence in national policy debates. Concurrently, it could deploy its material capacities to monitor and enforce industrial CO_2 emission limits, oversee the implementation of carbon pricing mechanisms, or manage large-scale carbon capture and storage projects to mitigate the impacts of climate change.

The three conventional branches of government, whether acting independently or in concert, cannot reliably enforce all non-self-executing constitutional norms, highlighting the need for constitutional guarantor institutions, as envisioned by Khaitan.[180] Guarantor institutions' duality is critical in addressing the climate crisis, where traditional branches of government have failed to prioritize or enforce environmental norms. Courts, though capable of interpreting and 'nourishing' environmental rights, lack the operational resources to ensure compliance.[181] Similarly, executives and legislatures, often subject to lobbying or partisan interests, may lack the political will to act decisively on environmental issues. Guarantor institutions bridge this gap, embodying a model of governance that is both operationally effective and constitutionally anchored. By being constitutionally entrenched, a guarantor institution could resist pressures from industries or governments that might seek to dilute environmental standards for short-term gain.

Taking a closer look at these institutions, it is apparent that they persist in appointing personnel for these institutions, rather than electing them.[182] But unlike in purely technocratic

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[174] Khaitan, T. (2021); Ackerman, B. (2000).
[175] Khaitan, T. (2021).
[176] Khaitan, T. (2021).
[177] Khaitan, T. (2021).
[178] Ackerman, B. (2000).
[179] Khaitan, T. (2021).
[180] Khaitan, T. (2021).
[181] Khaitan, T. (2021).
[182] Vibert, F. (2007).

bodies, the traditional separation of powers is complemented within guarantor institutions, as they handle empirical aspects of public policy while leaving value judgments to elected officials.[183] Given that these regulatory bodies are "self-consciously political actors and . . . subject to political oversight,"[184] guarantor institutions cannot be classified as "technocratic."[185] Nevertheless, they must earn legitimacy through rigorous, transparent methods, and they must be integrated into systems of democratic oversight to ensure they do not become elitist or undemocratic. The classic checks and balances system must also be applied to unelected bodies.[186]

d. Implications

Each of the three models presented have their advantages and limitations. Deliberative democracy fosters citizen participation and legitimate decision-making, but the process can be time-consuming and does not automatically guarantee ambitious environmental outcomes. Fixed constitutional commitments establish a clear, legally binding framework for achieving long-term environmental goals, yet their implementation relies heavily on independent institutions capable of upholding these commitments. Guarantor institutions ensure the entrenchment of environmental goals by operating independently of shifting political majorities, nevertheless their independence can undermine democratic accountability, raising concerns about their legitimacy.

While each model has its drawbacks, their respective strengths suggest that a combined approach offers a more promising pathway. Democratic innovations, when strategically integrated, can reinforce one another and effectively address the climate crisis. This is not a time for policy perfectionism,[187] nor for relying on single models.[188] It is important to multiply sites and scales of action and to work simultaneously across diverse fronts to tackle systematic drivers of ecological degradation. Only through a pluralistic approach can these strategies catalyze the structural reforms essential for addressing the climate emergency. In such a novel model, deliberative processes could foster inclusive public dialogues by engaging citizens in meaningful deliberation, thereby helping constitutional environmental commitments' wide support and resilience in the face of political changes. Fixed constitutional commitments could provide legally binding, long-term frameworks for environmental governance, transcending short-term politics. Guarantor institutions could safeguard these commitments from being weakened or abandoned, even when political pressures may challenge them.

V. Conclusion

In conclusion, the climate crisis tests liberal democracies, but it also offers a chance for democratic evolution. While democracies face structural barriers like short-termism and

[183] Khaitan, T. (2021); Vibert, F. (2007).
[184] Khaitan, T. (2021).
[185] Khaitan, T. (2021).
[186] Vibert, F. (2007).
[187] Lamb, W. F., et al. (2020).
[188] Ortmann, J. & Veit, W. "Theory Roulette" (2023).

political inertia, they remain adaptable systems capable of reform. Acknowledging the complexity of climate governance, this paper refrained from proposing a singular solution and highlighted the need to combine diverse solutions to drive essential systematic reforms. Three models in the wide array of proposals were discussed: deliberative democracy, fixed constitutional commitments, and guarantor institutions. This paper suggested that the technocratic model is not the only solution, and must be rejected, as these examples demonstrate that there are more valid, democratic pathways for tackling the climate emergency without forsaking the principles that define liberal democracies.

In a world where the stakes have never been higher, democratic systems, if reformed and strengthened, have the potential to lead in the fight against climate change. The urgency of this crisis of our times demands that we think beyond traditional paradigms and explore how democratic innovations can offer not just effective but equitable and inclusive solutions. The path forward lies not in abandoning democracy, but in refining it to ensure that future generations inherit not just a habitable planet, but a system of governance that is both responsive and accountable to the needs of the environment and its people. Democracy must not only transform but must transform quickly. This is the challenge, and the opportunity that liberal democracies must rise to meet.

Cultural Heritage and Resilience in International Law

Valentina Vadi [a]

ABSTRACT

What is the link between cultural heritage protection and communities' resilience building in international law? This study examines the critical nexus between cultural heritage safeguarding and resilience-building in international law showing how protecting cultural heritage can enhance communities' ability to cope with unexpected changes and challenges. Cultural heritage, whether tangible or intangible, serves not merely as a repository of collective memory or aesthetic beauty but as a dynamic resource that strengthens communities' capacity to withstand and recover from diverse threats, including armed conflict, environmental degradation, and cultural erasure. The analysis adopts a multi-layered approach, exploring how international cultural heritage law addresses this relationship, discussing the World Heritage Convention, the Convention on Cultural Diversity, the Intangible Cultural Heritage Convention, the emerging norms protecting Indigenous peoples' cultural heritage, and the Underwater Cultural Heritage Convention's respective role in safeguarding various forms of cultural heritage and fostering resilience against environmental and human threats. The study concludes that international law is increasingly recognizing cultural heritage as a source of resilience, strengthening social cohesion, building cultural identity, and providing adaptive knowledge systems essential for communities facing existential challenges. It also demonstrates resilience by dynamically interpreting existing norms and adopting new norms and legal categories, while intersecting with other fields of international law. This analysis is particularly apposite in times of crisis, when the structure of international law is under pressure and needs some fluidity, flexibility, and resilience.

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I. Cultural Heritage and Resilience in International Law: Exploring the Connection

The connection between cultural heritage safeguarding and resilience-building has gained significant momentum in international law over the past decade.[1] Cultural heritage—whether tangible sites, intangible practices, or traditional knowledge—increasingly appears in international frameworks not just as something worth protecting for its own sake, but as a functional component of individual and community resilience. When disasters strike or conflicts erupt, communities with a strong cultural identity often recover more effectively because cultural heritage provides social cohesion, economic pathways, and cultural resilience.

This shift is reflected in several international legal instruments. A paradigmatic example is offered by the Sendai Framework for Disaster Risk Reduction (2015-2030), a global UN agreement adopted in Sendai, Japan, that guides efforts to shift from disaster management to disaster risk management.[2] The Framework recognizes the linkage between cultural heritage and resilience in risk management.[3] It urges states "to anticipate, plan for, and reduce disaster risk . . . to

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[1] *See e.g.*, Cornelius Holtorf, *Embracing Change: How Cultural Resilience Is Increased through Cultural Heritage* (2018) 50 WORLD ARCHAEOLOGY 639–50, 639 (reporting that "Many voices currently insist that uncompromised conservation of cultural heritage is a significant guarantor of cultural resilience. . . . In this view, cultural heritage is a valuable inheritance that needs to be conserved and transmitted to future generations; any risk of damage or destruction of cultural heritage is to be taken very seriously because the latter ensures cultural resilience and contributes to sustainability, both now and in the future.")

[2] Marie Aronsson-Storrier, *Sendai Five Years on: Reflections on the Role of International Law in the Creation and Reduction of Disaster Risk* (2020) 11 INTERNATIONAL JOURNAL OF DISASTER RISK SCIENCE 230-238, at 230 (examining "the position of the Sendai Framework for Disaster Risk Reduction 2015–2030 within international law."); Alexia Herwig, Resilience and Responsibility in International Law. The Achievements of the Sendai Framework through the Example of Climate Change, in Alexia Herwig and Marta Simoncini (eds.) LAW AND THE MANAGEMENT OF DISASTERS—THE CHALLENGE OF RESILIENCE (Routledge 2016) (clarifying that "The overarching goal of the Sendai framework is to reduce disaster risk, reduce vulnerability and build resilience because of the devastating effects disasters produce and their negative impact on sustainable development.")

[3] United Nations Office for Disaster Risk Reduction (UNDRR), Sendai Framework for Disaster Risk Reduction 2015-2030, adopted at the Third UN World Conference on Disaster Risk Reduction in Sendai, Japan, on March 18, 2015, available at https://www.undrr.org/publication/sendai-framework-disaster-risk-reduction-2015-2030. For commentary, see Alexia Herwig, *Resilience and Responsibility in International Law—The Achievements of the Sendai Framework through the Example of Climate Change* in Alexia Herwig

more effectively protect persons, communities and countries, their livelihoods, health, cultural heritage, socioeconomic assets and ecosystems, and thus strengthen their resilience."[4] It also highlights the importance of "public and private investment in disaster risk prevention and reduction … to enhance the economic, social, health, and cultural resilience of persons, communities, countries."[5]

Similarly, the Paris Agreement, adopted in 2015 to combat climate change by limiting global warming, incorporates resilience thinking to enhance adaptation capacity and foster climate resilience.[6] Among other strategies, it encourages the use of traditional knowledge that is a form of intangible cultural heritage in climate change adaptation. It also recognizes the importance of respecting, promoting, and considering the rights of Indigenous peoples and local communities when addressing climate change.[7]

Finally, the Sustainable Development Goals, as delineated by the 2030 Agenda for Sustainable Development, include the goal of "making cities and human settlements inclusive, safe, resilient and sustainable."[8] As cities increasingly face numerous social, economic, and environmental challenges, urban resilience and sustainability have become salient topics in urban governance.[9] Simultaneously, cities

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and Marta Simoncini (eds.) LAW AND THE MANAGEMENT OF DISASTERS—THE CHALLENGE OF RESILIENCE (Routledge 2016).

[4] Sendai Framework for Disaster Risk Reduction 2015-2030, para. 5.

[5] *Id.* at para. 29.

[6] Katarzyna Cichos, *Guidelines for Resilient Disaster Risk Reduction: International Law Perspective* in Saeid Eslamian and Faezeh Eslamian (eds.) DISASTER RISK REDUCTION FOR RESILIENCE (Springer 2022) at 23–39.

[7] The Paris Agreement was adopted by 195 Parties at the U.N. Climate Change Conference (COP21) in Paris, France, on 12 December 2015. It entered into force on 4 November 2016. Art. 7(5) ("Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems . . . ") and preamble ("Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.") For commentary, see Annalisa Savaresi, *Traditional Knowledge and Climate Change: A New Legal Frontier?* (2018) 9 J. HUMAN RIGHTS & THE ENVIRONMENT 32–50 (highlighting that "The Paris Agreement is the first climate treaty to include a reference to traditional knowledge, opening up a new legal frontier to address this complex subject in international law.")

[8] UNGA, Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution adopted on 25 September 2015, A/RES/70/1, Goal 11 (Making cities and human settlements inclusive, safe, resilient, and sustainable) Target 11.3 (mentioning the need of enhancing "inclusive and sustainable urbanization") and Target 11.4 (mentioning the goal of "strengthen[ing] efforts to protect and safeguard the world's cultural and natural heritage.")

[9] Elisa Kochskämper et al., *Resilience and the Sustainable Development Goals: A Scrutiny of Urban Strategies in the 100 Resilient Cities Initiative* (2025) 68 JOURNAL OF ENVIRONMENTAL PLANNING AND MANAGEMENT 1691–1717, 1691 (noting that "Cities are frequently considered as innovation hubs that promote transformative change (Bai et al. 2018). They often engage in action to adapt to climate change and other social, economic, and environmental challenges of uncertain

play an important role in crucial fields of international law, including the fight against climate change, human rights protection, and cultural heritage preservation.[10]

Given these broad trends within general international law, is international cultural heritage law incorporating resilience thinking in its theory and practice? This article aims to address the question of whether and, if so, how international cultural heritage law is evolving to embrace resilience. This shift challenges older preservation paradigms that treated heritage as static or separate from living communities and thus could unintendedly affect individual and collective cultural entitlements.[11] The resilience lens demands conceptualizing heritage as a dynamic source of strength for people.[12] It also requires international cultural heritage law to evolve in order to address old and new challenges, including over-tourism, the commodification of culture, climate change, and armed conflicts.

However, examining the existing legal framework through a resilience lens poses some challenges too, such as reconciling international law with local autonomy, bridging the gaps between legal frameworks governing different types of cultural heritage, and ensuring that the "resilience" frame does not become a pretext for undermining human dignity, cultural rights, and other fundamental human rights.

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futures. To address these challenges, urban resilience and urban sustainability have become key topics in research and practice for transformative city action and urban governance.")

[10] *See generally* Helmut Philipp Aust & Janne Nijman (eds.), RESEARCH HANDBOOK ON CITIES AND INTERNATIONAL LAW (Cheltenham, 2021) (assessing the impact of international law on cities, illuminating the growing global role of cities and making the case for a renewed understanding of international law in the light of the urban turn); Giuseppe Nesi, *The Shifting Status of Cities in International Law? A Review, Several Questions and a Straight Answer* (2020) 30 ITALIAN YEARBOOK OF INTERNATIONAL LAW 17-36 at 19 (noting "the active participation of cities … in international fora where issues of local, regional, national and international concern are debated, negotiated and decided upon, and the increasing development of huge networks of cities and local authorities that negotiate themes that are crucial for cities and urban conglomerations but also of international concern.")

[11] *See e.g.*, African Commission of Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, decision, 4 February 2010. After the Kenyan government evicted hundreds of Endorois, an Indigenous community, from their traditional lands around the Lake Bogoria to create a natural reserve, the Endorois Welfare Council brought the case to the African Commission on Human and Peoples Rights (ACHPR). In its 2010 decision, the Commission held that the Kenyan government had violated several provisions of the African Charter on Human and Peoples' Rights, including the right to culture. See *id.* at para. 156 ("the African Commission is of the view that Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands—Lake Bogoria and the surrounding area. It agrees that Lake Bogoria and the Monchongoi Forest are central to the Endorois' way of life and without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors.")

[12] Arjan Wardekker, Sanchayan Nath, & Tri Utami Handayaningsih, *The Interaction between Cultural Heritage and Community Resilience in Disaster-affected Volcanic Regions* (2023) 145 ENVIRONMENTAL SCIENCE & POLICY 116-128, 116 (noting that "Research on cultural heritage and disasters often focuses on the vulnerability of heritage and ways to disaster-proof it against geophysical, societal, and environmental hazards. However, heritage might in turn also increase the resilience of the communities in which it is present, for example by providing livelihood diversification, helping build social connections, and embedding local knowledge of past disasters.")

Instead of fighting discrimination and oppression, the use of resilience language risks shifting the burden of surviving these onto vulnerable individuals and communities, thus normalizing structural violence.[13]

This study proceeds as follows. After this short introduction, Section 1 discusses how international cultural heritage law is evolving to endorse resilience thinking. Section 2 examines the World Heritage Convention's role in fostering resilience. Section 3 explores the Convention on Cultural Diversity's framework for sustaining pluralistic societies. Section 4 investigates the Intangible Cultural Heritage Convention's recognition of living traditions as adaptive systems. Section 5 examines the emerging norms that protect Indigenous peoples' cultural heritage as a foundation for community resilience based on their right to self-determination and other human rights. Section 6 discusses how the Underwater Cultural Heritage Convention fosters the resilience of submerged legacies and coastal communities against environmental and human threats. The conclusion summarizes the article's key findings.

This study concludes that international law increasingly recognizes cultural heritage as a source of resilience in different ways and at various levels. This analysis is both timely and relevant. Resilience thinking is particularly apposite in times of crisis, when the structure of international law is under pressure and needs some fluidity, flexibility, and resilience. It is relevant because it addresses existential questions about what heritage deserves protection, by whom, why, when, and how it should be protected. International cultural heritage law is embracing some resilience in its theory and practice. At the epistemological level, it is gradually endorsing the inevitability of some change within heritage and heritage conservation. At the operational level, it is gradually endorsing resilience as a regulatory approach. It is internalizing some of its key features, such as polycentric governance, adaptation to changing needs and circumstances, and interdisciplinary interaction with other fields. For instance, resilience thinking can facilitate dialogue between cultural heritage protection and international disaster law, international environmental law, and international climate change law. Resilience thinking can help international cultural heritage law evolve by making cultural heritage more resilient and becoming more resilient in dealing with the challenges of the 21st century. Simultaneously, the integration of human rights considerations within international cultural heritage law should prevent and avoid possible negative pitfalls of resilience thinking by requiring states to protect, respect, and fulfill human rights in implementing their obligations under international cultural heritage law.[14]

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[13] Shakuntala Banaji, *Against Resilience: The (Anti-)Ethics of Participation in an Unjust and Unequal Public Sphere* (2024) 31 JAVNOST - THE PUBLIC 141–157 at 141 https://doi.org/10.1080/13183222.2024.2311012 (noting that "the notion of public and individual resilience continues to be invoked in a celebratory mode for communities and environments that survive and thrive despite political repression" and arguing that "the concept of resilience now serves mainly to elude or defang valid and varied critiques of communicative inequality, discrimination and violence in the . . . contemporary public sphere.")

[14] Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, (2011) 22 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 9–16 at 10 ("cultural property may be seen as an essential dimension of human rights, when it reflects the spiritual, religious and cultural specificity of minorities and groups.")

II. Cultural Heritage, Resilience, and International Cultural Heritage Law

Is international cultural heritage law incorporating resilience thinking in its theory and practice? The incorporation of resilience thinking in international cultural heritage law can constitute a genuine conceptual shift in the field. International cultural heritage law has traditionally adopted a quintessentially static and defensive approach to cultural heritage protection to prevent looting and destruction and protect sites from alterations.[15] For example, both the 1972 World Heritage Convention (WHC)[16] and the 1954 Hague Convention[17] centered on the protection of cultural sites and preventing harm to them.[18]

When applied to cultural heritage governance, the resilience framework entails a paradigm shift: resilience is the ability to adapt well in the face of adversity.[19] In a material science context, it is the capacity of a material to return to its original shape after being deformed.[20] Recent conceptions of resilience extend beyond the idea of "bouncing back" to a previous state and emphasize processes of "bouncing forward."[21] Accordingly, resilience is about elasticity, continuity through change, and transformation. This creates productive tension within the law itself, leading to

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[15] See *id.* at 10-11 (noting that "International humanitarian law has been complemented by specific rules on the protection of cultural property in the event of armed conflict, both international and internal. Obligations to prevent and repress the illicit traffic of moveable cultural property8 have been recognized by a growing number of importing and exporting states.")

[16] UNESCO Convention concerning the Protection of World Cultural and Natural Heritage (World Heritage Convention), 16 November 1972, in force 17 December 1975, 1037 U.N.T.S. 151.

[17] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, The Hague, 14 May 1954, in force 7 August 1956, 249 U.N.T.S. 240.

[18] Francioni, *The Human Dimension of International Cultural Heritage Law*, at 11 (noting that "The innovative concept of 'world heritage' has provided the basis for the development of a system of international cooperation for the conservation and valorization of certain cultural and natural properties of outstanding universal value.")

[19] Jasper Finke, *Interpretative Change as Evidence of International Law's Resilience in Times of Crisis* (2019) 57 ARCHIV DES VÖLKERRECHTS 266–85, 268 (defining resilience as "a concept applied in ecology, evolutionary biology, and psychology to describe the ability of a system, community, or person to cope with crises and adverse events.")

[20] Henrik Thorén, *Resilience as a Unifying Concept. International Studies in the Philosophy of Science* (2014) 28(3) INTERNATIONAL STUDIES IN THE PHILOSOPHY OF SCIENCE 303–324 (explaining that "The general idea is that resilience is the ability of something to return to some reference state (a particular shape, for instance) after a disturbance of some sort. It might, for example, be the ability of a yarn to return to its previous length after being stretched with a weight.")

[21] Cornelius Holtorf, *Embracing Change: How Cultural Resilience is Increased through Cultural Heritage* (2018) 50 WORLD ARCHAEOLOGY 639–650; Jacqueline Peel, *International Environmental Law and Climate Disasters*, in Rosemary Lister and Robert R.M. Verchick (eds) RESEARCH HANDBOOK ON CLIMATE DISASTER LAW (EE 2018) 77–96 (contrasting the understanding of resilience in the disaster risk reduction field (bouncing back) with the climate adaptation instruments (building forward).).

doctrinal evolution, the adoption of new legal tools, and growing interaction between international cultural heritage law and other fields of international law, such as climate change law, international disaster law, and international human rights law.[22] In these various fields of international law, resilience thinking has already shaped legal evolution.[23] If resilience is defined as "the capacity to absorb and adapt to stress without compromising essential function," "for law to embrace resilience as an objective, . . . it must itself be dynamic and flexible, capable of learning and adaptation."[24] The adoption of resilience thinking has permeated international law in two main ways. On the one hand, as adjudicators can interpret international legal instruments evolutionarily, this has enabled them to consider resilience thinking in the adjudication of international disputes. On the other hand, resilience thinking is gradually making its way into international law-making.

Adjudicators and international organizations have interpreted international legal instruments evolutionarily, increasingly emphasizing community participation and endorsing some dynamism in heritage protection. Such approaches are not revolutionary; they do not amend the treaty text. Rather, they operate at the interpretive level, conceptualizing the applicable treaties as living instruments whose interpretation necessarily evolves through time.[25] They operate in synergy with participatory requirements in international law that can facilitate cross-scale interactions, legitimize institutions, and enhance cultural resilience.[26]

For instance, the Operational Guidelines for World Heritage, a set of periodically updated instructions to signatory states concerning the implementation of the World Heritage Convention, now discuss climate adaptation strategies.[27] Some such strategies involve letting certain aspects of sites change rather than trying to preserve them exactly as designated[28] and consistently addressing contemporary

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[22] For a seminal study concerning legal evolution in international cultural heritage law, see Francesco Francioni, *The Evolving Framework for the Protection of Cultural Heritage in International Law* in Silvia Borelli and Federico Lenzerini (eds) CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY (Brill 2012) 301–326.

[23] *See e.g.*, Rosa Celorio, *Several Steps Forward, One Backward: Climate Change, Latin America, and Human Rights Resilience* (2019) 34 MARYLAND JOURNAL OF INTERNATIONAL LAW 96; Francesca Ippolito, *Environmentally Induced Displacement: When (Ecological) Vulnerability Turns into Resilience (and Asylum)?* (2024) 20 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 74–91; Eleni Polymenopoulou and Flavia Zorzi Giustiniani, *The Shift towards Resilience: Disaster Risk Reduction (DRR) in the International and Regional Legal Frameworks* (2024) DENVER JOURNAL OF INTERNATIONAL LAW & POLICY; JANINE NATALYA CLARK and MICHAEL UNGAR, RESILIENCE, ADAPTIVE PEACEBUILDING AND TRANSITIONAL JUSTICE (CUP 2021).

[24] Jaye Ellis, *Crisis, Resilience, and the Time of Law* (2019) 32 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 305–320, 305.

[25] *See generally* EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES (OUP 2014).

[26] Jonas Ebbesson & Ellen Hey, *Where in Law is Social-Ecological Resilience?* (2013) 18 ECOLOGY AND SOCIETY 25.

[27] UNESCO, 2025 Operational Guidelines, WHC.25/01, 16 July 2025, available at https://whc.unesco.org/en/guidelines/.

[28] Jim Perry and Iain J. Gordon, *Adaptive Heritage: Is This Creative Thinking or Abandoning Our Values?* (2021) 9 CLIMATE 128.

challenges such as climate change.[29] Such reinterpretations manifest "international law's resilience in times of crisis", highlighting its "ability to adapt" and ultimate viability when facing crises and adverse effects.[30] The Operational Guidelines do not alter or amend the World Heritage Convention but provide an authoritative interpretation of its provisions.

New legal instruments reflect some resilience thinking, too. For instance, the 2003 Convention on Intangible Cultural Heritage[31] is explicitly resilience-oriented as it aims to safeguard constantly evolving practices and focuses on the communities that bear them.[32] International legal instruments have been amended to include novel concepts and categories. For instance, the 1992 inclusion of cultural landscapes as a World Heritage category was a major shift.[33] These are "combined works of nature and of man" whose outstanding and universal value lies in the continuous interaction between human beings and the environment.[34] This novel category thus embodies continuity and change. Cultural landscapes remain in place. Simultaneously, though, they constantly evolve. Vineyards are cultivated and grapes harvested. Rice terraces are farmed. Pastoralist landscapes include herding. Sacred forests host ongoing ceremonies and spiritual practices.[35] For example, the Konso Cultural Landscape in

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[29] UNESCO, 2025 Operational Guidelines, para. 118 (recommending "that States Parties include disaster, climate change and other risk preparedness as an element in their World Heritage site management plans and training strategies.") para. 118bis ("States Parties shall ensure that Environmental Impact Assessments, Heritage Impact Assessments, and/or Strategic Environmental Assessments be carried out as a pre-requisite for development projects and activities that are planned for implementation within or around a World Heritage property. These assessments should serve to identify development alternatives, as well as both potential positive and negative impacts on the Outstanding Universal Value of the property and to recommend mitigation measures against degradation or other negative impacts on the cultural or natural heritage within the property or its wider setting. This will ensure the long-term safeguarding of the Outstanding Universal Value, and the strengthening of heritage resilience to disasters and climate change.") and para. 119 ("Properties may support a variety of ongoing and proposed uses that are ecologically and culturally sustainable and which may enhance the quality of life and well-being of communities concerned.")

[30] Finke, *Interpretative Change as Evidence of International Law's Resilience in Times of Crisis*, 269.

[31] Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH), 17 October 2003, 2368 U.N.T.S.

[32] *See generally* Janet Blake & Lucas Lixinski (eds.), THE 2003 UNESCO INTANGIBLE HERITAGE CONVENTION. A COMMENTARY (2020).

[33] Aurélie Elisa Gfeller, *Negotiating the Meaning of Global Heritage: "Cultural Landscapes" in the UNESCO World Heritage Convention, 1972–92* (2013) 8 JOURNAL OF GLOBAL HISTORY 483–503 (analyzing the introduction of the category of "cultural landscapes" in the UNESCO World Heritage Convention.)

[34] Valentina Vadi, *The Protection of Cultural Landscapes and Indigenous Heritage in International Investment Law*, in Laura Westra, Colin Soskolne, and Daniel Spady (eds.) HUMAN HEALTH & ECOLOGICAL INTEGRITY –ETHICS, LAW AND HUMAN RIGHTS (2012) 250–261.

[35] African Court on Human and Peoples' Rights, Application No. 006/2012 – *African Commission on Human and Peoples' Rights v. The Republic of Kenya*, Judgment, 26 May 2017 (finding that the Respondent had violated the rights of the Ogiek people, an Indigenous community residing in the Mau Forest, through forced evictions and denial of their cultural, religious and land rights.) See *id.* paras. 182 and 183 (describing the Ogieks' performance of spiritual and cultural practices in the Mau forest as distinctive of their culture).

Ethiopia, characterized by extensive dry-stone terraces, epitomizes "the persistent human struggle" of the local Konso people "to use and harness the hard, dry, and rocky environment: The terraces retain the soil from erosion, collect a maximum of water, discharge the excess, and create terraced fields that are used for agriculture."[36] Cultural landscapes thus epitomize resilience in the face of challenging environments.[37]

Examining international cultural heritage law through a resilience lens also helps identify connections between the various international cultural heritage conventions. For example, about one third of World Heritage sites present underwater features,[38] thus requiring protection under both the WHC and the Convention on the Protection of Underwater Cultural Heritage (CPUCH).[39] These instruments can envisage diverse approaches to enhance the resilience of such sites and coastal communities. It also helps illuminate the nexus between international cultural heritage law and other branches of international law.[40] For instance, in the past decades, the linkage between international cultural heritage law and international criminal law has come to the forefront of legal debates.[41] Scholars have discussed whether the most egregious cultural destruction, like that conducted by the Islamic State of Iraq and Syria (ISIS) at Palmyra, the Taliban at Bamyan, and extremists at Timbuktu, might constitute crimes against humanity.[42] This iconoclastic fury raises

[36] UNESCO, World Heritage Convention, Konso Cultural Landscape, available at https://whc.unesco.org/en/list/1333/.

[37] Amin Rastandeh and Meghann Jarchow, *Landscape Resilience in the Face of Climate Change*, in Amin Rastandeh and Meghann Jarchow (eds) CREATING RESILIENT LANDSCAPES IN AN ERA OF CLIMATE CHANGE (Edward Elgar 2023) 1, at 2 (defining "landscape resilience as the ability of landscapes, including their human communities, to adapt to and to mitigate the impacts of climate change; and to persist under changing and uncertain conditions such that safeguard biodiversity and nature's contributions to people.")

[38] Elena Perez-Alvaro and Chris Underwood, *Underwater Cultural Heritage in World Heritage Sites: Figures and Insights into Possibilities and Realities* (2024) THE HISTORIC ENVIRONMENT: POLICY & PRACTICE 15 (4): 611–43 (noting that "an analysis of all listed sites up to 2024 reveals that over a third include elements of underwater cultural heritage.")

[39] Convention on the Protection of the Underwater Cultural Heritage (CPUCH), 2 November 2001, in force 2 January 2009, 2562 U.N.T.S. 3.

[40] *See generally* Evelyne Lagrange, Stefan Oeter, & Robert Uerpmann-Wittzack (eds.) CULTURAL HERITAGE AND INTERNATIONAL LAW OBJECTS, MEANS AND ENDS OF INTERNATIONAL PROTECTION (Springer 2018) (examining various international legal regimes governing cultural heritage, including the law of armed conflicts, UNESCO Conventions and international criminal law.)

[41] Micaela Frulli, *International Criminal Law and the Protection of Cultural Heritage*, in Francesco Francioni and Ana Filipa Vrdoljiak (eds.) THE OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW 100-120.

[42] *See generally* Alberta Fabbricotti (ed.) INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE AND THE LAW: A RESEARCH COMPANION (2024); Daniel M. Cole, *From the Hague to Timbuktu: The Prosecutor v. Ahmad al Faqi al Mahdi; A Consequential Case of Firsts for Cultural Heritage and for the International Criminal Court*, 31 TEMP. INT'L & COMP. L.J. 397 (2017); Mark S. Ellis, *The ICC's Role in Combatting the Destruction of Cultural Heritage*, 49 CASE W. RES. J. INT'L L. 23 (2017); Derek Fincham, *Intentional Destruction and Spoliation of Cultural Heritage Under International Criminal Law*, 23 U.C. DAVIS J. INT'L L. & POL'Y 149 (2017); Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?* (2016) 15 J. MARSHALL REV. INTELL. PROP. L. 336.

important questions as to the continuing cultural salience of sites affected by deliberate destruction and the resilience of affected communities. It also raises the question as to whether attacks on cultural heritage can constitute evidence of further international crimes.[43]

However, resilience analysis cannot replace but must be coupled with other analytical frameworks and approaches. For instance, it cannot replace preventive, proactive, and precautionary approaches that aim to prevent or minimize risks and harms. It also cannot replace human rights analytical frames: Only by fully respecting, protecting, and fulfilling human rights can resilience analysis contribute to the appropriate evolution of international cultural heritage law in conformity with justice and international law. The fulfillment of human rights requires the adoption of policies that prevent harm and address structural inequalities. Resilience should not be used to place the burden of adaptation on vulnerable communities. International cultural heritage law is not a self-contained legal system; rather, it must be read in light of general international law and other subfields such as international environmental law and human rights law.

III. Resilience and the World Heritage Convention

The 1972 World Heritage Convention was designed around concepts such as conservation and authenticity which are almost antithetical to the dynamic, adaptive, and change-oriented principles of resilience thinking. The Convention requires that only properties holding Outstanding Universal Value (OUV), authenticity, and integrity, can be inscribed on the World Heritage List.[44] It also adopts a top-down approach, considering states as the primary actors responsible for managing world heritage.[45] Finally, it adopts a conservation lens to world heritage management.[46]

Let us examine these three features through a resilience lens. First, under the WHC, heritage must have exceptional significance transcending national boundaries to be worthy of protection.[47] This creates a hierarchy between World Heritage sites

[43] Matthew S. Weinert, *"A Disturbing Portent of Future Harm"? Attacks on Cultural Heritage, Atrocity Crimes, and the Problem of Prevention* (2024) 18 GENOCIDE STUDIES AND PREVENTION: AN INTERNATIONAL JOURNAL 166–183, 166 (noting that "attacks on cultural properties, objects, sites, and expressions often precede atrocity crimes.")

[44] World Heritage Convention, Art. 11.2 ("On the basis of the inventories submitted by States … the Committee shall establish, keep up to date and publish, under the title of 'World Heritage List,' a list of properties forming part of the cultural heritage and natural heritage … which it considers as having outstanding universal value.")

[45] World Heritage Convention, Art. 11.3 ("The inclusion of a property in the World Heritage List requires the consent of the State concerned.")

[46] World Heritage Convention, preamble ("Recalling that the Constitution of the Organization provides that it will maintain, increase, and diffuse knowledge by assuring the conservation and protection of the world's heritage.")

[47] World Heritage Convention, preamble ("Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole")

and other heritage sites.[48] However, from a resilience perspective, locally significant heritage may be more functionally valuable than world heritage by supporting community identity and adaptation.[49] Authenticity and integrity are the criteria for inscribing sites on the World Heritage List.[50] These requirements have been traditionally interpreted to require minimal alteration or intervention. These features suggest that heritage has an ideal state that should be preserved against change. However, resilience thinking sees change as inevitable and adaptation as vital. As legal scholars become more aware of the dynamism of ecosystems, there has been a call for shifting the focus of international cultural heritage law from preserving heritage to safeguarding it to promote its resilience.[51]

Second, like other international law instruments, the Convention adopts a top-down approach by making states responsible for protection.[52] However, resilience theory emphasizes polycentric governance, local agency, and community-based management. The state-centric model adopted by the WHC can undermine the local capacity that builds cultural heritage in the first place and the consequent resilience of the site and the local communities. Yet, many sites still have top-down management that excludes or marginalizes inputs by local communities and Indigenous peoples.[53] There is persistent tension between the international expert authority and the local community agency.[54]

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[48] Tod Jonesa, Roy Jonesa and Michael Hughes, *Heritage Designation and Scale: a World Heritage Case Study of the Ningaloo Coast*, (2016) 22 INTERNATIONAL JOURNAL OF HERITAGE STUDIES 242, at 243 (noting that "hierarchies of scale … characteristically underpin the World Heritage designation process, and much of the research in heritage studies.")

[49] Janet Blake, *From Global to Local Heritage — Intangible Cultural Heritage and the Role of the Museum* in (2015) 10 ANTHROPOLOGY OF THE MIDDLE EAST 22, 22 (noting that "Heritage has a dual character whereby it can, at the same time, be celebrated for its outstanding universal value while having a special meaning and value for local and, in particular, bearer communities. Basing protection on the former notion of heritage as a universal, global value has been the dominant approach in international law-making since the second half of the twentieth century. More recently, the significance of heritage to local actors has become much better understood and recognised.")

[50] Sofia Labadi, *World Heritage, Authenticity and Post-authenticity—International and National Perspectives*, in Sophia Labadi and Colin Long (eds) HERITAGE AND GLOBALISATION (Routledge 2010) 66, at 66 (noting that "Authenticity has always been an essential qualifying criterion for the inclusion of sites on the World Heritage List.") and 72 ("cultural heritage properties must fully meet the conditions of authenticity.")

[51] Jaye Ellis, *Change and Adaptation in International Environmental Law: The Challenge of Resilience*. In Klara Van der Ploeg, Luca Pasquet, and Léon Castellanos-Jankiewicz (eds) INTERNATIONAL LAW AND TIME: NARRATIVES AND TECHNIQUES (Springer 2022) 357–377.

[52] Barbara D. Miller, *Heritage Management Inside Out and Upside Down: Questioning Outsider and Top-Down Approaches* (2009) 2 HERITAGE MANAGEMENT 5–1, at 5 (noting that anthropologists criticize global/universal policies "as potentially inappropriate for local and dynamic contexts.").

[53] Esmé Shirlow, *The Role of International Law in Enhancing Urban Climate Resilience*, in Angela van der Berg and Jonathan Verschuuren (eds.) URBAN CLIMATE RESILIENCE (EE 2022) 20–43 (investigating "the hidden role of cities and other local authorities … in the making, implementation, and breaking of international laws relevant to climate change.").

[54] Valentina Vadi, *Local Communities, Cultural Heritage and International Economic Law*, in L. Biukovic, and P. Potter (eds.), LOCAL ENGAGEMENT WITH INTERNATIONAL ECONOMIC LAW AND HUMAN RIGHTS (EE 2017) 150–168.

Third, the WHC adopts static approaches to cultural heritage management, reactive monitoring, and "danger" listing. When threatened, sites get listed on the World Heritage in Danger List.[55] These static approaches frame the stability and immutability of sites as the norm and changes as exceptions requiring emergency response by states.[56] However, resilience thinking recognizes ongoing, multiple, interacting challenges as the norm, requiring adaptive management rather than crisis intervention.[57] Like other international law instruments, the WHC has traditionally been reactive, responding to crises rather than anticipating future challenges. Nonetheless, this reactive approach can hinder the convention's ability to address complex, evolving issues, like climate change and related challenges like desertification and rising sea level.

Therefore, the fundamental architecture of the World Heritage Convention is static, state-centric, and reactive whereas resilience thinking requires dynamic, polycentric, and proactive governance.[58] This article calls for a gradual shift in the legal interpretation and application of the Convention to embrace some dynamism, bottom-up and proactive approaches, emphasizing prevention, adaptability, and resilience. The convention needs resilience thinking due to the existential challenges that world heritage is facing, including climate change, over-tourism, development pressure, and armed conflicts. This section now briefly examines how these challenges affect world heritage.

Climate change is often irreversibly affecting world heritage sites on all continents. For instance, climate-change-related sea level rise threatens as diverse as Venice in Europe, Kilwa Kisiwani in Africa, and the Everglades in the Americas. Climate-change-related glacial melt affects sites from the Himalayas in Asia to the Arctic.[59] Climate change is fundamentally altering reef ecology in Oceania: Coral reefs like the Great Barrier Reef face bleaching and acidification.[60] Forests face

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[55] Nicholas Brown, Claudia Liuzza, & Lynn Meskell, *The Politics of Peril: UNESCO's List of World Heritage in Danger* (2019) 44 JOURNAL OF FIELD ARCHAEOLOGY 287–303. (observing "geopolitical inequity and bureaucratic inefficacy characterizing the implementation of the List in Danger that prevent the realization of its envisioned purpose as a collaborative tool for garnering international investment in preservation.")

[56] Greg Terrill, *Climate Change: How Should the World Heritage Convention Respond?* (2008) 14 INTERNATIONAL JOURNAL OF HERITAGE STUDIES 388–404 (noting that while "climate change will result in escalating change, whereas the World Heritage Convention is based upon a presumption of relative stability and manageable change.")

[57] Erin Seekamp & Eugene Jo, *Resilience and Transformation of Heritage Sites to Accommodate for Loss and Learning in a Changing Climate* (2020) 162 CLIMATIC CHANGE 41–55 (calling for "expanding the heritage paradigm from solely a preservation perspective to one that also embraces a transformation perspective.")

[58] Michal Saliternik & Sivan Shlomo Agon, *Proactive International Law* (2024) 75 UNIVERSITY OF CALIFORNIA L.J. 661.

[59] UNESCO, World Heritage Convention, *World Heritage and the Arctic*, available at https://whc.unesco.org/en/arctic/ (reporting that "Currently, there are five World Heritage sites within the Arctic Circle.")

[60] Kenneth R.N. Anthony, *Coral Reefs Under Climate Change and Ocean Acidification: Challenges and Opportunities for Management and Policy* (2016) 41 ANNUAL REVIEW ENVIRONMENT AND RESOURCES, 59-81 at 59 (noting that "Carbon emissions in an industrialized world have created two problems for coral reefs: climate change and ocean acidification. Climate

megafires.[61] Traditional preservation, that is, maintaining sites as they were, is increasingly difficult if not impossible. While resilience thinking requires adapting management to changing conditions, the WHC still treats climate impacts primarily as threats to be mitigated rather than transformations to be managed. Sites end up in reactive crisis mode rather than proactive adaptation.

With World Heritage inscription, tourism increases,[62] providing economic benefits but also threatening sites through overuse, infrastructure pressure, commodification, and transformation of surrounding communities. Defined as "the excessive growth of visitors leading to overcrowding and the consequential suffering of residents", overtourism is "associated with the livability of a place, the well-being of residents, visitor experience and the extent to which stakeholders have a direct or indirect involvement in tourism."[63] For instance, overtourism has put significant strain on Venice. Since 2014, the World Heritage Committee has requested Italy to prohibit the largest ships from entering the Lagoon, threatening to include Venice in the List of World Heritage in Danger, because of possible accidents with disastrous consequences.[64] To comply with its obligations under the convention, the Italian government has prohibited navigation of large vessels in the historic center of Venice.[65] These big ships can no longer reach *Piazza San Marco*, rather docking on the mainland.[66] A new ordinance was adopted to tax the day-trippers five euros to come into town.[67]

While a preservation approach tries to limit tourism or control impacts, a resilience approach would ask whether, and if so, how communities and sites can adapt to tourism while maintaining what makes them significant. The focus would be on building adaptive capacity in management systems and local communities, for instance, by decentering art collections and diffusing cultural wealth, spreading

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change drives ocean warming, which impacts biological and ecological reef processes, triggers large-scale coral bleaching events, and fuels tropical storms. Ocean acidification slows reef growth, alters competitive interactions, and impairs population replenishment.")

[61] Peter Smith & Judy Smith, *Impact of the 2019-20 mega-fires on the Greater Blue Mountains World Heritage Area* (2022) 144 NEW SOUTH WALES. PROCEEDINGS OF THE LINNEAN SOCIETY OF NEW SOUTH WALES 227-254 at 227 (referring to "a world-wide trend that has seen extremely destructive fires occurring with increasing frequency over the last 20 years, driven chiefly by anthropogenic climate change but with other factors also having an influence.")

[62] Francesco Bandarin, Foreword, in David Harrison and Michael Hitchcock (eds) The Politics of World Heritage—Negotiating Tourism and Conservation (2005) at v (noting that "While applications for World Heritage status are made on the basis of conservation, tourism is an attendant phenomenon.")

[63] Alessandra Lanciotti, *Preservation of Historical Buildings through the Lens of International Law* (2024) 1 REAL ESTATE 198–211.

[64] *Id.*

[65] Decreto-legge n. 45 del 2021, *Recante Misure Urgenti in Materia di Trasporti e per la Disciplina del Traffico Crocieristico e del Trasporto Marittimo Delle Merci Nella Laguna di Venezia* (approved by the Italian Parliament with Law 17 May 2021, n. 75. In *Gazzetta Ufficiale della Repubblica Italiana* (Official Journal of the Italian Republic), Serie Generale n.79 of 28 May 2021, n. 126. Available at https://www.gazzettaufficiale.it/eli/id/2021/04/01/21G00055/sg.

[66] Sylvie Bigar, *Why Is Venice Not on the List of Endangered World Heritage Sites?* FORBES, Sept. 28 2023.

[67] *Id.*

maintenance costs by imposing a tourist tax,[68] diversifying cultural offerings and economic activities, protecting residential housing from conversion to tourism accommodation,[69] and engaging multiple stakeholders to set up adaptive management plans that can respond to changing conditions. Cities like Venice should be seen as living cities, managing tourism to support the economy while maintaining livability and the cultural vitality that gave the city significance.

Many World Heritage sites face development pressure.[70] Cultural heritage protection can conflict with contemporary needs, like housing, infrastructure, and economic activity, creating tensions between heritage value and livability. For instance, Vienna's historic center was briefly listed as World Heritage in Danger due to a high-rise development.[71] The city argued it needed contemporary architecture and development. Whose needs take priority? Should the state maintain the outstanding universal value that justified inscription or meet local needs for housing and urban development? Resilience thinking requires exploring whether, and if so, how cities can evolve while maintaining their cultural significance. It requires thinking about world heritage as living heritage rather than an open-air museum.[72]

World heritage sites can face threats from armed conflict and terrorism.[73] While traditional responses entail restoring sites, resilience-building responses require supporting communities to recover and consider transformative possibilities such as digital heritage solutions when restoration is not possible. While traditional responses focus on material authenticity, the latter focus on continuity of significance. For instance, when militias occupied Timbuktu, in Mali, a world heritage site for its historic role as an Islamic scholarly center and its earthen architecture, they destroyed mausoleums and burned manuscripts.[74] After violent destruction, the sites were

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[68] *Id.* (referring to Venice).

[69] Mechtild Rössler, *Balancing Tourism and Heritage Conservation: A World Heritage Context* in C. Cameron, (ed.) EVOLVING HERITAGE CONSERVATION PRACTICE IN THE 21ST CENTURY. CREATIVITY, HERITAGE AND THE CITY (Springer 2023).

[70] For an examination of cultural heritage-related investment treaty arbitrations, *see* VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (CUP 2014).

[71] UNESCO, World Heritage Convention, *Historic Centre of Vienna inscribed on List of World Heritage in Danger*, 6 July 2017, available at https://whc.unesco.org/en/news/1684 (reporting that "The World Heritage Committee has inscribed the Historic Centre of Vienna on List of World Heritage in Danger due to high-rise projects in the middle of the Austrian capital.")

[72] Huong T. Bui, Thomas E. Jones, David B. Weaver, and Andrew Le, *The Adaptive Resilience of Living Cultural Heritage in a Tourism Destination* (2020) 28 JOURNAL OF SUSTAINABLE TOURISM 1022–40 at 1022 (arguing that "conservation of living heritage sites extends beyond the built environment to an appreciation of its associated social aspects. Investigation of both the interactions between residents and physical landscapes, and the continuity of the social fabric in times of rapid social, economic and environmental change therefore requires a holistic and systematic approach that is absent in current heritage tourism research.")

[73] *See generally* Alberta Fabbricotti (ed.) INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE AND THE LAW: A RESEARCH COMPANION (2024).

[74] Amy Strecker & Joseph Powderly, *Heritage Destruction, Human Rights, and International Law in Times of Conflict and in Peace*, in Amy Strecker and Joseph Powderly (eds) HERITAGE DESTRUCTION, HUMAN RIGHTS AND INTERNATIONAL LAW (2023) 1-18

rebuilt with international support using traditional techniques. The reconstruction demonstrated the resilience of local communities who rebuilt buildings using traditional techniques and the continued significance of given sites despite destruction. Reportedly, Irina Bokova, then Director General of UNESCO, framed heritage rehabilitation in Timbuktu as a "success story" contributing to the fight against violent extremism.[75]

Resilience is entering World Heritage theory and practice, inserting some polycentricity, dynamism, and proactivity. With regard to polycentric governance, that is, distributing authority across multiple scales and actors, including local communities, national authorities, international bodies, and Indigenous peoples,[76] polycentricity enhances cultural heritage resilience: if one governance level fails, others operate. The Operational Guidelines have been periodically amended to require the participation of multiple actors in the management of world heritage sites.[77] The 2007 Strategy to Assist State Parties to Implement Appropriate Management Responses, which mentioned resilience only twice, acknowledged the importance of interinstitutional cooperation with other international bodies in the fight against climate change.[78] The 2023 Policy Document on Climate Action for World Heritage, which mentions resilience no less than 20 times, recognizes heritage's role in community resilience[79] and stresses how "management systems that engage with local communities can strengthen natural, cultural, and social resilience."[80]

(stressing that "there now exists a general consensus, embodied in the corpus of international law, that intentionally destroying cultural heritage is an international wrong and, except in the case of absolute military necessity, a war crime entailing individual criminal responsibility.")

[75] Mathilde Leloup, *Turning Destruction into an Opportunity—Understanding the Construction of Timbuktu's "Success Story* by UNESCO, in José Antonio González Zarandona, Emma Cunliffe, and Melathi Saldin (eds) THE ROUTLEDGE HANDBOOK OF HERITAGE DESTRUCTION (Routledge 2023) (reporting that UNESCO acted on the ground through "strategic partnerships" with the International Criminal Court (ICC) and the UN Security Council).

[76] *See generally* Valentina Vadi, *Exploring the Borderlands: The Role of Private Actors in International Cultural Law*, in J. Summers and A. Gough (eds.), NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS—CREATION, EVOLUTION AND ENFORCEMENT (Brill 2018) 109–125.

[77] World Heritage Committee, The Operational Guidelines for the Implementation of the World Heritage Convention, WHC.25/01, adopted on 16 July 2025, available at https://whc.unesco.org/en/guidelines/, at para. 12 ("States Parties to the Convention are encouraged to adopt a human-rights based approach, and ensure gender-balanced participation of a wide variety of stakeholders and rights-holders, including site managers, local and regional governments, local communities, indigenous peoples, non-governmental organizations (NGOs) and other interested parties and partners in the identification, nomination, management and protection processes of World Heritage properties.")

[78] 2007 Strategy to Assist State Parties to Implement Appropriate Management Responses.

[79] UNESCO, World Heritage Convention, Policy Document on Climate Action for World Heritage (2023), as adopted by the General Assembly of States Parties at its 24th session (UNESCO 2023) Resolution 24 GA 8, at para. 53 (noting that "World heritage properties and the values they embody have the potential to contribute to social resilience and the recovery from climate change losses by providing … a sense of place, continuity and identity.")

[80] *Id.* at para. 14.

More fundamentally, resilience means supporting the communities and practices that created and maintain world heritage. Sites can be resilient if the surrounding communities are. Heritage management needs to support local livelihoods, provide community benefits, respect human rights, and contribute to broader community wellbeing. This means moving from protecting heritage from people to supporting heritage for and with people.[81] It requires respecting traditional access and use rights, ensuring heritage does not displace residents or make areas unaffordable. There has been growing recognition that World Heritage cannot be managed sustainably without local community engagement and benefit.

With regard to dynamism, the 2011 UNESCO Recommendation on the Historic Urban Landscape promotes managing heritage cities as living, dynamic, and evolving systems rather than frozen monuments.[82] Although the recommendation does not mention resilience, it is resilience-oriented by emphasizing adaptation, layering of history, and integration of heritage with contemporary urban life. The 2030 Agenda for Sustainable Development endorses the compatibility between economic development, social needs, and cultural heritage protection,[83] as does the 2015 Policy on the Integration of a Sustainable Development Perspective into World Heritage Convention processes.[84] On the one hand, local communities benefit from the conservation of cultural heritage because it is part of their identity, attracts tourism, and sustains related economic activities. On the other hand, some urban infrastructure may be necessary to enable sustainable development and the long-term viability of heritage conservation. More recently, the 2023 Policy Document on Climate Action for World Heritage also acknowledges that "transformative change can help in strengthening resilience and achieving sustainable development." [85] For instance, in Venice, mere site maintenance is inadequate to deal with climate change-related sea level rise. Activated in 2020, the MOSE flood barrier system has successfully prevented disasters by managing sea level rise.[86]

However, the theory has advanced faster than practice, and balancing cultural heritage conservation and economic development, stability with change remains complex in practice. For instance, the World Heritage Committee delisted the Liverpool Maritime Mercantile City in 2021 due to concerns over new buildings

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[81] See e.g. HERITAGE FOR PEOPLE. SHARING VERNACULAR KNOWLEDGE TO BUILD THE FUTURE Letizia Dipasquale, Saverio Mecca, and Lucia Montoni (eds) (2023).

[82] UNESCO Recommendation on the Historic Urban Landscape, Paris 10 November 2011.

[83] UNGA, Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution adopted on 25 September 2015, A/RES/70/1, Goal 11 (Making cities and human settlements inclusive, safe, resilient, and sustainable) Target 11.3 (mentioning the need of enhancing "inclusive and sustainable urbanization") and Target 11.4 (mentioning the goal of "strengthen[ing] efforts to protect and safeguard the world's cultural and natural heritage.")

[84] UNESCO, World Heritage Convention, Policy for the Integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention, WHC-15/20.GA/INF. 13 (2015).

[85] *Id.* at para. 13.

[86] Sylvie Bigar, *Why Is Venice Not on the List of Endangered World Heritage Sites?* FORBES, 28 September 2023.

and a new stadium.[87] The Committee held that urban development, including siting a stadium on the waterfront, significantly affected the city's skyline, its authenticity, and integrity, thus undermining the outstanding universal value of the city.[88] Whether such development amounts to cultural vandalism or a sort of cultural investment remains debatable. Sport constitutes a fundamental aspect of modern cultures and can be seen as instrumental to promoting education, health, and development, in addition to fostering international cooperation and enhancing cultural understanding.[89] This example shows the system's persisting inability to accommodate urban evolution and acknowledge local needs. The delisting was controversial as economic vitality could help support long-term heritage maintenance. A resilience approach might have explored how urban development could occur while maintaining outstanding universal value, rather than treating any change, including the building of a stadium, as incompatible with World Heritage status. After all, even stadiums can be architectural sites worth safeguarding.[90]

With regard to proactivity, meaningful resilience integration would require reframing outstanding universal value.[91] Instead of defining outstanding and universal value as a static feature to be preserved, it should be reconceived as the site's essential qualities to be safeguarded through adaptation.[92] For cultural landscapes, this might mean continuing agricultural practices even as specific crops or techniques evolve. For historic cities, it could entail maintaining their distinct character while allowing select contemporary architectural developments. For natural sites, it would mean supporting ecological processes rather than freezing heritage in time. In other words, "Resilience in the context of heritage requires new ways of approaching value that do not prioritize conserving material heritage above all else . . . these new approaches must move beyond a . . . framework focused on what existed before and embrace the

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[87] U.N.E.S.C.O., World Heritage Convention, Decision 44 COM 7A.34, Liverpool – Maritime Mercantile City (United Kingdom of Great Britain and Northern Ireland) (C 1150).

[88] *Id.*

[89] VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL ECONOMIC LAW (Brill 2023) 60.

[90] G. Ramshaw and S. Gammon, *Heritage and Sport* in E. Waterton and S. Watson (eds) THE PALGRAVE HANDBOOK OF CONTEMPORARY HERITAGE RESEARCH (2015) (exploring the connections between sport and built heritage.) Other scholars pinpoint that sport can be seen as heritage. See Lorenzo Casini, *Sport as Cultural Heritage*, HANDBOOK ON INTERNATIONAL SPORTS LAW, Edited by James Nafziger and Ryan Gauthier (2022) 671-680 (conceptualizing "sport as both intangible and tangible heritage.")

[91] Kathryn Lafrenz Samuels and Ellen J. Platts, *Global Climate Change and UNESCO World Heritage* (2022) 29 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY 409–432 (reporting that the Australian government is asking to "reconsider OUV as an 'evolving' assessment since, even with adaptation and mitigation strategies in place, the original OUV at inscription will be difficult (Australia says 'impossible') to maintain.")

[92] For a similar argument, see William P. Megarry, *The Climate Crisis, Outstanding Universal Value and Change in World Heritage*, in M.-T. Albert et al. (eds.), 50 YEARS WORLD HERITAGE CONVENTION: SHARED RESPONSIBILITY – CONFLICT & RECONCILIATION (2022) 227, 228 ("focusing on the need to adopt a more values-based approach to understanding impacts, vulnerabilities and adaptation planning that is more sympathetic to inevitable change.")

emergence of new heritage" through processes of change.[93] This dynamic balance is difficult to achieve, as is determining how much change is compatible with the outstanding and universal value that justified inscription, and at what point transformation means the site no longer embodies such value and could be delisted. Nonetheless, accepting some change can enhance cultural heritage resilience and long-term sustainability.

More generally, adopting a proactive approach to heritage management requires planning for uncertainty, monitoring change, learning from experience, and adapting strategies accordingly.[94] This is standard practice in conservation biology and resource management, but remains uncommon in cultural heritage management. Scenario planning requires proactively planning for multiple possible futures.[95] What if sea levels rise by 1 meter or 2 meters? What if tourism doubles or if another pandemic reduces tourism to zero? For each scenario, what would be needed?[96] This future-oriented approach builds adaptive capacity before crises hit.[97] The recent UNESCO World Heritage Regional Action Plan for Europe and North America (2024-2031) refers to "future-thinking and scenario planning methodologies to inform and develop long-term planning strategies for World Heritage properties."[98] Yet, heritage studies typically focus on past and current conditions and known threats, not uncertain futures.[99]

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[93] Lafrenz Samuels and Ellen J. Platts, *Global Climate Change and UNESCO World Heritage*.

[94] Gerlinde Berger-Walliser and Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law* (2014) GEO. J. INT'L L. 435 (noting that "Proactive law differs from traditional adversarial legal concepts, command-and-control based concepts and state-centred regulation. Proactive law regards the law as an enabling instrument … One of the main objectives of proactive law is to prevent problems and litigation, and to use the law as a lever to create value for the … the individual, or society at large … Proactive law advocates for a paradigm shift from a system based on rationality, separation, and power to one based on understanding, integration, and accommodation.")

[95] Yan Tang, Jing Xie, Shixian Luo & Katsunori Furuya, *Scenario Techniques for Cultural Landscapes*, LANDSCAPE RESEARCH (2025) 1–19.

[96] Cornelius Holtorf and Annalisa Bolin, *Heritage Futures: A Conversation* (2024) 14 JOURNAL OF CULTURAL HERITAGE MANAGEMENT AND SUSTAINABLE DEVELOPMENT 252–265 at 255 ("One important way of implementing futures thinking is to ask … what alternative futures are conceivable and possibly preferable, and then assess how heritage management may be able to benefit future generations in the best possible way.") and 257 ("Heritage management could work with scenarios and try to optimise strategies in relation to a variety of equally possible futures.")

[97] Ilektra Simitsi & Elpida Tzika, *Applying Foresight Methodology in Public Governance for Sustaining Resilient Cultural Heritage Management* (2024) 5(2) HELLENIC ASSOCIATION OF POLITICAL SCIENTISTS POLICY BRIEFS SERIES, 139–151 (exploring "the integration of foresight methodology" into cultural heritage governance" and arguing that "Foresight, through tools such as scenario planning, trend analysis, and visioning, helps governments foresee future challenges, align policies with long-term goals, and plan resilient strategies.")

[98] U.N.E.S.C.O. World Heritage Regional Action Plan for Europe and North America (2024-2031) at para 3.4.5, p. 11.

[99] Holtorf and Bolin, *Heritage Futures: A Conversation*, at 252 (noting the importance of a temporal dimension in heritage studies and arguing for "the importance of considering the future in heritage studies and heritage practice" to understand "how heritage may be part of building a sustainable present and future.") For a complementary approach suggesting the importance of

In conclusion, the integration of resilience thinking into the World Heritage Convention can enhance the perceived legitimacy and effectiveness of the convention, helping it to address various challenges ahead, including climate change, overtourism, and armed conflicts. Recent policy evolution, like sustainable development integration, the adoption of a climate strategy, and the historical urban landscape approach, shows adaptability. The adoption of the cultural landscape category shows that the system can evolve. Further steps enhancing resilience could include: 1) interpreting foundational concepts like outstanding universal value, authenticity, and integrity in a more fluid way to respond to contemporary challenges; 2) accommodating local agency and multipolarity; and 3) proactively adopting adaptive management frameworks necessary in a world of rapid, non-linear changes.[100] Resilience thinking offers a potential path forward, and its implementation requires changes that the system has the capacity to make.

IV. Resilience and the Convention on Cultural Diversity

Resilience thinking is somehow part and parcel of the Convention on Cultural Diversity[101] as cultural diversity itself constitutes a resilience mechanism.[102] From an evolutionary perspective, cultural diversity functions like biodiversity: it represents humanity's repository of varied adaptive strategies, distributed knowledge, and innovation potential that enhance collective capacity to persist through change.[103] Different cultures have developed distinct approaches to fundamentally similar challenges like food production, resource management, governance, knowledge

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historical awareness in cultural heritage studies, *see* Valentina Vadi, *The Turn to History in International Cultural Heritage Law and Heritage Studies* (2025) 32 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY 365–368 at 365 (noting how "international legal scholars have increasingly incorporated historical methods and perspectives into their work.") *See also* Ciaràn Benson, *Psychology and World Heritage? Reflections on Time, Memory, and Imagination for a Heritage Context* (2020) 27 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY. 259-276 (arguing that "The idea of world heritage is … a future-oriented ideal for a common humanity" while world heritage sites also constitute "building blocks for collective memory.") see also Lucas Lixinski, *Resisting Chrononormative International Law* (2024) 44 POLISH YEARBOOK OF INTERNATIONAL LAW 11-36 at 13 (arguing that international cultural heritage law "selects a practice or artefact from the past, in the present, with a view towards impacting a future. … As such, ICHL engages multiple dimensions of time.")

[100] *See* Holtorf and Bolin, *Heritage Futures: A Conversation*, 254 ("to correctly conserve the past, we need to anticipate the future. And this may imply transformation.")

[101] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted 20 October 2005, entered into force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005, vol. I, 83.

[102] Amanda Wood, Cibele Queiroz, Lisa Deutsch, Blanca González-Mon, Malin Jonell, Laura Pereira, Hanna Sinare, Uno Svedin & Emmy Wassénius, *Reframing the Local–Global Food Systems Debate through a Resilience Lens* (2023) 4 NATURE FOOD 22-29 (noting that "Diversity is at the core of resilient systems.")

[103] Jules Pretty, et al., *The Intersections of Biological Diversity and Cultural Diversity. Towards Integration* (2009) 7(2) CONSERVATION AND SOCIETY 100-112, at 3 (noting that "in the same way that biological diversity increases the resilience of natural systems, cultural diversity has the capacity to increase the resilience of social systems.")

transmission, social organization, and environmental adaptation. When unexpected challenges emerge, like novel climate conditions, new diseases, resource constraints, and social disruptions, having multiple cultural approaches to draw from enhances collective resilience. When one approach fails, others persist. Some approaches will prove better suited than others. Moreover, new solutions often emerge from combining elements from different cultural traditions. Cultural diversity maximizes the potential for creative recombination. Therefore, cultural diversity is humanity's resilience infrastructure.[104] Moreover, culture also provides people with varied resources for making sense of change and finding purpose through disruption.[105]

Due to globalization, cultural diversity is eroding.[106] Economic integration, media dominance, and industrialization create powerful pressures toward cultural convergence, displacing local and traditional cultures.[107] Many Indigenous and minority cultures face continuing marginalization, discrimination, and assimilationist pressure.[108] Such diversity loss results of colonialism's legacy and persisting structural violence over centuries. Cultural homogenization entails language extinction, cultural assimilation, knowledge loss, and the homogenization of lifeways, values, and worldviews.

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[104] *Id.* (arguing that "The maintenance of cultural diversity into the future … increases the capacity of human systems to adapt to change.")

[105] Todd A. Crane, *Of Models and Meanings: Cultural Resilience in Social–Ecological Systems* (2010) 15 ECOLOGY AND SOCIETY 19, at 19 (arguing that "changes in the biophysical system can be culturally constructed in different ways.")

[106] VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL ECONOMIC LAW (2023) 2 ("economic globalization and international economic governance can … jeopardize the safeguarding of cultural heritage. Asymmetry in flows and exchanges of cultural goods can lead to cultural homogenization and the

predominance of a given dominant culture. The commodification of culture, that is, the transformation of cultural practices or items into commodities or objects of trade, can dilute their cultural value unless it is conducted in a culturally appropriate way. Such cultural objects and practices risk becoming mere market items regardless of their cultural value for their traditional stakeholders. In parallel, investments in the extractive industries have the ultimate capacity of changing cultural landscapes and the ways of life of local

communities.")

[107] *Id.* 45 ("globalization can exert strong homogenizing tendencies thus weakening or even erasing existing cultures and leading to a sort of cultural imperialism. By facilitating the export of cultural products such as television programs, music, and other entertainment from given countries to others, economic globalization could pave the way to the emergence of an overarching world culture.")

[108] *See generally* Valentina Vadi, *International Economic Law and Indigenous Cultures*, in V. Vadi and D. Collins (eds) THE ROUTLEDGE HANDBOOK ON INTERNATIONAL ECONOMIC LAW (2026) 460–477; Valentina Vadi, *The Protection of Indigenous Cultural Heritage in International Investment Law and Arbitration* in A. Di Blase and V. Vadi (eds), THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW (Roma III Press 2020) 197–244; Valentina Vadi, *Heritage, Power and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration*, 50 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW (2018) 101–155; Valentina Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law*, 42 COLUMBIA HUMAN RIGHTS LAW REVIEW 3 (2011) 797–889.

How does international cultural heritage law address this? UNESCO was founded partly to promote respect for "the fruitful diversity of cultures."[109] The 2001 Universal Declaration on Cultural Diversity declares cultural diversity to be "as necessary for humankind as biodiversity is for nature"[110] and "a factor in development."[111] It also explicitly links cultural diversity to human rights.[112] The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions recognizes states' rights to maintain cultural policies against trade liberalization pressures.[113]

The Convention recognizes "the dual nature of cultural expressions as objects of trade and artefacts of cultural value" and the sovereign right of states to adopt cultural policies for promoting cultural diversity.[114] The Convention thus supports the pursuit of cultural objectives and gives them an equal status alongside economic, social and environmental ones that currently determine development policies.[115]

However, some scholars question whether the convention adequately addresses cultural diversity loss at its roots.[116] They consider the range of cultural

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[109] U.N.E.S.C.O. Constitution, preamble. Constitution of the United Nations Educational, Scientific, and Cultural Organization (UNESCO Constitution), adopted 16 November 1945, in force 1946, 4 U.N.T.S. 275 (1945).

[110] U.N.E.S.C.O. Universal Declaration on Cultural Diversity, adopted by the 31st Session of the General Conference of UNESCO in Paris, 2 November 2001, Art. 1 (recognizing that "As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature.")

[111] *Id.* at art. 3 (noting that "cultural diversity widens the range of options open to everyone".)

[112] *Id.* at art. 4.

[113] The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) was adopted on 20 October 2005. Of the 156 countries voting on the convention, 148 voted in favor, with opposing votes by the United States and Israel, and abstentions by Australia, Honduras, Liberia, and Nigeria. The CCD entered into force on 18 March 2007. UNESCO, Records of the General Conference, 33rd session, Paris, 3–21 October 2005 (2005), vol. I, at 83.

[114] *See* Christoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?* (2006) 9 JOURNAL OF INTERNATIONAL ECONOMIC LAW 553–574, 553 ("The major objectives of the CCD are the recognition of the dual nature of cultural expressions as objects of trade and artefacts of cultural value and the recognition of the sovereign right of governments to formulate and implement cultural policies and measures for the protection and promotion of cultural diversity.").

[115] *Id.* (arguing that "The ambitious role assigned to the CCD by its proponents is to fill an existing lacuna for cultural objectives in public international law and to serve as a cultural counterbalance to the World Trade Organization (WTO) in future conflicts between trade and culture.") Holly Ailett, *An International Instrument for International Cultural Policy: The Challenge of UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005*, (2010) 13 INTERNATIONAL JOURNAL OF CULTURAL STUDIES 355, at 355 ("the Convention may be implemented to give cultural agendas an equal status alongside economic, social and environmental issues that currently determine policy for development.")

[116] Ben Garner and Justin O'Connor, *Rip it up and Start Again? The Contemporary Relevance of the 2005 UNESCO Convention on Cultural Diversity* (2020) THE JOURNAL OF LAW, SOCIAL JUSTICE & GLOBAL DEVELOPMENT 8, at 10 (arguing that "the [Convention on Cultural Diversity] has failed to challenge, and sometimes reinforced, an essentially 'economistic' language of cultural and public policy, and that it needs to revisit its core values and intellectual underpinnings if it is to provide a cultural policy resource adequate for today's challenges.")

policies envisaged by the convention as something too little too late to counter cultural homogenization.[117] Is the convention merely treating symptoms while neglecting the root causes of cultural homogenization relating to economic globalization, power structures, and educational policies?

Against this background, resilience thinking can strengthen the overarching goal of the convention to safeguard cultural diversity by connecting local resilience to global diversity.[118] Supporting a community's cultural resilience through language use traditional practice, and knowledge transmission helps foster cultural diversity. Resilience thinking helps bridge scales: Cultural diversity is not just an abstract global good; rather, it is concrete local resilience that contributes to global adaptive capacity.[119] If one Amazonian community maintains traditional medical knowledge, this can help humanity's collective resilience in addressing illnesses.[120]

Resilience thinking legitimizes some cultural adaptation and change. Cultures can evolve, adopt new elements, and transform practices: from a resilience perspective, this is not diversity loss; rather, it is adaptive maintenance of diversity through change.[121] This approach challenges both essentialist preservation that freezes cultures and defeatist narratives that equate change with loss. Cultural diversity persists through adaptation: for example, languages develop new vocabulary for digital contexts and traditional practices can use modern tools.

Resilience thinking can help reframe cultural diversity as both valuable and functional. While traditional cultural diversity discourse emphasizes the intrinsic value of cultural diversity and its linkage to human rights,[122] resilience framing adds

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[117] Rostam Neuwirth, *'United in Divergency': A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2006) 66 ZaöRV 819, 853 (noting that "most of the provisions [of the CCD] are programmatic in character, expressing good intentions which are not legally binding in a strict sense.")

[118] Junwen Jia, Weiqiang Yang, Fang Wu and Xuefeng Cui, Elevated Diversity of the Supply Chain Boosts Global Food System Resilience, (2024) 19 ENVIRONMENTAL RESEARCH LETTERS (showing that "boosting a country's food supply chain diversity will increase the resistance of the country to food shocks", thus contributing to "global food supply security.")

[119] *See generally* Ana María Fraile-Marcos (ed) GLOCAL NARRATIVES OF RESILIENCE (Routledge 2019).

[120] Valentina Vadi, *Intangible Heritage, Traditional Medicine and Knowledge Governance*, (2007) 2 JOURNAL OF INTELLECTUAL PROPERTY LAW AND PRACTICE 682–692.

[121] Carl Folke, Stephen R. Carpenter, Brian Walker, Marten Scheffer, Terry Chapin, Johan Rockström, *Resilience Thinking: Integrating Resilience, Adaptability and Transformability* (2010) 15 ECOLOGY AND SOCIETY (explaining that "Adaptability is part of resilience. It represents the capacity to adjust responses to changing external drivers and internal processes and thereby allow for development along the current trajectory … Transformability is the capacity to cross thresholds into new development trajectories. Transformational change at smaller scales enables resilience at larger scales.")

[122] Eleni Polymenopoulou, "*Cultural Diversity" from the Perspective of Human Rights, Media, and Trade Law: Cross-Fertilization or Conflict?* (2021) 2 SANTANDER ART AND CULTURE LAW REVIEW 123-148 (arguing that "the promotion of cultural diversity is a laudable cause in and of itself, and a first step towards achieving equality."); Yvonne Donders, *Do Cultural Diversity and Human Rights Make a Good Match?* (2010) 61 INT SOC SCI J. 15-35, 15 (analysing "the relationship between cultural diversity and human rights, in particular cultural rights . . . equality and non-discrimination" and discussing several cases in which "human rights were invoked to protect cultural interests, confirming the value of cultural diversity.")

a functional argument regarding cultural diversity as necessary for survival. Resilience thinking can strengthen political and legal arguments for cultural diversity as a vital necessity.

After examining the promises of incorporating resilience thinking into the interpretation and application of the Convention on Cultural Diversity, it is worth exploring the potential pitfalls of this approach, namely, cultural instrumentalization, neo-colonialism, and discrimination. Let us examine these potential pitfalls of resilience thinking and investigate whether and, if so, how these shortcomings can be properly addressed within the existing legal framework.

First, valuing cultural diversity for its usefulness rather than for its inherent value and its linkage to human rights instrumentalizes culture. Resilience framing risks to prioritize cultures deemed useful. Indigenous cultures with valuable traditional ecological knowledge get attention and resources. Minority cultures — small linguistic communities, diasporic cultures, urban subcultures—might be neglected. That neglect would breach human rights, including equality and cultural rights, which hold that all cultures have equal dignity, provided they respect human rights.[123] Therefore, resilience thinking should not be prioritized over other perspectives. Instead, it should be integrated within the existing human rights framework based on human dignity and equality.[124]

Second, if cultural diversity were framed primarily as a resilience resource, such framing would place responsibility on minority and Indigenous cultures to remain different for humanity's benefit. In other words, when institutions emphasize resilience, they may inadvertently normalize the conditions that make resilience necessary. This creates a "resilience paradox", where the emphasis on adaptive capacity to face challenges obscures structural inequalities and power asymmetries that create those challenges in the first place.[125] This approach would shift the focus from the majority cultures' responsibility to stop causing harm to the minority

[123] For a similar argument in the context of labor relations, see Matthijs Bal, Maria Kordowicz, and Andy Brookes, *A Workplace Dignity Perspective on Resilience: Moving Beyond Individualized Instrumentalization to Dignified Resilience* (2020) 22 ADVANCES IN DEVELOPING HUMAN RESOURCES 453, 453 (arguing that "During the last decades, the dominant discourse of resilience at work has underlined the necessity of workers to overcome obstacles and to thrive at work … The resilience-turn in human resource development … has increasingly normalized the need for resilience such that it becomes a sine qua non of the contemporary worker … This article seeks to problematize the hegemonic discourse around resilience … whereby resilience is either instrumentalized as it enhances performance, or denotes an individual responsibility to ensure well-being.")

[124] For a similar point, in the context of labor relations, see *id.* at 453 ("The development of a conceptual alternative approach to resilience is offered through integrating a workplace dignity paradigm into resilience.")

[125] Benjamin Rachunok and Roshanak Nateghi, *Overemphasis on Recovery Inhibits Community Transformation and Creates Resilience Traps* (2021) 12 NATURE COMMUNICATIONS 1 at 5 (explaining that "The term trap is used in many instances to describe feedback loops in which governance and interventions designed to rectify a larger societal problem contribute or exacerbate the problem … Resilience traps can occur by an incomplete translation of resilience concepts to operational models.") and 6 ("Short-sighted policies, … motivated by solely prioritizing … rapid recovery can entrench untenable and non-sustainable aspects of the status quo and inhibit transformation needed to promote a sustainable and resilient society.")

cultures' resilience.[126] Critics argue this is neocolonial—extracting resilience value from vulnerable cultures while oppressing them economically and politically.[127]

Third and more fundamentally, resilience discourse can mask justice issues, depoliticizing cultural loss.[128] Instead of confronting economic exploitation, discrimination, and structural violence, talking about resilience transforms cultural survival into a technical challenge, rather than a political struggle that requires the respect, protection, and fulfillment of human rights. It treats the symptoms of cultural loss while root causes persist. Ignoring such root causes can also end in assimilation: If resilience means cultures adapting to globalization by becoming more like dominant cultures, that is diversity loss.[129]

Instead, cultural diversity resilience could be enhanced by respecting, protecting, and fulfilling not only the cultural rights of local communities but also their civil and political rights as well as their economic and social rights, including self-determination. The link between cultural diversity and human rights was clearly established by the Universal Declaration on Cultural Diversity, which recognizes that "the defence of cultural diversity is . . . inseparable from respect for human dignity" and that it "implies a commitment to human rights and fundamental freedoms".[130] The Convention on the Protection and Promotion of the Diversity of Cultural

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[126] Laura Pulido, *Geographies of Race and Ethnicity II: Environmental Racism, Racial Capitalism and State-sanctioned Violence* (2017) 41 PROGRESS IN HUMAN GEOGRAPHY 524-533 (raising environmental justice issues and criticizing how some communities are expected to be resilient to environmental hazards (pollution, climate change) rather than having those hazards removed).

[127] Clement Amponsah, *Neo-Colonial Subjectivities in Resilience Praxis and the Urgency to Think "Beyond Inclusion*, E-INTERNATIONAL RELATIONS (2024) (arguing that "The World Bank's paradigmatic definition of resilience building as essentially "helping people to help themselves" … denote[s] a neoliberal, and somewhat neo-colonial, shift in responsibility from the state and international policymakers to local and Indigenous populations to better strive for themselves.")

[128] Susan Fainstein, *Resilience and Justice* (2015) 39 INTERNATIONAL JOURNAL OF URBAN AND REGIONAL RESEARCH 157-167 at 157 ("For example, efforts to achieve resilience in relation to climate change through developing natural buffers against sea level rise will likely result in the displacement of populations. Who will be displaced and what measures will be taken to replace lost housing and community are crucial questions not captured by the term resilience. The issue becomes whether, by using this word, policymakers are, as with sustainability, seeking an innocuous label to justify controversial actions.")

[129] Compare with Abhinandita Jena and Smrutisikta Mishra, *Neocolonialism and Cultural Amnesia: Practices and Challenges of Postcolonial Collaborative Methodologies in Reclaiming Indigenous Voices* in L. Santhosh Kumar, Minu A., Barnashree Khasnobis, Preetha M., and Merrin R. S. (eds) NEOCOLONIALISM—RE-PRESENTING NARRATIVES, REALITIES AND RESPONSES (Routledge 2026) (arguing that "The continuing prevalence in the Global South of the neoliberal notion of development originating in the European Enlightenment era continues to entrench the domination of the Global South by the Global North, essentially as a covert form of colonial subjugation. … It reinforces a vicious cycle of cultural homogenization and cultural imperialism by eroding the orientation towards native culture and perpetuating Western-oriented assimilation. While efforts at cultural conservation and preservation create repositories of heritage, they do little to prevent the eventuality of cultural amnesia.")

[130] U.N.E.S.C.O. Universal Declaration on Cultural Diversity, Adopted by the 31st Session of the General Conference of UNESCO in Paris, 2 November 2001, Article 4.

Expressions also acknowledges that "cultural diversity can be protected and promoted only if human rights and fundamental freedoms . . . are guaranteed."[131]

Cultural diversity protection must be grounded in communities' rights to maintain their cultures on their own terms.[132] For instance, cultural diversity protection requires Indigenous peoples' free, prior, and informed consent for any interventions on their lands, community control over cultural heritage and knowledge, land rights, and freedom from discrimination and violence.[133] In other words, genuinely supporting cultural diversity requires addressing the root causes of cultural hegemony by confronting colonial legacies and ongoing marginalization.[134]

The question is not whether cultures will change, but whether they can change while maintaining distinctiveness. The Convention on Cultural Diversity, as it currently stands, has been inadequate to counter diversity loss because it addresses symptoms of loss, such as providing some support for endangered cultural practices, while not addressing its root causes like economic systems, power structures, and discrimination. Current diversity loss is contingent on policy choices and power structures. If changes were to be made to economic systems, educational approaches, and political arrangements, diversity could persist and even flourish.

For instance, in a recent case received by the United Nations Committee on the Rights of the Child, *M.E.V., S.E.V. and B.I.V. v Finland*,[135] three sisters belonging to the Sami people submitted that Finland had breached their cultural rights. The country permitted "a mineral exploration project on their traditional territory without a proper impact assessment and without obtaining the free, prior and informed consent of their community."[136] According to the authors of the communication to the Committee,

> "the exploration works would cause unpredictable adverse consequences for the continuity of their culture, limiting their ability to benefit from the transmission, from older generations, of Sami culture and the associated work and livelihood. As the continued practice of Sami children's culture and way of life is strongly dependent on traditional reindeer herding, if traditional

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[131] CCD Article 2(1). For a seminal study, see Yvonne Donders, *Do Cultural Diversity and Human Rights Make a Good Match?* (2010) 61 INTERNATIONAL SOCIAL SCIENCE JOURNAL 15-35.

[132] Donders, *Do Cultural Diversity and Human Rights Make a Good Match?* (exploring the scope of cultural rights, as well as the cultural dimension of human rights).

[133] *See generally* Antonietta Di Blase and Valentina Vadi (eds), THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW (University of Rome III Press 2020).

[134] On the importance of adopting long-term approaches to international legal history and theory, see Valentina Vadi, *The Sea as History: Transplanting Braudel's Vision of Time to International Legal History* in Daniel R. Quiroga Villamarin and Luis Eslava (eds.) REPRESENTING TIME, SPACE, MOVEMENT IN GLOBAL LEGAL THEORY (Cambridge University Press, *forthcoming* 2026).

[135] See e.g. UN Committee on the Rights of the Child, *M.E.V., S.E.V. and B.I.V. v Finland*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 172/2022, 16 January 2025, CRC/C/97/D/172/2022.

[136] *Id.* at para 1.1.

> reindeer herding is lost due to additional threats, which the State party has allowed to arise through mineral exploration works, further aggravating the situation and destroying the sustainability of reindeer herding, their identity, adequate standard of living, language and culture more broadly will suffer and be lost, as all these elements are grounded in living with reindeer."[137]

The Committee upheld the complaint, noting that "in the case of Indigenous Peoples, the enjoyment of culture might relate to a way of life closely associated with their traditional lands, territories and resources and that, therefore, Indigenous Peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life."[138]

Resilience thinking can strengthen arguments for cultural diversity by adding functional rationale: it demonstrates that diverse systems outperform monocultures. However, resilience framing cannot replace existing legal frameworks based on human dignity and fundamental human rights; rather, it can complement such rules. Integrating resilience within a human rights framework can help diverse cultures shine, empowering vulnerable communities and addressing what is fundamentally a justice issue. Genuine diversity resilience requires structural changes—economic redistribution, power-sharing, educational transformation—that dominant cultures consistently resist.[139] Cultural diversity resilience is not primarily a heritage management challenge. It is a political struggle over justice and what kind of world we want to live in—one with rich cultural diversity respectful of human dignity and human rights.

V. Resilience and the Intangible Cultural Heritage Convention

Intangible cultural heritage (ICH) and resilience are conceptually close because both deal with adaptive continuity in the face of change. Intangible cultural heritage refers to "the practices, representations, expressions, knowledge, skills . . . that communities, groups and, in some cases, individuals recognize as part of their cultural heritage."[140] This heritage is "transmitted from generation to generation" and "constantly recreated by communities . . . in response to their environment, their interaction with nature and their history."[141] It provides people with "a sense of

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[137] *Id.* at para. 2.14.

[138] *Id.* at para. 9.13.

[139] Ksenia Chmutina, Rohit Jigyasu, and Takeyuki Okubo, *Editorial for the Special Issue on "Securing Future of Heritage by Reducing Risks and Building Resilience* (2020) 29 DISASTER PREVENTION AND MANAGEMENT: AN INTERNATIONAL JOURNAL 1–9 (highlighting that efforts are needed "towards addressing root causes of social and economic vulnerability of those communities who are true bearers of heritage.")

[140] Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH), 17 October 2003, 2368 U.N.T.S., Art. 2.1.

[141] *Id.*

identity and continuity."[142] Intangible cultural heritage includes "oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; [and] traditional craftsmanship."[143]

Resilience is fundamentally about maintaining core identity and function while adapting to disruptions. ICH, the immaterial manifestations of culture, is dynamic by definition and deals with continuity in the face of change.[144] Unlike tangible heritage, where 'authenticity' has traditionally meant material integrity and minimal change, the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH)[145] recognizes ICH as "a living, breathing element of human existence."[146] It explicitly recognizes that intangible heritage embodies some continuity as it is transmitted from generation to generation while it simultaneously evolves. Article 2 of the CSICH notes that ICH is "constantly recreated by communities and groups in response to their environment."[147] This language links intangible heritage to local communities' resilience: practices are transmitted to younger generations to help them address contemporary challenges—thus maintaining continuity while responding to change.[148] For instance, in *M.E.V. et al. v. Finland*, the three claimants expressly referred to their intangible heritage as tool for preserving their cattle and thus living a meaningful life.[149]

Moreover, ICH can serve as "a catalyst for building resilient communities" and fighting climate change.[150] When communities face challenges like migration, environmental disasters, and climate change, their intangible heritage often becomes

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[142] *Id.*

[143] *Id.* at 2.2.

[144] Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples* (2011) 22 EUROPEAN JOURNAL OF INTERNATIONAL LAW 101–120.

[145] Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH), 17 October 2003, 2368 U.N.T.S.

[146] Philip McDermott and Mairéad Nic Craith, *Intangible Cultural Heritage and Climate Change Sustainability and Adaptability in a Time of Crisis?* (2024) 33 ANTHROPOLOGICAL JOURNAL OF EUROPEAN CULTURES 1, 1 (noting that "A ground-breaking treaty, the Convention brought recognition of heritage as a living, breathing element of human existence."

[147] CSICH Art. 2.1.

[148] Xenophon Zabulis, Nikolaos Partarakis, Emmanouil Zidianakis, and Danae Kaplanidi, *A Critical Review of the Function of Intangible Cultural Heritage as a Driver for Social Resilience and Cohesion* (2025) 5 ENCYCLOPEDIA at 3 (highlighting that "This inherent adaptability [of ICH] is critical for its ongoing relevance and utility in a rapidly changing world.")

[149] U.N. Committee on the Rights of the Child, *M.E.V., S.E.V. and B.I.V. v. Finland*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 172/2022, 16 January 2025, para. 2.3 ("The authors have also learned from an early age, from older family members, the traditional Sami way of singing (*luohti yoik*), which is used by women in the fells during their reindeer watch to scare away predators.")

[150] McDermott and Nic Craith, *Intangible Cultural Heritage and Climate Change*, at 5 and 8 (noting that "recent Conferences of the Parties of the [United Nations Framework Convention on Climate Change] have given insufficient attention to the potential impact of ICH to understand how communities adapt to, deal with and address global warming. Neither is there adequate recognition of the role that cultural behaviour can play in reversing global warming.")

a source of resilience.[151] ICH also includes adaptive resilience systems.[152] Traditional ecological knowledge, agricultural practices, water management systems, medicinal knowledge, and architectural techniques represent adaptive resilience encoded in cultural practice. Traditional rice cultivation in South Asia,[153] pastoralist mobility patterns in the Sahel,[154] and Pacific Islander navigation and weather prediction[155] are all sophisticated adaptive strategies enhancing resilience.

ICH can strengthen individual and collective resilience. On the one hand, cultural practices provide meaning, continuity, and connection that support health and well-being, particularly through disruption. Language, storytelling, music, dance, and rituals are fundamental human needs that enable people to develop identity, process trauma, maintain hope, and envision futures.[156] On the other hand, ICH can foster "social cohesion, which in turn . . . enables a community to . . . thrive."[157] This creates a virtuous cycle: "strong ICH supports cohesion, which builds resilience, and a resilient community is better equipped to perpetuate and adapt its ICH, further strengthening its social fabric and adaptive capacities."[158] Shared practices, festivals, and rituals create bonds and social cohesion that help communities cope with crises.

[151] Gül Aktürk and Martha Lerski, *Intangible Cultural Heritage: A Benefit to Climate-displaced and Host Communities* (2021) 11 J ENVIRON STUD SCI 305–315 at 305 (discussing "intangible heritage as a catalyst to building resilient communities").

[152] Stella Sophia Kyvelou, *From Preservation to Living Heritage Systems: Activating Heritage, Towards Territorial Resilience* (2025) 8 HERITAGE 438, 438 (noting that "Cultural heritage has increasingly been acknowledged as a … valuable resource for enhancing territorial and urban resilience. It offers a sense of belonging … and historical knowledge that can be effectively utilized in risk prevention and management activities.")

[153] Laurence L. Delina, Kim-Pong Tam, Sanny D. Afable, Ivee Fuerzas, Wiwik Dharmiasih, Albert Salamanca, *Rice, Resilience, and Relationships: Unpacking the Intangible Sources of Resilience in Southeast Asian Heritage Ricescapes* (2025) 195 WORLD DEVELOPMENT (highlighting "the critical role of intangible resources in fostering resilience among Indigenous rice farmers, emphasizing the importance of social, cultural, and spiritual dimensions in their agricultural practices.")

[154] *See generally* Pierre Hiernaux, Cecile Dardel, Laurent Kergoat, Eric Mougin, *Desertification, Adaptation and Resilience in the Sahel: Lessons from Long-Term Monitoring of Agro-ecosystems* in Roy Behnke and Michael Mortimore (eds) THE END OF DESERTIFICATION? (Springer 2016).

[155] Heather L. McMillen, Tamara Ticktin, Alan Friedlander, Stacy D. Jupiter, Randolph Thaman, John Campbell, Joeli Veitayaki, Thomas Giambelluca, Salesa Nihmei, Etika Rupeni, Lucille Apis-Overhoff, William Aalbersberg, Dan F. Orcherton, *Small Islands, Valuable Insights: Systems of Customary Resource Use and Resilience to Climate Change in the Pacific* (2014) 19 ECOLOGY AND SOCIETY (arguing that "Although most islands in the Pacific are small, their knowledge systems include valuable insights on seasonal cycles, ecological processes, and the management of biocultural diversity that are relevant at a broad scale for understanding resilience and adaptability to . . . climate change.")

[156] Xenophon Zabulis, Nikolaos Partarakis, Emmanouil Zidianakis, and Danae Kaplanidi, *A Critical Review of the Function of Intangible Cultural Heritage as a Driver for Social Resilience and Cohesion* (2025) 5 ENCYCLOPEDIA at 12 ("They can be therapeutic and empowering, offering emotional release, a sense of continuity, and a means of self-expression." ICH can act as a buffer "against anxiety" and "helps individuals and groups survive crises and treat trauma, find meaning in adversity, and maintain hope.")

[157] *Id.* at 4.

[158] *Id.*

After disasters, like earthquakes, floods, and conflicts, ICH practices often become instrumental for recovery. For instance, after the tsunami in Japan, community festivals and traditional practices fostered emotional recovery and social reconnection.[159] After Hurricane Katrina, New Orleans' musical traditions and *Mardi Gras* festival were central to the city's cultural resilience and recovery.[160]

While ICH fosters significant cultural and social resilience, it can also enhance economic resilience.[161] It can support livelihoods through tourism, craft production, traditional agriculture, and performing arts.[162] It can provide economic diversification, reducing vulnerability to single-industry dependence. Inscription on the UNESCO ICH lists often leads to tourism interest and related activities. This can provide economic benefits and transmission incentives, supporting their viability.

How does resilience thinking reshape ICH law and policy? The 2003 Convention aims at "safeguarding" rather than "preserving" ICH.[163] While "the concept and practices of safeguarding are contested", safeguarding is not just about preventing loss; rather, it is about enhancing conditions for ongoing practice, adaptation, and transmission.[164] Article 2.3 of the CSICH defines safeguarding as "measures aimed at ensuring the viability of intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through . . . education, as well as the revitalization of the various aspects of such heritage."[165] In other words, "safeguarding ICH means preserving its link with living cultures and its role in the identity of its holders, as well as allowing the transmission of it . . . to future generations."[166]

The 2003 Convention aligns with resilience theory's emphasis on local agency and bottom-up approaches rather than top-down expert control. It regards communities as heritage bearers and decision-makers. For instance, communities

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[159] Akiko Iizuka, *Local Performing Arts and Recovery from the Great East Japan Earthquake and Tsunami: A Descriptive Qualitative Study*, (2021) 63 INTERNATIONAL JOURNAL OF DISASTER RISK REDUCTION (noting that "Local performing arts contribute to psychological recovery from disasters.")

[160] James R.G. Morris and Paul Kadetz, *Culture and Resilience: How Music has Fostered Resilience in Post-Katrina New Orleans* in Michael J. Zakour, Nancy B. Mock and Paul Kadetz (eds) CREATING KATRINA, REBUILDING RESILIENCE—LESSONS FROM NEW ORLEANS ON VULNERABILITY AND RESILIENCY (2018) 233-256.

[161] Valentina Vadi, *Intangible Cultural Heritage and Trade*, in C. Waelde, C. Cummings, M. Parvis, and H. Enright (eds.), RESEARCH HANDBOOK ON CONTEMPORARY INTANGIBLE CULTURAL HERITAGE (Edward Elgar 2018) 398–415.

[162] Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples* (2011) 22 EUROPEAN JOURNAL OF INTERNATIONAL LAW101–120, at 119 (noting that "ICH can represent a formidable tool to foster economic income (especially through tourism) as well as to improve the international visibility of the state.")

[163] *See* CSICH Art. 1 (reporting that "the purposes of this convention are: a) to safeguard the intangible cultural heritage …")

[164] Natsuko Akagawa and Laurajane Smith, *The Practice and Politics of Safeguarding* in Natsuko Akagawa and Laurajane Smith (eds) SAFEGUARDING INTANGIBLE HERITAGE: PRACTICES AND POLITICS (Routledge 2018) chapter 1.

[165] CSICH Art. 2.3.

[166] Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 120.

participate in the identification of intangible cultural heritage.[167] More broadly, states parties "endeavor to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management."[168] The convention acknowledges that ICH is woven into social structures, environmental relationships, and belief systems.[169]

Structural factors like cultural hegemony, economic marginalization, and discrimination can affect the safeguarding of ICH.[170] To counter irremediable loss, digital documentation can ensure the virtual resilience of ICH.[171] Extensive documentation, databases, and archives of ICH practices create knowledge resilience: these repositories preserve information even if living practice does not survive and can contribute to its diffusion worldwide to an extent unknown before.[172] They can also prevent misappropriation.[173] However, whether documentation can replace a living practice remains to be seen.[174] Extensive documentation can create the illusion

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[167] CSICH Art. 11.b.

[168] CSICH Art. 15.

[169] Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples* (2011) 22 EUROPEAN JOURNAL OF INTERNATIONAL LAW 101–120 (arguing that the "international safeguarding of ICH must rely on the concomitant application … of international human rights law, for the reason that ICH represents a component of cultural human rights and an essential prerequisite to ensure the actual realization and enjoyment of individual and collective rights of its creators and bearers.")

[170] The Italian philosopher Antonio Gramsci (1891–1937) developed the concept of "cultural hegemony" to indicate the use of cultural institutions to maintain power in given societies. For Gramsci, dominant culture propagates its own values and norms, making them the common values of all, and thus maintains its political clout. In Gramsci's view, a state cannot dominate in modern conditions by merely advancing its own narrow economic interests; neither can it dominate purely through force. Rather, it must exert cultural leadership. Gramsci concluded that the only way to challenge cultural hegemony was by resisting dominant government and business interests by building counter-hegemonic alternative values in which the interests of subaltern groups could be recognized and articulated. ANTONIO GRAMSCI, QUADERNI DEL CARCERE, V. Gerratana (ed.) (Torino: Einaudi 1975) Quaderno 14, para. 56. For commentary, see VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL ECONOMIC LAW (Brill 2023) 123.

[171] Marilena Alivizatou, *Digital Intangible Heritage: Inventories, Virtual Learning and Participation* (2019) 12 HERITAGE AND SOCIETY 116-135 (investigating ways in which new information and communication technologies have been used to serve heritage documentation and learning.)

[172] Anne Wagner and Marie-Sophie de Clippele, *Safeguarding Cultural Heritage in the Digital Era – A Critical Challenge* (2023) 36 INT. J. SEMIOT. LAW 36, 1915–1923 at 1916 ("The digital revolution offers unprecedented opportunities for cultural heritage preservation. By digitizing artifacts, artworks, historical documents, and traditional practices, we can ensure their wider accessibility to people around the world, regardless of geographic boundaries or physical limitations.")

[173] Chidi Oguamanam, *Documentation and Digitization of Traditional Knowledge and Intangible Cultural Knowledge: Challenges and Prospects*, in Toshiyuki Kono, ed., INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY: CULTURAL DIVERSITY AND SUSTAINABLE DEVELOPMENT (Antwerp: Intersentia, 2009) 357-383.

[174] Anne Wagner and Marie-Sophie de Clippele, *Safeguarding Cultural Heritage in the Digital Era – A Critical Challenge* (2023) 36 INT J SEMIOT LAW 36, 1915–1923 at 1916 ("this digital transformation also presents unique challenges. As we transition from traditional

of safeguarding while the living practice dies. Some argue that digital archives preserve knowledge for potential future revitalization.[175] Others say that such documentation is failure dressed up as success.

ICH is also vulnerable to appropriation. Others have adopted, commodified, or profited from practices without the consent or benefit to the communities of origin. For instance, yoga's global commercialization is largely disconnected from South Asian communities, as is tribal or ethnic aesthetics in fashion.[176] Traditional knowledge has often been incorporated into commercial products without recognition. Not only in some cases can such cultural extraction undermine the viability of the original practitioners' ICH, but it can also be offensive if the appropriated heritage has sacred value.[177]

While various resilience strategies can be identified, geographical indications (GIs) seem a promising tool. GIs, such as tequila, champagne, and Chianti, are collective intellectual property rights owned by all the producers of a given region whose products comply with the specifications outlined in the relevant code of practice.[178] Each producer can then exercise that right independently. GIs protect producers' investments and consumers' expectations by certifying the unique qualities that characterize a product because of its geographical origin.[179] GIs enable the construction, safeguarding, and evolution of agricultural know-how. They express the link between human perseverance, culture, and natural resources.

GIs can foster cultural resilience by providing producers with the capability to rise above challenges and adapt quickly to new circumstances using their cultural background. For instance, when a 6.2 magnitude earthquake almost destroyed the Italian town of Amatrice in 2016, restaurants across the world made donations for every plate served of Amatriciana, the pasta dish named after the town.[180] Even if most of the town no longer exists, not only does the tradition live on, but the recent conferral of a GI can contribute to the reconstruction efforts and cultural resilience.[181] In the aftermath of the 2012 earthquake that shook Northeast Italy, sales of Parmesan cheese, a GI-protected cheese traditionally produced in Parma according to traditional

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preservation methods to digital repositories, we encounter issues related to data integrity, interoperability, and long-term sustainability.")

[175] *Id.* at 1917 (noting that "By adopting responsible digital preservation practices and fostering a deep appreciation of cultural heritage, we can ensure that the echoes of the past will resonate powerfully, enriching the present and inspiring the future.")

[176] BENEDETTA UBERTAZZI, INTELLECTUAL PROPERTY RIGHTS AND INTANGIBLE CULTURAL HERITAGE (Routledge 2022) 119-185. See also Benedetta Ubertazzi, *Territorial and Universal Protection of Intangible Cultural Heritage from Misappropriation* (2010) NEW ZEALAND YEARBOOK OF INTERNATIONAL LAW 69-106.

[177] Valentina Vadi, *Intangible Heritage, Traditional Medicine and Knowledge Governance* (2007) 2 JOURNAL OF INTELLECTUAL PROPERTY LAW AND PRACTICE 682–692.

[178] Dev S. Gangjee, *Geographical Indications and Cultural Heritage* (2012) 4 W.I.P.O. JOURNAL 85, 86 (discussing the "cultural turn" within GI law.)

[179] VADI, CULTURAL HERITAGE IN INTERNATIONAL ECONOMIC LAW, 303.

[180] Valentina Vadi, *Intangible Cultural Heritage and Trade*, in Charlotte Waelde, Charlotte Cummings, Mathilde Parvis, and Helena Enright (eds), RESEARCH HANDBOOK ON CONTEMPORARY INTANGIBLE CULTURAL HERITAGE (Edward Elgar 2018) 398–415, 398–9.

[181] *Id.*

cultural practices, helped the gradual recovery of the local communities.[182] Cultural resilience empowers individuals not only to survive and recover, but also to evolve and even thrive despite stressful events.

VI. Resilience and Indigenous Peoples' Cultural Heritage

Indigenous peoples are peoples historically rooted to a specific place and deeply affected by colonization and subsequent loss of autonomy, political oppression, economic exploitation, and cultural assimilation.[183] For Indigenous peoples, safeguarding their cultural heritage is particularly important because it contributes to building both individual and collective identity, resilience, and a sense of common destiny.[184] Indigenous cultural heritage often expresses functional knowledge for survival and adaptation. Traditional ecological knowledge, land management practices, agricultural systems, governance structures, and spiritual practices constitute adaptive responses to environmental and social challenges. Indigenous cultural heritage is thus quintessentially a resilience mechanism. Therefore, not only is the safeguarding of Indigenous cultural heritage necessary to respect, protect, and fulfill their human rights, but it also "ensure[s] the survival and continued development of the cultural, religious, and social identity of the [Indigenous peoples] concerned, thus enriching the fabric of society as a whole."[185]

Despite its salience, international law has long neglected the protection of Indigenous heritage, often "leav[ing] threats to [this] heritage unaddressed and violations unpunished."[186] No binding international instrument specifically protects Indigenous heritage with enforcement mechanisms.[187] Indigenous cultural heritage plays a prominent role in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[188] Drafted with the active participation of Indigenous representatives, the Declaration has mainstreamed the protection of Indigenous heritage into the fabric of international law, dedicating many provisions to different aspects of Indigenous culture.[189] The declaration recognizes the right of Indigenous peoples to practice, revitalize, and transmit their cultural heritage.[190] It also

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[182] *Id.*

[183] *See* Antonietta Di Blase, *The Self-Determination of Indigenous Peoples* in Antonietta Di Blasé and Valentina Vadi (eds) THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2020) 47-90.

[184] *See generally* M. Steele, *Indigenous Resilience* ARIZONA LAW REVIEW (2020) and Hilary Weaver (ed), THE ROUTLEDGE INTERNATIONAL HANDBOOK OF INDIGENOUS RESILIENCE (Routledge 2022).

[185] Wiessner, *The Cultural Rights of Indigenous Peoples*, 121–22.

[186] Ayla Alves, *Cultural Heritage Rights and Indigenous Peoples* in Mattias Åhrén and others (eds) THE OXFORD HANDBOOK OF INDIGENOUS PEOPLES AND INTERNATIONAL LAW (2024).

[187] VADI, CULTURAL HERITAGE IN INTERNATIONAL ECONOMIC LAW.

[188] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) GA Res. 61/295, UN Doc. A/RES/61/295, in force 13 September 2007.

[189] VADI, CULTURAL HERITAGE IN INTERNATIONAL ECONOMIC LAW, 51.

[190] UNDRIP Arts. 11-13.

specifically addresses traditional knowledge and cultural expressions.[191] While this landmark instrument is currently not binding, its nature may change in the future to the extent that its provisions reflect customary international law.[192] Overall, the legal framework protecting Indigenous heritage remains fragmented among Indigenous law, state law and international law. Within international law, various branches provide some limited protection of Indigenous cultural heritage including cultural heritage law, human rights law, environmental law, and intellectual property law, none of which comprehensively safeguard Indigenous peoples' heritage.

Indigenous heritage and resilience are deeply intertwined. Indigenous peoples maintain their cultural uniqueness despite centuries of genocidal policies.[193] They have survived colonization, cultural genocide,[194] forced displacement, economic exploitation, and environmental destruction. Such disruptions would destroy most societies. Across the Americas, Africa, Asia, the Arctic, and Oceania, colonization often involved the systematic destruction of Indigenous cultures.[195] Residential/boarding schools forcibly removed children, prohibiting Indigenous languages and cultural practices.[196] Cultural sites were looted or destroyed, and territories appropriated while Indigenous peoples faced forced displacement from ancestral lands. Indigenous peoples continue facing cultural destruction through resource extraction on sacred sites, discrimination, and marginalization.[197] Indigenous

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[191] UNDRIP Art. 31.

[192] On the legal status of the Declaration, see Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples* (2009) 58 ICLQ 957–983.

[193] Lucas Lixinski, *The Resilience of Identity: Indigeneity and the Turn to History in International Law* in Mattias Åhrén and others (eds) THE OXFORD HANDBOOK OF INDIGENOUS PEOPLES AND INTERNATIONAL LAW (2024) (discussing "the lack of Indigenous-centric accounts in the turn to history in international law.")

[194] Indigenous peoples and human rights advocates have long argued for recognizing cultural genocide. Article 8 of the UN Declaration on the Rights of Indigenous Peoples establishes Indigenous peoples' right not to be subjected to "forced assimilation or destruction of their culture." However, this is not a binding treaty, and it does not use the term genocide or provide enforcement mechanisms comparable to the Genocide Convention.

[195] Lindsey Kingston, *The Destruction of Identity: Cultural Genocide and Indigenous Peoples* (2015) 14 JOURNAL OF HUMAN RIGHTS 63–83, at 63 (considering "the destruction of indigenous cultures and the forced assimilation of indigenous peoples through the analytical lens of genocide."

[196] David MacDonald and Graham Hudson, *The Genocide Question and Indian Residential Schools in Canada* (2012) 45 CANADIAN J. POL. SCI. 427-449 (addressing the question of whether Canada committed genocide against Aboriginal peoples by attempting to forcibly assimilate them in residential schools.); Holly Jacobs, *Settler Colonialism and Assimilative Education: Comparing Federal Reconciliation Efforts for Indigenous Residential and Boarding Schools in Canada and the United States* (2022) 19 LOY. U. CHI. INT'L L. REV. 73 (arguing that "these schools comprised but one piece of a carefully crafted network of federal policies aimed at the removal, assimilation, and cultural genocide of Indigenous peoples, and as a result, had destructive and lasting effects on those they oppressed.")

[197] For a discussion of how international investment law deals with Indigenous peoples' heritage, see Valentina Vadi, *Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration* (2017) 50 GEORGE WASHINGTON INT'L L. REV. 725.

peoples' resilience, which required strategic cultural preservation and transmission of knowledge under extreme duress, deserves recognition.[198]

However, Indigenous peoples' resilience should not shift attention away from states' duties regarding human rights protection, substituting resilience-building for justice. In other words, Indigenous peoples' resilience should not become an excuse for injustice or breach of human rights standards. Indigenous heritage protection requires protecting cultural sites, objects, and ways of life, recovering looted cultural property, documenting and memorializing destroyed heritage, and creating secure conditions for cultural practice and educational opportunities. Destroyed sites can become memorial sites, preserving memory and acknowledging irreparable loss.[199]

Resilience thinking can benefit Indigenous heritage by supporting adaptive change and enhancing local agency. While traditional cultural heritage discourse often freezes heritage in time, resilience thinking explicitly values adaptation and transformation while maintaining continuity. This can support Indigenous communities, who are adapting their cultural practices to climate change and contemporary needs by incorporating new technologies. Resilience thinking focuses on heritage functionality, thus aligning with Indigenous perspectives. By emphasizing local knowledge, community capacity, and bottom-up approaches, resilience thinking can support arguments for Indigenous cultural self-determination.[200]

However, resilience thinking poses risks and is subject to several critiques. First, some see resilience as shifting the burden for adaptation on vulnerable communities rather than addressing structural injustices.[201] Asking Indigenous peoples to be "resilient" in the face of climate change caused by industrial economies, or to adapt their lifestyle to accommodate extractive development or green energy projects that ultimately benefit other societies, shifts the burden of adaptation on vulnerable communities while materially benefiting other societies. It thus neglects fundamental dimensions of international justice and human rights.[202] Pacific Island

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[198] Joshua L. Reid, *On Indigenous Resilience* (2024) 129 THE AM. HISTORICAL REV. 1410–1419 (noting that for some Indigenous scholars, "resilience is central to being Indigenous" and that they "connect it explicitly to indigeneity, arguing that to be indigenous is to be resilient.")

[199] Sherene A. James-Williamson, Jorjan E. Dolphy, and Stephanie Y. Parker, *Absence Heritage: A Critical Analysis for Awareness, Preservation and Resilience* (2024) 12 INTERNATIONAL JOURNAL OF GEOHERITAGE AND PARKS (arguing that "making absence present can increase awareness and engender resilience in people … Making absence present provides a basis for social and restorative justice, open dialogue and healing and connecting people and the landscape.")

[200] Jeff Corntassel, *Cultural Restoration in International Law: Pathways to Indigenous Self-determination*, (2012) CANADIAN JOURNAL OF HUMAN RIGHTS 93.

[201] Aaron Atteridge and Elise Remling, *Is Adaptation Reducing Vulnerability or Redistributing it?* (2018) 9 CLIMATE CHANGE; Adam Izdebski, Lee Mordechai, and Sam White, *The Social Burden of Resilience: A Historical Perspective* (2018) 46 HUMAN ECOLOGY 291-303 (examining how, historically, adaptive processes that reinforced resilience posed different burdens on various segments of society "entrenching political or economic configurations.")

[202] Valentina Vadi, *Green Colonialism in the Energy Transition* in Kathryn Gwianzon et al. (eds) LAW, GOVERNANCE AND ECOLOGICAL INTEGRITY IN THE ERA OF EMERGENCY (Routledge: *forthcoming* 2026).

communities face submersion,[203] Arctic communities experience dramatic environmental change,[204] and coastal Indigenous peoples are threatened by sea-level rise.[205] Indigenous sacred sites, ancestral territories, and burial grounds may become submerged or be lost forever.[206]

Resilience thinking can help document sites, adapt practices to new locations, and maintain relationships across distance. However, it cannot mask the profound injustice involved in the forced migration due to climate change caused by others' emissions. Similarly, mining, logging, oil, and gas development in Indigenous territories should not be allowed without prior impact assessment and their free, prior and informed consent. Such activities destroy cultural sites and disrupt traditional practices.[207] In *M.E.V. et al. v. Finland*, the Committee on the Rights of the Child appropriately noted the authors' general claim that:

> "in the current circumstances created by climate change and other outside threats to the sustainability and transmission of Sami reindeer herding culture, the mineral exploration permit granted by the State party for exploration for copper, iron and gold on their traditional territory during the critical winter months in scarce winter herding pastures, without an impact assessment and without obtaining the free, prior and informed consent of their community, violates their fundamental rights under the Convention as children who are members of the Sami people. In particular, … the project would cause irreparable harm to their reindeer herding community by disrupting the whole annual reindeer herding cycle, making Sami reindeer herding unsustainable and therefore damaging a core dimension of their rights, as Indigenous children, to be active and willing recipients of the unhindered transmission of: (a) the Sami way of life …; (b) the Sami identity …; and (c) traditional Sami economic activities based on reindeer herding."[208]

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[203] U.N. Human Rights Committee, Views adopted on Teitiota Communication, 7 January 2020 (holding that New Zealand did not violate Mr. Teitiota's right to life by denying him asylum).

[204] U.N. Committee on the Rights of the Child, *M.E.V., S.E.V. and B.I.V. v Finland*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 172/2022, 16 January 2025, CRC/C/97/D/172/2022, para. 8.4 (noting that while the authors of the communication "did not to present a separate claim based on climate change," they raised the issue of climate change "to substantiate their claims under articles 8, 27 and 30 of the Convention.")

[205] United Nations, Human Rights Committee, *Daniel Billy and Others v Australia* (Torres Strait Islanders Petition), Decision, 23 September 2022 (checking whether Australia violated the human rights of low-lying islanders through failure to act on climate change.)

[206] *Id.*

[207] Valentina Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law*, 42 COLUMBIA HUMAN RIGHTS LAW REVIEW 3 (2011) 797–889.

[208] U.N. Committee on the Rights of the Child, *M.E.V., S.E.V. and B.I.V. v Finland*, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the

Genuine resilience would require respecting, protecting, and fulfilling Indigenous peoples' rights, including their veto power over development, benefit-sharing that meaningfully supports cultural continuity, or better yet, leaving resources in the ground on Indigenous terms.[209] In a landmark case, the Inter-American Court of Human Rights has expanded its jurisprudence on Indigenous rights, acknowledging, for the first time, that "voluntary isolation is not merely a cultural preference but a legally protected state"[210] deriving from Indigenous peoples' rights to self-determination and cultural identity.[211]

Second, critics argue that resilience talk can depoliticize Indigenous struggles by framing heritage loss as an adaptation challenge rather than a justice issue rooted in colonialism, land theft, and rights violations. Some Indigenous scholars and activists reject resilience discourse entirely, arguing it accepts harm and structural violence as inevitable rather than demanding justice, and that it frames Indigenous futures as adaptation to others' choices rather than self-determined flourishing.[212]

Third, there is growing interest in Indigenous traditional ecological knowledge for climate adaptation, disaster risk reduction, and conservation. However, this often involves extracting knowledge from communities while maintaining external control over territories and decision-making. Under this model, Indigenous heritage becomes a resource for others' resilience without supporting Indigenous peoples' rights. Finally, resilience thinking risks reducing heritage to its utilitarian function, valuing it for what it can do rather than recognizing its intrinsic value. Indigenous peoples should fully enjoy their cultural rights regardless of whether their heritage helps climate adaptation or ecosystem management.

Child on a communications procedure, concerning communication No. 172/2022, 16 January 2025, CRC/C/97/D/172/2022, para. 9.2.

[209] Sarah Sargent, *What's in a Name? The Contested Meaning of Free, Prior, and Informed Consent in International Financial Law and Indigenous Rights* in Valentina Vadi and Bruno De Witte (eds) CULTURE AND INTERNATIONAL ECONOMIC LAW (Routledge 2015). See also Irene Watson, *Aboriginal(ising) International Law and Other Centres of Power* (2011) 20(3) GRIFFITH LAW REVIEW 619–640 (arguing that "the centering of Aboriginal perspectives would assist the process of building more equitable relationships based upon principles of coexistence.")

[210] Letícia Machado Haertel, *From the Right to be Consulted to the Right to No Contact: The Inter-American Court Faces Its First Case on Indigenous Peoples in Voluntary Isolation*, EJIL TALKS!, March 20, 2025.

[211] Inter-American Court of Human Rights, *Caso Pueblos Indígenas Tagaeri y Taromenane v. Ecuador.* Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 4 de septiembre de 2024 (in Spanish)

[212] *See e.g.*, Brad Evans and Julian Reid, *Exhausted by Resilience: Response to the Commentaries* (2015) 3 RESILIENCE—INTERNATIONAL POLICIES, PRACTICES AND DISCOURSES 154-159 (criticizing the resilience doctrine and arguing that "resilience has created an image of a world in which the very phenomena of violence and insecurity are assumed as natural and incontestable… the doctrine forces us to become active participants in our own depoliticization … it looks to the future as an endemic terrain of catastrophe … what does not kill you only makes you stronger."). See also BRAD EVANS and JULIAN REID, RESILIENT LIFE: THE ART OF LIVING DANGEROUSLY (Polity Press 2014).

Protecting Indigenous heritage requires states to respect, protect, and fulfill their rights, including those to self-determination, culture, and land.[213] Resilience can be conceptualized as an enhancement of rights-based autonomy, not a replacement for it. Indigenous peoples should determine what aspects of heritage to maintain, adapt, or let go; control documentation and knowledge transmission; and govern territories according to their own legal systems. Indigenous peoples cannot be asked to be resilient when communities are being displaced, when territories are being destroyed by extractive industries, or when climate impacts are rendering homelands uninhabitable. Instead, their human rights should be respected, protected, and fulfilled, addressing root causes of injustice and confronting ongoing green or neo-colonialism, environmental destruction, racial discrimination, poverty, and political marginalization.[214] Cultural heritage law can build resilience only if the structural conditions of vulnerability are properly addressed in compliance with human rights law.

In conclusion, resilience can be a useful analytical tool for understanding how Indigenous cultural heritage functions and adapts, but must be firmly grounded in Indigenous peoples' rights, self-determination, and international justice. The international legal architecture for Indigenous cultural heritage remains inadequate, and resilience discourse cannot gloss over those structural gaps.

VII. Resilience and Underwater Cultural Heritage

Defined as all objects that have been underwater for more than one hundred years, underwater cultural heritage functions as a repertoire and a source of resilience.[215] Shipwrecks, submerged settlements, and inundated landscapes contain well preserved records of past climate conditions, sea levels, storm patterns, and human adaptation strategies. Underwater sites also preserve traditional maritime knowledge, including boat-building, navigation methods, fishing practices, and coastal management, that developed over centuries of adaptation. Indigenous fish traps, traditional harbor designs, and vernacular maritime architecture represent tested

[213] Jérémie Gilbert, *Land Rights as Human Rights* (2013) 18 SUR INTERNATIONAL JOURNAL ON HUMAN RIGHTS, 115-135 at 119 (highlighting that "From the most diverse and often remote places of the globe, from the frozen Arctic to the tropical rainforests, indigenous peoples have argued that their culture will disappear without a strong protection of their right to land. While indigenous communities are most diverse, most of them share a similar deep-rooted relationship between cultural identity and land.")

[214] M. Alexander Pearl, *Green Colonialism: Sidelined While on the Front Lines* (2024) 56 CASE W. RES. J. INT'L L. 95, 95 (2024) (arguing that "Indigenous peoples represent the drivers and implementers of policy and contribute invaluable traditional ecological knowledge in understanding the interdependency and interconnectedness of the environment and communities. Across the globe, Indigenous peoples are on the front lines suffering from the effects of climate change, and they should have the opportunity to take a leading role in developing and protecting the newly identified U.N. right to a healthy environment.")

[215] Convention on the Protection of the Underwater Cultural Heritage (CPUCH), adopted on 2 November 2001, in force 2 January 2009, [2009] 2562 UNTS 3, Article 1 ("Underwater cultural heritage means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years . . . ")

adaptive strategies that modern communities might learn from. The resilience is not just in the physical remains but in the knowledge systems they represent.[216]

The protection of coastal and underwater cultural heritage can enhance the cultural, economic, and ecological resilience of coastal communities.[217] It can help shape cultural identity, strengthen social bonds, and raise historical awareness. It can also foster sustainable heritage tourism and related economic activities. In parallel, coastal and underwater heritage sites often become habitats supporting marine biodiversity. There is growing recognition that heritage conservation and ecosystem resilience can be mutually reinforced.

Resilience thinking is reshaping underwater heritage law and practice. The Convention's Annex incorporates rigorous archaeological standards that prioritize *in situ* preservation and documentation aimed at keeping sites exactly as found. Such conservation allows sites to remain underwater and creates epistemic resilience, that is, resilient knowledge systems. When sites are properly documented before any intervention, that information survives even if the physical site is later damaged by climate change, trawling, development, or other threats. The emphasis on creating comprehensive archives builds epistemic resilience.

The Convention creates some legal resilience against commercial exploitation.[218] It prohibits the commercial exploitation of UCH, creating resilience against treasure hunting and salvage operations that destroy archaeological context.[219] However, the Convention has not been widely ratified, which limits its resilience-building impact.[220] Notably, major maritime nations like the United States and the United Kingdom are not parties.

Resilience theory emphasizes participatory governance, local knowledge, and adaptive capacity at multiple scales. This is pushing underwater heritage law, which has been fairly state-centric and expert-driven, toward greater community participation. The Preamble of the convention explicitly recognizes this need of transnational cooperation: "cooperation among States, international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties and the public at large is essential for the protection of underwater cultural heritage".[221] Coastal residents, fishing communities and local divers often

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[216] Elena Perez-Alvaro, *Underwater Cultural Heritage as a Water Resource: Knowledge for Sustainability* (2024) 10 JOURNAL OF HERITAGE MANAGEMENT (noting that "Throughout history, people from various civilizations have inhabited water-rich environments, leaving both tangible and intangible remnants. Consequently, underwater cultural heritage presents itself as a reservoir of information . . . ")

[217] *See generally* Lisa L. Price and Nemer E. Narchi (eds) COASTAL HERITAGE AND CULTURAL RESILIENCE (2018).

[218] Valentina Vadi, *Article 2 and Rule 2 of the Annex on Recovery and Commercial Exploitation* in Patrizia Vigni e Tullio Scovazzi (eds) OXFORD COMMENTARY ON THE 2001 UNESCO UNDERWATER CULTURAL HERITAGE CONVENTION (Oxford: OUP *forthcoming* 2026);

[219] CPUCH Art. 2.7.

[220] At the time of this writing, 80 countries have ratified the convention. Data available at https://www.unesco.org/en/underwater-heritage/states-parties (last visited on 27 November 2025).

[221] CPUCH preamble.

interact with sites daily. Indigenous communities may have cultural interests in the protection of ancestral maritime zones.[222] Therefore, engaging these non-state actors is vital for the management of underwater cultural heritage as they can report changes and threats. This engagement often determines whether sites actually persist through disruptions. The Convention's provisions on public awareness and access provide legal hooks for this, but implementation has been limited.[223]

The protection of UCH can enhance community resilience. The Convention affirms that "States Parties shall preserve underwater cultural heritage for the benefit of humanity."[224] It also requires states parties which have seized underwater cultural heritage to ensure its disposition "for the public benefit, taking into account the need for conservation and research; … the need for public access, exhibition and education; and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the underwater cultural heritage concerned."[225] The preamble of the convention explicitly acknowledges "the public's right to enjoy the educational and recreational benefits of responsible … access to in situ underwater cultural heritage, and of the value of public education to contribute to awareness, appreciation and protection of that heritage."[226]

However, i*n situ* protection means that the public can rarely see UCH: by their very nature, underwater sites risk remaining "out of sight and out of mind."[227] Moreover, scuba diving requires specialized training and expensive equipment, and thus it is largely "an elite sport."[228] Currently, there are about six million active divers globally, compared to a world population of eight billion.[229] For those who cannot dive, alternative methods, such as using submarines or other devices, are available, but these options are typically affordable only to a wealthy few.

An additional challenge arises from how underwater cultural heritage is presented to the public. Article 27 of the Universal Declaration on Human Rights expressly recognizes that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its

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[222] Elena Perez-Alvaro, *Indigenous Rights and Underwater Cultural Heritage: (De)constructing International Conventions* (2023) 22 MARITIME STUDIES 31.

[223] CPUCH Art. 20 (providing that "Each State Party shall take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Convention.")

[224] CPUCH Art. 2(3).

[225] CPUCH Art. 18.4.

[226] *See also* Rule 7 of the Annex (stating that "Public access to in situ underwater cultural heritage shall be promoted . . . ").

[227] Della A. Scott-Ireton and Jennifer F. McKinnon, *As the Sand Settles: Education and Archaeological Tourism on Underwater Cultural Heritage* (2014) 14 PUBLIC ARCHAEOLOGY 157-171, 158.

[228] Forrest Booth, *The Collision of Property Rights and Cultural Heritage; the Salvors and Insurers' Viewpoints*", in Barbara Hoffman (ed) ART AND CULTURAL HERITAGE—LAW, POLICY AND PRACTICE (CUP 2006) 293–307, 296.

[229] Elena Perez Alvaro, *Underwater Cultural Heritage and the Sustainable Development Goals* (2023) 2 BLUE PAPERS, 78–87, at 81

benefits."[230] While there are multiple paradigms for cultural openness and accessibility, each with its strengths and pitfalls, only displaying undersea heritage in museums would make it truly accessible to the public, catering to different segments of society, including children, the disabled, and the elderly. Introducing children to museums can foster "critical thinking skills, spark curiosity, teach them history, encourage creativity," and allow them to think out of the box.[231] Article 31 of the Convention on the Rights of the Child expressly acknowledges "the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts."[232] The same provision requires states parties to "encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity."[233] The Convention is the most widely ratified international human rights treaty.[234]

Visiting nautical museums can also enhance the well-being of the elderly and the disabled.[235] For them, museums can be comforting places providing transformational experiences. A United Nations Convention on the Rights of Older Persons (UNCROP) is being developed to ensure that older people enjoy the same fundamental human rights as everyone else.[236] This convention would provide a comprehensive framework for protecting their rights, including cultural rights. The Convention on the Rights of Persons with Disabilities recognizes the "importance of accessibility to the physical, social, economic, and cultural environment . . . in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms.[237] It also recognizes the right of persons with disabilities to take part on an

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[230] Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

[231] Rebecca Carlsson, *How Are Museums Catering for Different Age Groups?* 29 May 2020, available at https://www.museumnext.com/article/how-museums-are-catering-for-different-age-groups/.

[232] Convention on the Rights of the Child (CRC), adopted on 20 November 1989 by GA Res. 44/25, in force 2 September 1990, 1577 UNTS 3, Article 31(1).

[233] *Id.* at Art. 31(2).

[234] 196 states have ratified the CRC. The United States is the only country that has not ratified it, fearing that it would undermine US sovereignty by giving the United Nations power to determine the best interests of US children or that it could interfere in the private family life.

[235] *Id.* at 231.

[236] For a seminal study, see Frédréric Mégret, *The Human Rights of Older Persons: A Growing Challenge* (2011) 11 HUMAN RIGHTS LAW REVIEW 37-66 (noting that "the human rights of older persons is an issue that is beginning to garner international attention, partly as a result of the demographic importance of that population.") See also Mallika Ramachandran, *Older Persons and the International Human Rights Framework: Argument for a Specific International Convention* (2014) JOURNAL OF THE INDIAN LAW INSTITUTE 523-549 (considering the specific human rights challenges faced by the elderly and the debate on the need for a specific international convention on the rights of older persons.); William John Mitchell, *Making the Case for a Convention on the Human Rights of Older Persons* (2021) 27 AUSTRALIAN JOURNAL OF HUMAN RIGHTS 532-553 (renewing the case for a Convention on the Rights of the Elder.)

[237] Convention on the Rights of Persons with Disabilities, adopted on 12 December 2006 by UNGA Res. 61/106, in force 3 May 2008, preamble.

equal basis with others in cultural life."[238] Everyone should have access to UCH, not just the wealthy and fittest.

Digital twins can enhance virtual resilience and public accessibility as digital copies can outlast physical sites and can enable dry visits, educational games, and interactive museums. The preamble to the Convention acknowledges "the availability of advanced technology that enhances discovery of and access to underwater cultural heritage."[239] Nonetheless, digital copies cannot be the only method for accessing underwater heritage. While technological developments can improve universal accessibility, they often become a new barrier, due to the technological gap that is just as relevant as the continued architectural barriers. Moreover, technological obsolescence entails that digital formats change over time.[240] Finally, modern technology, such as virtual reality, cannot replicate "the intangible value" of seeing tangible artifacts in person.[241] This raises philosophical questions about heritage: where does heritage reside? Does it lie in material remains or in documentation, in community memory or in ongoing practice?

VIII. Bridging the Gaps Among Regimes

Resilient systems require integration across domains. Cultural heritage protection cannot be addressed solely by one field of knowledge, international cultural heritage law.[242] Rather, it requires an interdisciplinary approach; Cultural heritage should be managed by adopting a holistic approach and applying international cultural heritage law in conjunction with international human rights law, international environmental law, international economic law, and other fields. This holistic approach requires heritage professionals to engage with sectors that traditionally have not focused on or even ignored cultural heritage.

For instance, heritage sites face threats from development, tourism, and resource extraction. Some cultural sites are often inseparable from cultural practices and spiritual life. International heritage law struggles here because it often secularizes heritage, treating sacred sites as cultural rather than religious, and does not recognize spiritual relationships as valid legal interests.[243] For adequately protecting sacred sites, international cultural heritage law can refer to international human rights law,

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[238] *Id.* at Art. 30.

[239] CPUCH preamble.

[240] Susana Molins Lliteras, *The Dysfunctional Copy: "Mali Magic," Loss and the Digital Remake of the Timbuktu Archive* (2024) 50 SOCIAL DYNAMICS 43–59.

[241] Katie Sinclair, *Blood and Treasure: How Should Courts Address the Legacy of Colonialism When Resolving Ownership Disputes over Historic Shipwrecks?* (2020) 38 BERKELEY JOURNAL OF INTERNATIONAL LAW 307, 338.

[242] Lia Helena de Lima Demange, *The Principle of Resilience* (2013) 30 PACE ENVIRONMENTAL LAW REVIEW 695, 695 (noting that "conservation cannot be addressed solely by one field of knowledge, it requires an interdisciplinary approach.")

[243] Lucas Lixinski, *Religious Heritage in International Law: Nationalism, Culture, and Rights*, 64(1) PRAVOVEDENIE 138-155 (2021) (reporting that "UNESCO estimates … that about 20% (twenty percent) of 1000-plus monuments and sites on the World Heritage List have important religious aspects connected to them.")

which protects cultural rights and freedom of religion.[244] Resilience would mean protecting sites and the practices they enable holistically.

This study also highlights the existence of structural tensions in international cultural heritage law. For instance, the 2001 CPUCH and the 1972 WHC operate in parallel to one another, but do not naturally align. Trying to narrow the divide by bridging them through a resilience framework reveals both promises and pitfalls. For example, while underwater sites can be listed on the World Heritage List, the 1972 Convention predates modern underwater archaeology and lacks the technical specificity the 2001 Convention provides. The CPUCH's Annex offers detailed archaeological standards that could strengthen how World Heritage sites with underwater components are managed for resilience. Several World Heritage sites have both terrestrial and underwater elements. Resilience demands treating these as unified ecological and cultural systems. The Annex's standards can complement the WHC's protective framework. Both conventions are grappling with climate impacts—sea level rise, ocean acidification, and extreme weather.[245] A resilience approach would use the Annex's technical standards to monitor and manage submerging World Heritage sites, rather than treating submersion as loss.[246] Resilience thinking would treat the underwater portions of polyvalent heritage sites like Alexandria's submerged quarters not as degraded remnants but as evolved heritage landscapes.[247]

However, tensions can also emerge due to the instruments' different ethos: while the World Heritage Convention emphasizes the "outstanding universal value" of world heritage, the CPUCH protects all underwater cultural heritage over 100 years old. World Heritage is about global significance; underwater heritage law looks more egalitarian. Resilience could bridge this by focusing on adaptive capacity rather than just aesthetic exceptionalism. While the CPUCH's default position is leaving material underwater, the World Heritage's interpretation of "conservation" has traditionally emphasized active intervention.

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[244] *Id.*

[245] David Gregory, Tom Dawson, Dolores Elkin et al. *Of Time and Tide: The Complex Impacts of Climate Change on Coastal and Underwater Cultural Heritage* (2022) 96 ANTIQUITY 1396-1411 (discussing the effects of climate change on coastal and underwater cultural heritage).

[246] But see Tanya Venture, Caitlin DeSilvey, Briony Onciul & Hannah Fluck, *Articulating Loss: A Thematic Framework for Understanding Coastal Heritage Transformations* (2021) 12 THE HISTORIC ENVIRONMENT: POLICY & PRACTICE 395–417 (arguing that "climate change pressures are likely to exacerbate and accelerate the inevitable loss of coastal heritage.")

[247] For a similar approach, see Ellie Graham, Joanna Hambly, and Tom Dawson, *Learning from Loss: Eroding Coastal Heritage in Scotland* (2017) 6(4) HUMANITIES 87(noting that "Instead of seeing the potential destruction of heritage sites as a disaster, we should embrace the opportunity that they can provide for us to learn about the past and to plan for the future. Heritage laws often enshrine a policy of preservation in situ, meaning that our most spectacular sites are preserved in a state of equilibrium, with a default position of no permitted intervention. However, the options for threatened coastal sites mirror those of shoreline management plans, which usually recommend either the construction of a coastal defence or, more likely, a strategy of managed retreat, where erosion is allowed to take its course after appropriate mitigation strategies have been enacted.")

A resilience framework drawing on both conventions would: (1) use the CPUCH's standards to document what will be submerged, (2) recalibrate World Heritage's Outstanding Universal Value to include the heritage's adaptive transformation, (3) build institutional capacity to manage heritage across the land-water interface, (4) engage local communities in managing sites.[248]

In conclusion, a systematic dialogue is needed across treaty regimes, joint operational guidelines, and willingness to see heritage protection in conjunction with human rights protection and international justice.

IX. Conclusion

The question about how we protect cultural heritage and diversity in an era of rapid, dramatic change feels increasingly urgent. The tensions are real between preservation and adaptation, between celebrating survival and demanding accountability, between technical heritage interventions and addressing root causes of vulnerability. This study addresses the complex question of how we protect cultural heritage and diversity in an era of rapid, dramatic change weaving together international heritage law, human rights law, and resilience theory.

Art Resilience generally refers to the "capacity of people, communities, societies, cultures to adapt", transform, and even thrive "in the face of dynamic change."[249] Whether resilience will become a general principle of law remains to be seen.[250] Certainly, resilience thinking can constitute a heuristic working tool, "an interdisciplinary guiding principle",[251] or "a lens of inquiry that serves a platform for interdisciplinary dialogue."[252] Resilience thinking can offer a useful lens through which to investigate the challenges faced by international cultural heritage law like overtourism, climate change, cultural homogenization, economic iconoclasm, and armed conflict. Resilience thinking can offer fresh approaches to these dilemmas and thus influence future heritage governance. At the same time, it also poses numerous questions, as it cannot replace existing analytical and legal frameworks and respect for human dignity and rights.

This article investigates whether and, if so, how resilience thinking can migrate from the hard sciences to international cultural heritage law. It then analyzed how resilience thinking can be applied to various sectors of the field, including world

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[248] On communities' participation in the management of coastal heritage, see Robert Parthesius, *Trading Places: Negotiating Place in World Heritage*, in R. Parthesius and J. Sharfman (eds.), MARITIME AND UNDERWATER CULTURAL HERITAGE MANAGEMENT ON THE HISTORIC AND ARABIAN TRADE ROUTES (2022) 1, at 2 (arguing that "communities [ought] to become more involved in the selection and management of these sites through identifying their own stake and negotiating their space in heritage.")

[249] Carl Folke, *Resilience* (2016) 21 ECOLOGY AND SOCIETY 44, 45.

[250] Nicholas A. Robinson, *The Resilience Principle* (2014) 5 IUCN ACADEMY OF ENVIRONMENTAL LAW EJOURNAL 19, at 19 (exploring "the prospect of recognizing resilience as a principle of law.")

[251] Frauke Wiese, *Resilience Thinking as an Interdisciplinary Guiding Principle for Energy System Transitions* (2016) 5 RESOURCES 30.

[252] Carl Folke, *Resilience* (2016) 21 ECOLOGY AND SOCIETY 44, 44.

heritage, underwater heritage, intangible cultural heritage, cultural diversity, and Indigenous heritage. In conclusion, the article suggests that resilience thinking can offer fruitful insights due to its "dynamic and forward-looking nature,"[253] provided that it is used together with other analytical and legal frames that are part and parcel of international law, including human rights law.

[253] *Id.*

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