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NEW ORDER OR WORLD DISORDER?

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New Order or World Disorder?
Research Project

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A

1.

After the fall of the Berlin wall, a unipolar world dominated by American hegemony emerged. The latter established a model of globalization centred on the creation of a world market and a type of capitalism "without borders or barriers". Such a crisis, also characterized by the movement of capital in the "Global South" through the delocalization of production and the emergence of China as a global player, had profound implications on the international community. In particular, it did not prevent, in the long run, the crisis of the American hegemony and the emergence of other powers.

In this scenario, three criticalities have re-shaped the conceptual boundaries of globalization and accelerated the ongoing process of exacerbating inequalities within a multi-polar world.

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First, the COVID-19 pandemic has accentuated the North-South differences, including the inequalities between countries able to cope with the spread of infections and those lacking the necessary resources.

Second, the climate emergency is marked by an ongoing conflict between "developed" and "developing" countries. The latter claim their right to reach a level of development matching that of the "advanced" countries while at the same time searching to reach an even higher level of energy consumption than the necessary one.

Third, the supply chain disruptions, which had already had an impact on global growth and inflation, have been further aggravated by the war of aggression against Ukraine by the Russian Federation, which interacts with the previous criticalities.

The war against Ukraine is not just the invasion of a sovereign country by a country that claims "imperial" expansion. Its causes are complex and involve multiple responsibilities. In many respects, the war constitutes an aggression by Russia against a sovereign State as well as a hostile act against NATO (via Ukraine as a proxy) and a declaration of war of the US against the EU economic system, centred on Germany. The war's several implications invite an analysis of its deeper roots and causes. The debate first centres on the "historical reasons" at the origin of the invasion, that is on the founding moment of "Russian civilization", identified in the conversion to the Orthodox faith of Kievan Rus' in 988. The debate can be extended to two other major issues – namely, the (presumed) threat posed to Russia's security by NATO's extension and the Kremlin's violations of international law.

A Eurocentric perspective invites a reading of the ongoing conflict as a "clash of civilizations". It is possible to identify two opposing sides in this debate. On the one hand, there is the "collective West" (so-called in the manuals compiled by the Kremlin for state and political media), as represented by the coalition of Western liberal democracies, such as NATO and the European Union. On the other hand, there appears to be an empire that claims its role as a great power, rejecting and challenging Western

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hegemony in the name of the values of self-proclaimed national traditions concerning a patriarchal vision of society and imperial "great spaces".

The Russian empire proclaims a decline and a sunset of the West, claims a multipolar world and denounces past (e.g. colonialism) and present (e.g. the Gulf wars and neocolonialism) crimes of the Western world. Another way to read the conflict is through the lens of the world-system theory, which places the current escalation of events in the *longue durée*, integrating in the analyses the different actors at the global and regional levels. In this respect, the rivalry between the US and China and the war the US is waging through sanctions to keep hegemony and to forbid a multipolar world to emerge is, of course, fundamental.

Through these lenses, the economic dimension proves to be fundamental, making compelling to consider the crises of overaccumulation and profitability, as well as the process of further monopolization and related skyrocketing inequality. These are crises within globalization itself in which the limitations of the United Nations are emerging, and the position of the European Union is being redefined. The current crisis in the Middle East has further expanded the ongoing process of destabilization of the world order.

On the one hand, the Hamas attack of 7 October 2023 has certainly reached such extreme forms of brutality and cruelty that it does not admit of any justification. On the other hand, the complexity of the Israeli's position in the conflict, especially when seen in the light of international law, has emerged over time. In the advisory opinion of the International Court of Justice of 9 July 2004, we read for instance that "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law" (ICJ *Advisory opinion on the Legal Consequences of the Construction of a Wall in the OPT*, § 120). The Middle Eastern crisis threatens to spread, outlining completely unpredictable scenarios. This begs the question: how will the current crises impact the future of globalization?

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2.

The analysis of globalization must be further extended to fully understand the processes that are taking place within it: how it will be modified by scientific and technical innovations? how human rights will be guaranteed? which are and will be the relations between globalization and migratory flows? what is the relation between colonialism and capitalism and its heritage today?

There are many more related questions arising from this scenario:

- What transformations is globalization undergoing?
- What is the likely the impact of scientific and technological innovations (especially AI) on the process of globalization?
- What do the features of the new world order look like?
- Can we only hypothesize a global disorder?
- What is going to be the impact of globalization on migratory flows?
- Is there a "sunset" 'of the West and, if so, what is its significance?
- What are the implications for international governance and international organizations for the development of the new global order?
- Is the United Nations an unreformable organization?
- How can human rights be guaranteed within the frame of globalization?
- What is the role of the European Union and what are its limits?
- What might be the further development of global capitalism?
- Is the current conflict a way of addressing the long-lasting crisis of overaccumulation?

All these topics imply the need for a long-term research process, one that must be conducted through a *multidisciplinary approach* encompassing different theoretical frameworks, such as philosophy of law, political science, ethics, political philosophy, history of political thought, international law, public law, political economy, human rights law and gender studies.

The aim of this project is to achieve a *global collective thought* capable of explaining the complexity of the new global reality. It is conceived as a large-

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scale and long-term project which will try to address and interpret the complexity of globalization processes.

B

The essays collected in the first part of this issue of *Athena* deal only with some aspects of the global scenario, in particular: the possibility of prosecuting human rights violations beyond the limits of current international jurisdictions; the need to limit AI applications making them compatible with international law; the necessity of reforming the International Monetary System in order to face the challenges of globalization.

The essay *Global Human Rights Sanctions and State Sovereignty: Whether the New Tool Breaks the Old Order?* examines the Global Human Rights Sanctions Regimes (GHRSRs), commonly referred to as Magnitsky sanctions - that is to say, sanctions designed to address perpetrators of severe human rights violations committed abroad.

The Author highlights the innovative aspect of GHRSRs, which lies in their status as the first sanctions regime on human rights, transcending geographical boundaries. She correctly observes that GHRSRs have emerged as a consequence of the failure of established human rights protection mechanisms, such as the International Criminal Court (ICC), to perform as intended. A very important question about GHRSR concerns the tension that its introduction has caused between the new legal order and the existing international legal framework. The essay analyses in particular the question of the relationship between GHRSR and the sovereignty of the States. The Author argues in a convincing way that GHRSR can be seen as *the exercise of a universal jurisdiction* over so grave human rights violations that it legitimates every State to repress them. The Author's conclusion supports the thesis that when GHRSR is imposed on State organs, the sanction is a political decision that establishes State responsibility for grave human rights violations. As the Author explains, owing to the fact that this sanction is an

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act between States and not the conclusion of a judicial process, state immunity does not apply.

The essay *Globalization and Data Gathering Using AI in /from Outer Space* analyses the so-called "fourth technological revolution", which is characterised by the introduction of artificial intelligence (AI). AI allows for faster solutions to complex problems, since collecting and processing data *via* AI allows substantial reductions of the time spent in operations, while at the same time accelerating the production of results. The Author highlights that, seen from this angle, data gathering using AI in space may be used as a means for *unlimited access to information*, *disregarding national boundaries* or secrecy, as well as personal privacy. The Author's aim is to discuss possible solutions and approaches to ensure privacy protection. The article explains very convincingly that, while in European Law (namely, EU law) a milestone was reached in 2016 with the adoption of the General Data Protection Regulation (GDPR), these limits are not applicable to AI data gathering from space. Very clearly, the Author maintains that the challenge now consists of finding a way forward *which will strike a balance* between technological development and high-resolution massive data gathering on the one hand and an individual's legal and ethical rights to privacy on the other hand. The question that needs to be analysed and resolved concerns the increasing interdependence between globalization – specifically, globalized markets and means of communication – and the massive collection and processing of data.

In this frame, the question arises as to *whether limits should be set* for the conduct of such an activity; and in that case, what kind of limits. Ultimately, the Author supports the necessity of concluding *a new international treaty* whose final aim is to ensure the use of outer space in a manner that would be respectful of both stakeholders' interests and humanitarian rights.

The essay *Global Governance: Adjustment or Reform of the International Monetary System?* discusses the question of whether the current architecture of the international economic and monetary governance is fit for providing

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global public goods. The author finds the answer to be negative. There are, however, still possibilities to avoid wasting precious time for human survival.

The essay suggests a reform of the International Monetary System grounded on a new architecture consisting of a multi-layered structure with the IMF at the central level and MDBs (Multilateral Development Banks*)* at regional level. The IMF recently added five MDBs to the list of institutions that are allowed to hold and deal with SDRs (Special Drawing Rights), making them the most powerful agent in a transition towards greater use of such currency in development projects. According to the Author, the reform of IMF is needed in order to be able to face global challenges, which require a much more efficient structure than only relying on loose international cooperation.

Moreover, the reform should contemplate an increased role of SDRs, as international money could help rescue multilateralization vis-a-vis bilateral confrontation.

In conclusion, the essays in this issue of Athena critically evaluate the multiplicity and complexity of some of the processes currently taking place in context of the unfolding process of globalization, including its transformations. They invite us to continue and further deepen our research on these issues in order to conceptualise with ever greater precision the new world order that is emerging before our eyes.

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CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Global Human Rights Sanctions and State Sovereignty: Does the New Tool Challenge the Old Order?

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ABSTRACT

Global human rights sanctions (also known as Magnitsky sanctions) regimes target individuals and entities involved in gross human rights abuses. The sanctions measures, including visa bans, transaction restrictions, and asset freezes, are implemented through executive decision-making processes. This article critically analyses the legality of Magnitsky sanctions in relation to the principle of state sovereignty, exploring whether these new transnational legal regimes disrupt the existing international legal order. Given that global human rights sanctions can be employed to address both individual responsibility and state responsibility for human rights violations, this paper scrutinizes the legitimacy of the jurisdiction of these sanctions and evaluates whether they can be justified as countermeasures, respectively. This paper argues that the jurisdiction of sanctions is not in violation of international law. As unilateral measures against states for violating human rights law, Magnitsky sanctions can significantly contribute to the formation of customary international law on third-party countermeasures.

Keywords: global human rights sanctions, state sovereignty, extraterritorial jurisdiction, countermeasures, asset freezing

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1. Introduction of GHRSRs

Global Human Rights Sanctions Regimes (GHRSRs), commonly referred to as Magnitsky sanctions, are sanctions frameworks designed to address perpetrators of severe human rights violations committed abroad. The US was the first country to establish such a legal regime in 2016, known as the Global Magnitsky Human Rights Accountability Act. Since then, this sanctions regime has been adopted by 35 countries worldwide, including the EU through decision (CFSP) 2020/1999 and regulation (EU) 2020/1998, and the UK through the Global Human Rights Sanctions Regulations 2020.

GHRSRs encompass a range of restrictive measures that can be utilized to target individuals (natural persons) and/or entities (legal persons and other bodies).[1] These measures may include visa bans, asset freezes, and transaction restrictions. While the potential sanctions measures are similar across all countries, the specific types of grave human rights violations that serve as grounds for designating individuals and entities under these sanctions regimes may vary from jurisdiction to jurisdiction. Commonly recognized serious human rights violations that form the basis for designation under GHRSRs include torture and extrajudicial killings (right to life). Apart from the US and Canada, other jurisdictions' GHRSRs also encompass slavery (forced labour).[2] Moreover, the EU GHRSR includes enforced disappearances and arbitrary arrests or detentions, as well as international crimes such as genocide and crimes against humanity. GHRSRs in the US

[1] The individuals and entities who are on the sanctions lists are referred to as sanctioned persons.

[2] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(a)(1), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US); Justice for Victims of Corrupt Foreign Officials Act, S.C. 2017, c. 21, § 4(2)(a) (Can.); Global Human Rights Sanctions Regulations 2020, SI 2020/680, reg. 4(2) (UK); 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 2(1)(c); *Autonomous Sanctions Regulations 2011* (Cth) reg 6A(4)(a) (Austl.).

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and the EU also provide for the possibility of sanctioning perpetrators of "other human rights violations".[3]

The designation process within GHRSRs typically involves a "blacklisting" decision, bypassing a judicial process. The authority to designate individuals and entities under GHRSRs rests with government representatives, such as the President of the US, the Secretary of State in the UK, and the Council of the EU.[4] It has to be mentioned that Canada recently introduced a court review for forfeit orders claimed by the Minister, adding a judicial element to the process.[5] However, this paper will only focus on assets freeze instead of assets forfeiture and thus will exclude the forfeiture order from the scope of discussion.

The innovative aspect of GHRSRs lies in their status as the first and only thematic sanctions regime on human rights, transcending geographical boundaries. Prior to their establishment, individual sanctions based on human rights violations existed in various jurisdictions. For instance, the EU passed a regulation[6] and a decision[7] in 2011 addressing serious human rights violations in Iran, while the US enacted Sergei Magnitsky Rule of Law Accountability Act (Magnitsky Act) in 2012 following the death of Magnitsky.[8] However, these measures were all country-specific. The introduction of a thematic sanctions regime on human rights institutionalized

[3] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(a)(1), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US); 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 2.1(d).
[4] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(a), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US); Global Human Rights Sanctions Regulations 2020, SI 2020/680, reg. 5(1) (UK); 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art.14.
[5] Budget Implementation Act, 2022, No. 1 (S.C. 2022, c. 10) (Can).
[6] 2011 O.J. (L100/1) Council Regulation (EU) No 359/2011 of 12 April 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran.
[7] 2011 O.J. (L100/51) Council Decision 2011/235/CFSP of 12 April 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Iran.
[8] Sergei Magnitsky Rule of Law Accountability Act, Pub. L. No. 112-208, 126 Stat 1496 (2012) (US).

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sanctions against perpetrators of human rights violations and shifted the focus of sanctions from states to specific cases and victims.

A significant development brought about by GHRSRs is the "disconnection of breach from geography" (Portela, 2022). This means that "malicious individuals and networks can be sanctioned despite broader foreign policy priorities which could otherwise prevent effective actions." (Normington, 2019). The decision-making procedures within GHRSRs are also simpler compared to previous approaches to addressing human rights violations. Previously, states had to establish specific legal frameworks for each individual case. GHRSRs offer more flexibility as they can be applied to any new human rights abuses falling within their scope, allowing for a quicker response to human rights violations (Eckes, 2022).

GHRSRs have emerged in response to a backdrop of weakened international mechanisms for human rights protection and a global backlash against human rights. In this context, human rights NGOs have warmly welcomed GHRS as a new and powerful tool for confronting human rights violations (OMCT, 2018). According to Browder (2015, 303), GHRS represent "new method[s] for fighting human rights abuses in authoritarian regimes in the twenty-first century". This approach emphasizes individual accountability and aims to create tangible consequences that instil fear in human rights violators.

2. Challenge of GHRSRs Under International Law

Although GHRS holds significant potential, it has faced continuous opposition since its establishment. These oppositions encompass concerns regarding the tangible efficacy of the sanctions regimes, the genuine intentions behind their implementation, the adherence to due process in the sanctioning procedures, and more. This highlights the tension between this new legal framework and the existing international legal order. This paper

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will zoom in on one of those objections, which is the potential violation of the principle of state sovereignty.

The primary objections to GHRS come from sanctioned states, which have implemented various countersanctions in response to their citizens and/or entities being targeted under GHRS. For example, as a response to the US "Magnitsky list", Russia also created a "Guantanamo list" with an equal number of names on it.[9] Turkey issued the same sanction measures against the counterparts, two Ministers, of the US in response to the US sanctions.[10] This objection has been extensively deliberated within the framework of the UN Special Rapporteur on unilateral coercive measures (UCM), with GHRSRs repeatedly featuring in recent reports. The majority of countries worldwide consider UCM to be illegal. The current Special Rapporteur Douhan highlights that "the illegal nature of unilateral coercive measures has been consistently affirmed by the Human Rights Council and the General Assembly."[11] This stance is exemplified by a UN Human Rights Council (UNHRC) resolution from 2017, which declares that "unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the Charter and the norms and principles governing peaceful relations among States".[12] The reasons listed in the resolutions include violation of the state sovereignty and impeding free trade.

[9] "МИД РФ опубликовал список граждан США, которым закрыт въезд в Россию [The Russian Foreign Ministry has published a list of US citizens who are denied entry to Russia]." RIA Novosti, published July 19, 2014, https://ria.ru/20140719/1016693619.html.
[10] Republic of Turkey Ministry of Foreign Affairs. "QA-70, 2 November 2018, Statement of the Spokesperson of the Ministry of Foreign Affairs, Mr. Hami Aksoy, in Response to a Question Regarding the Decision on Lifting Sanctions Against U.S. Attorney General and the Secretary of Homeland Security." Accessed 21 May 2023. https://www.mfa.gov.tr/sc_-70_-disisleri-bakanligi-sozcusunun-abd-li-bakanlara-uygulanan-yaptirimlarin-kaldirilmasina-iliskin-sc_en.en.mfa.
[11] See Human Rights Council resolutions 15/24, 19/32, 24/14, 30/2 and 34/13 and General Assembly
resolutions A/RES/75/181, 69/180, 70/151 and 71/193. Alena Douhan. *Unilateral Coercive Measures: Notion, Types and Qualification*, Rep. of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights. U.N. Doc. A/HRC/48/59 (July 8, 2021).
[12] Human Rights Council Res. A/HRC/RES/34/13 (April 07, 2017).

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The debate at the UN goes beyond the UNHRC. The UN Special Rapporteurs points out that the issue of UCM remains an ongoing topic in debates at the UN General Assembly (GA) (Jazairy, 2019), with substantial disparities between the positions held by sanctioning and sanctioned states (Douhan, 2021). Despite the prevailing viewpoint of the international community regarding the illegality of UCM, approximately thirty states, primarily advanced Western nations, challenge this consensus and advocate for the legitimacy of unilateral sanctions as tools to pursue specific foreign policy objectives (Jazairy, 2019). Other than condemning UCM, Resolutions adopted during UN meetings, including those of the UNGA and UNHRC since the 1990s explicitly call for states to refrain from UCM.[13] even after the Russian invasion of Ukraine, where unilateral sanctions have been widely adopted, the latest resolution from the UNHRC still remains the same status.[14]

However, it is essential to acknowledge that the concept of UCM differs from that of unilateral sanctions or autonomous restrictive measures. The former primarily finds application within UN discussions, while the latter is implemented on a broader scale. Unilateral sanctions represent a category of unilateral measures that are used in various contexts, and GHRS and UCM are both subtypes of unilateral measures. That means, even if we set aside the controversy surrounding the conclusion that UCM are deemed unlawful (See Fellmeth, 2023) and accept it as the prevailing view within the international community, it is inappropriate to extend this conclusion directly to GHRS. Instead, it is necessary to examine whether GHRS can be classified as a form of UCM.

However, this approach is challenging because there is no definition of UCM in the resolutions of the UNHRC or the UNGA. The recent attempt can be found in the UNSR's report, where Douhan (2021) defines the UCM as

[13] Human Rights Council Res. A/HRC/RES/34/13 (April 07, 2017).
[14] Human Rights Council Res. A/HRC/RES/49/6 (April 13, 2022).

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> any type of measures or activity applied by States, groups of States or regional organizations without or beyond the authorization of the Security Council, not in conformity with international obligations of the sanctioning actor or the illegality of which is not excluded on grounds of the law of international responsibility, regardless of the announced purpose or objective.

Yet, this approach to defining it seems minimally beneficial and steers the discussion into an impasse: UCM is considered illegal; within unilateral measures, those whose illegality cannot be ruled out are categorized as UCM. From the current debate regarding UCM, it can be learnt that the international community has not achieved a consensus regarding what unilateral sanctions are lawful. That means the legality of GHRS under international law is also worth debating. This paper delves into the examination of the legality of GHRSRs within the realm of international law, particularly focusing on whether GHRS contradict the principle of state sovereignty. By doing so, this paper also contributes to the discussion of the tension that emerges between unilateral sanctions and the fundamental principles that form the bedrock of the current international legal framework.

3. GHRS and State Sovereignty

To answer the state sovereignty question, the target of GHRSRs is the first issue that needs to be investigated. This needs to be discussed because the acts of gross human rights violations that GHRSRs aim to target may give rise to both individual responsibility and state responsibility. On the surface, the question of whom GHRSRs target seems clear, as all GHRSRs state that the sanctions targets are individuals and entities. It is true that individuals are the targets of sanctions when they are imposed on non-state actors for human rights violations like human trafficking. However, in the reality of public discussion of how such sanctions are used, sanctions on individuals can be perceived differently. As Argent (2020) points out, in the view of some

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countries, "the imposition of individual sanctions [is] being seen as a targeted attack on the country as a whole". This issue is particularly relevant in the context of GHRS, which primarily targets state officials. As Wu (2022) notes, when GHRS are applied to state officials who exercise state power, the sanctions indirectly target the state.

While it is true that the statements from sanctioning states emphasize that GHRSRs only target individuals, the practice of implementing these sanctions paints a different picture. Upon closer examination, it becomes clear that the major jurisdictions, including the EU, the UK, the US and Australia, all have explicitly designated government organs, as opposed to individual officials, as targets of their sanctions. For instance, the EU has sanctioned the Office of the Prosecutor of the Democratic People's Republic of Korea,[15] the UK has sanctioned the Russian Terek Special Rapid Response Unit,[16] the US has sanctioned the 33rd Light Infantry Division of the Burmese Army,[17] and Australia has sanctioned the Iran Morality Police.[18] Although not all wrongful acts committed by state organs may be attributed to the state, it is undeniable that when a department or ministry of a state is sanctioned, the state as a whole bears the consequences. As such, sanctions imposed on entities that are state organs are essentially directed at the state itself.

The analysis above shows that GHRSRs include both state-to-state acts and state-to-individual acts. Since this article primarily focuses on state sovereignty, I will not delve into a detailed discussion of whether GHRS targets individuals and states separately when applied to different actors or if one sanction can be understood to target both. The only significance of identifying the targets of sanctions is to determine the rules that apply to

[15] "EU Sanctions Map." accessed March 02, 2023 , https://www.sanctionsmap.eu/#/main/details/-50/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D.
[16] "Financial sanctions, Global Human Rights." accessed March 02, 2023. https://www.gov.uk/government/publications/financial-sanctions-global-human-rights.
[17] "Sanctions List Search." OFAC, accessed September 06, 2022 , https://sanctionssearch.ofac.treas.gov/.
[18] "Consolidated List". Accessed March 03, 2023, https://www.dfat.gov.au/international-relations/security/sanctions/consolidated-list.

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different natures of acts. The question of whether GHRS violates state sovereignty can be further divided into two sub-questions: in the case of state-to-individual acts, the question arises as to whether the jurisdiction established by GHRS is permissible under international law, and in the case of state-to-state acts, the question is whether third states can legitimately impose restrictive measures, as outlined in GHRS, in response to the state's violations of international human rights obligations. The following sections will discuss respectively.

3.1 Individual Responsibility

In order to examine the legality of GHRS in relation to jurisdiction, it is crucial to identify the type of jurisdiction involved and the basis upon which it operates. There are diverse views regarding the bases of jurisdiction under GHRSRs. Abdelhady (2018) argues that GHRSRs exemplify universal jurisdiction since it does not require a jurisdictional nexus. Xiao (2021) contends that GHRSRs' jurisdiction is based on the concept of "long arm jurisdiction", which applies to individuals outside the jurisdiction of the implementing state. However, the EU asserts that its sanctions "do not apply extraterritorially" and "do not create obligations for non-EU persons or entities unless the business is conducted at least partly within the EU".[19] When examining the literature on unilateral sanctions, there is a similar criticism that those acts "extend the sanctioning State's domestic jurisdiction extraterritorially, in violation of well-established principles of jurisdiction (Barber, 2021)."

Before delving into the jurisdictional issue of GHRSRs, it is imperative to initially acknowledge the dual-tiered structure inherent to the sanctions framework, which consists of primary sanctions and the enforcement of the sanctions. Primary sanctions encompass measures such as visa bans, trade

[19] European Commission. "Frequently asked questions: Restrictive measures (sanctions)." posted February 26, 2022, https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1401.

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restrictions, and asset freezes that target individuals and entities allegedly responsible for human rights violations, while the enforcement of sanctions is designed to target the violation of the primary sanctions. When enforcement measures focus on third parties, they are commonly referred to as secondary sanctions.

This term is often associated with another sanctions regime addressing violations of primary sanctions, but as noted by Ruys and Ryngaert (2020), the broader concept of it encompasses "all measures which, in essence, aim to regulate economic transactions between a third state and a target state." Discussions surrounding the jurisdiction of sanctions frequently conflate primary sanctions and secondary sanctions, with arguments against the legality of sanctions often stemming from the latter (See Ruys and Ryngaert, 2020), which leads to a limited discussion on the legality of the primary sanctions.

In the context of GHRSRs, every jurisdiction sets out penalty provisions to punish the violation of GHRS imposed on the sanctioned persons: the US refers to the civil and criminal punishments under the International Emergency Economic Powers Act (IEEPA);[20] the UK sets up a Part in its Global Human Rights Sanctions Regulations to stipulate the enforcement of these sanctions;[21] the EU has the provision that "Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented."[22] The EU and the UK have made it clear that GHRSRs are only enforced within their own territories or against their own nationals,[23] but the enforcement regulation in the US does not incorporate restrictions on the

[20] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(f), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US).
[21] Global Human Rights Sanctions Regulations 2020, SI 2020/680, pt. 7 (UK).
[22] 2020, O.J. (L I 410/13) Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, art. 16(1).
[23] 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 19; Global Human Rights Sanctions Regulations 2020, SI 2020/680, reg. 3 (UK).

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scope of sanction enforcement, potentially allowing for the imposition of secondary sanctions.. However, among the 35 countries that could enforce the sanctions, only the US appears susceptible to secondary sanctions scenarios (to the best of my knowledge, this has not manifested in practice). This paper aims to dedicate space to discussions on prevalent issues in most sanctioning states and, therefore, will not delve into secondary sanctions.

Following the differentiation between primary and secondary sanctions and the clarification that this paper exclusively centres on primary sanctions, when delving into jurisdictional issues, it becomes essential to distinguish between primary sanctions themselves and the enforcement of the primary sanctions. If to say that objectors of unilateral sanctions often utilize the illegality of secondary sanctions to dispute the legitimacy of any unilateral sanctions regime, supporters of unilateral sanctions, in turn, rely on the legality of the jurisdiction in the enforcement of sanctions to claim that all types of jurisdictions related to unilateral sanctions are lawful. EU is an example of the latter. EU states that "EU sanctions inherently apply in non-EU countries – however, only within an EU jurisdiction", since "the obligations imposed are binding on EU nationals or people located in the EU or doing business here".[24]

It is necessary to examine how this is illustrated in the EU GHRSR. It states in the regulation that

> This Regulation shall apply: (a) within the territory of the Union, including its airspace; (b) on board any aircraft or vessel under the jurisdiction of a Member State; (c) to any natural person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the

[24] EU Commission, "Overview of sanctions and related resources", accessed November 11, 2023, https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources_en.

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> law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.[25]

It is clear that these jurisdictions are based on widely accepted principles, namely, territorial principle and nationality principle. However, this is only a partial narrative, as this Article solely addresses the jurisdiction of the enforcement of primary sanctions. Deliberately or otherwise, the EU moulds regulations to channel jurisdictional discussions primarily towards the enforcement of sanctions, diverting attention from the jurisdiction related to the imposition of primary sanctions in order to avoid the controversy of the potential exterritorial jurisdiction.

There are three forms of jurisdiction in international law, which are legislative/prescriptive, adjudicative and enforcement. Since adjudicative jurisdiction means "a State's authority to decide competing claims" (Colangelo, 2012) and often refers to "the authority of courts to entertain suits" (Kamminga, 2020), in the context of primary sanctions, where judicial involvement is absent, adjudicative jurisdiction is non-existent. Enforcement jurisdiction refers to "enforce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."[26] There are three sanctions measures in the primary sanctions in GHRSRs. Visa bans fall under the jurisdiction of immigration authorities, and asset freezes entail the freezing of assets within the sanctioning country, thus aligning with the territorial principle. Regarding the sanctions measure of transaction restriction, two parties are involved: the sanctioned individuals or entities and the companies of the sanctioning country. While the intended impact of these measures is to restrict the transactions of the sanctioned individuals and entities, the actual targets of these sanction measures are companies of the sanctioned country. This can be learned from the wording in the legislation:

[25] 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 19.
[26] Restatement (Third) of US Foreign Relations Law, s. 401(b)(c).

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instead of stating that the sanctioned persons are restricted from access to funds or economic resources, the EU states "No funds or economic resources shall be made available directly or indirectly to or for the benefit of the natural or legal persons, entities or bodies listed in the Annex."[27] Consequently, this measure adheres to either the territorial or nationality principle.

Thus, there is only one type of jurisdiction that needs to be discussed -- legislative (prescriptive) jurisdiction. Legislative jurisdiction, also referred to as prescriptive jurisdiction, determines "whether and under what circumstances a State has the right to regulate (Mann, 1964)". In GHRSRs, legislative jurisdiction refers to the authority to establish rules prohibiting foreign individuals and entities from committing certain human rights violations.

3.1.1 Territorial Jurisdiction

Since the legislative authority pertains to the imposition of sanctions on a foreign person who violated human rights abroad, the jurisdiction appears to be extraterritorial. However, there is a way to argue that GHRS is actually based on territorial jurisdiction. This is learnt from the discussion on the Alien Tort Statute (ATS) in the US. Colangelo (2013) suggests that jurisdiction based on international law is not extraterritorial jurisdiction, because the scope of the application of international law is global, and thus "accurate implementation and application of international law can transform exercises of extraterritorial jurisdiction into exercises of territorial jurisdiction." (Colangelo, 2014).

This rationale can easily be used to justify GHRSRs, given the foundation of GHRS is international human rights law. While this perspective appears cogent, it rests upon two key premises (Colangelo,2013): the assumption that the individual's home country is bound by the obligations outlined in that particular international law and the stringent adherence to international law.

[27] 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 3.

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However, this rationale is not applicable to all situations in GHRSRs. Firstly, not every state is burdened with the same international legal obligations regarding human rights; this prerogative is limited to those dictated by *jus cogens* and human rights violations acknowledged in treaties ratified by the states in which the perpetrators reside. Thus, in instances where the involved party lacks pertinent obligations, the sanctioning country cannot assert jurisdiction over the individual on the grounds of violating international law. This holds especially true, given that GHRS in the EU and the US can be applied against "other serious human rights violations".

More importantly, while sanctioning states include international human rights law in their legislation, the responsibilities they delineate often transcend the parameters set by international human rights treaties. For instance, GHRSRs expand the scope of the potential sanctioned persons by expanding the definition of the link of the target acts to human rights violations. Under GHRSRs, the UK could sanction an "involved person", and the EU could sanction a person who is "associated with" the persons who are "involved in" the human rights violations.[28] That is beyond the scope of individual responsibility for certain human rights violations. Thus, while the "implementing international law" argument potentially offers justification for certain (or even a significant amount of) facets of GHRS, it should be admitted that there are aspects of GHRSRs that extend beyond its scope.

Beyond the argument grounded in "implementing international law", universal jurisdiction is also justified for use when a state lacks a direct link to criminal acts. The basis for universal jurisdiction is that the criminal acts are "so heinous that every state has a legitimate interest in their repression" (Staker, 2018). However, the argument of "implementing international law" holds greater explanatory power, as criminal acts falling under the scope of universal jurisdiction are delineated in international treaties or considered *jus*

[28] Global Human Rights Sanctions Regulations 2020, SI 2020/680, reg. 6 (UK); 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 3.

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cogens, thus squarely within such argument. Hence, if the overarching theory of "implementing international law" fails to justify all scenarios under GHSR, it becomes necessary to scrutinize the legality of the extraterritorial legislative jurisdiction of GHRS.

3.1.2 Exterritorial Jurisdiction

In International Law, extraterritorial legislative jurisdiction resides in a middle ground where no rule explicitly permits its use, yet no rule expressly prohibits it. Two prevailing views on such grey areas: "no prohibition means allowed" and "no permission means forbidden". The *Lotus* case established the principle of extraterritorial jurisdiction, which permits it unless limited by prohibitive rules in specific cases.[29] However, the emerging perspective suggests that a state asserting legislative jurisdiction should provide justification with a specific connection to the acts in question. These two understandings are still debatable. While some believe that the latter represents the current prevailing view on jurisdiction (Bradley, 2001; Meessen 1996, 74), others argue that the requirement for the substantial link between the acts or persons and the state has not yet evolved into new customary international law (Ryngaert, 2015; Kuyper, 1984). The justification associated with the aforementioned perspectives can be temporarily set aside and instead scrutinize its applicability to the context of the sanctions under consideration.

In contrast to the typical scenario of legislative jurisdiction, the imposition of sanctions entails a separation of enforcement jurisdiction from legislative jurisdiction with no adjudicative jurisdiction involved. This detachment implies that the two types of jurisdictions have different scopes: the legislative jurisdiction is applied to acts carried out by foreigners in foreign states, while the enforcement jurisdiction operates based on territorial and nationally principles. This type of jurisdiction is commonly observed in

[29] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), para 46.

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immigration law, where specific requirements are established for foreigners to meet in order to obtain a visa. There appears to be a prevailing consensus asserting that border control unequivocally symbolizes a state's sovereignty (Tilahun, 2021), as "each State is free to regulate the entry into its territory of foreign nationals (Gestri, 2023)". That means, a state can decide on visa issuance regardless of grounds and without preceding juridical proceedings. Okosa (2019) contends that irrespective of the reason for visa denial, the state does not breach any international obligations.

There may be other restrictions posed on the legislative jurisdiction on visa regulations, but there seems to be no limitation based on the principle of state sovereignty. This also renders the visa ban one of the least controversial measures within sanctions regimes. Other sanction measures can similarly be explained. In essence, as long as the enforcement jurisdiction is within the territorial boundaries and there is no adjudicative jurisdiction involved, legislative jurisdiction should have no limitation. It appears contradictory to the perspective that it is not allowed for extraterritorial legislative jurisdiction. However, upon closer examination of the conditions, one would realize that the jurisdictional aspect of sanctions differs from that in the traditional situation of extraterritorial jurisdictions, and thus, the objections to the latter are not applicable to the former.

For example, there is an argument that extraterritorial jurisdiction may result in conflicts of jurisdictions when multiple states claim jurisdiction over the same issue. However, different legislative jurisdictions under GHRSRs can coexist without conflicting with one another. An example of this is the sanctions imposed in the Magnitsky case, which have been issued by multiple jurisdictions and effectively function together.[30] Importantly, these sanctions do not hinder Russia from exercising its own jurisdiction over the case. On

[30] Foreign and Commonwealth Office and The Rt Hon Dominic Raab MP, "UK announces first sanctions under new global human rights regime", Published July 6, 2020, https://www.gov.uk/government/news/uk-announces-first-sanctions-under-new-global-human-rights-regime; 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations.

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the contrary, sanctioning states encourage Russia to exercise its territorial jurisdiction. The US GHRSR clearly states that the sanctioned individual being prosecuted is one of the conditions for terminating the sanctions.[31]

In summary, regardless of whether one interprets the legislative jurisdiction of GHRS as territorial or extraterritorial, it does not infringe upon the sovereignty of other states. Consequently, with the absence of adjudicative jurisdiction and the legality of legislative and enforcement jurisdiction, it can be concluded that the jurisdiction of GHRS does not violate the principle of state sovereignty. However, it should be noted that the above conclusion holds true only when there is no adjudicative jurisdiction present. In other words, the extraterritorial legislative jurisdiction is deemed acceptable because sanctions are decisions of the executive body rather than the judiciary. However, it should be acknowledged that this underlying assumption is not immune to challenges. For instance, some question the legitimacy of the sanctions measures based on executive orders, suggesting a violation of due process. The analysis in this article does not delve into this viewpoint, nor does it seek to justify the legitimacy of the sanctions regime in terms of due process. Therefore, it is crucial to note that the viewpoint asserting the compatibility of the GHRSRs with the principle of state sovereignty is valid only when the sanctions decision does not require court involvement. Thus, this analysis cannot be applied to justify the forfeiture orders in the recent amendment in Canada GHRS.

3.2 State Responsibility

From the literature on sanctions, there are two internationally recognized lawful unilateral measures under international law which could be used to justify sanctions: retorsions and countermeasures. Although there is literature on the legality of sanctions in general, the determination of such is a nuanced consideration intricately linked to factors such as the nature of the targeted

[31] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(g), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US).

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acts, the specific measures employed, and so forth. Consequently, it is necessary to examine GHRS in this regard. The primary legal document drawn for assessing that is the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Although not a convention, ARSIWA is widely recognized as reflecting customary international law concerning state responsibility.

3.2.1 Retorsion

In the commentaries of ARSIWA, retorsion is defined as an "'unfriendly' conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act".[32] It is "widely regarded as a freedom" in International Law (Crawford 2013, 677), and therefore considered lawful (Sands, 2000). Some scholars, such as Damrosch (2019) and Sands (2000), explore to justify unilateral sanctions with this concept. For example, Sands (2000) states that retorsion is not an entitlement as a countermeasure for a sanctioning state, but it is still lawful in international law. Retorsion may include "the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes".[33] Even Douhan (2021), the Special Rapporteur arguing against UCM, admits that "customary international law provides for the possibility of 'unfriendly acts' that are consistent with the international obligations of the State engaging in it (retorsion)".

Other than this swift conclusion, Ruys (2017) correctly points out that the main issue of applying the concept of retorsion is to determine "whether or not certain measures do or do not amount to a breach of an international obligation of the State (or organization) engaging in them in the first place". In the context of GHRSRs, the fact that Russia called the UK GHRS against

[32] International Law Commission (hereinafter, ILC). *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, [2001] 2 Yearbook of ILC 31, U.N. Doc. A/56/10.
[33] *Ibid.*

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the government official "unfriendly" instead of "illegal" may suggest retorsion can be a possible way to justify GHRS.[34] However, it is crucial to analyse three sanctions measures separately. Tilahun (2021) correctly points out that the visa ban serves as a typical example of retorsion, whereas the assets freeze does not. Members of the Advisory Committee on Issues of Public International Law (CAVV) in the Netherlands also agree that the imposition of the entry requirement is retorsion.[35]

Regarding transaction restrictions, it is not against the rule under the principle of state sovereignty or sovereignty equality. GHRS only prohibits providing funds or services to foreign individuals and entities rather than to states or entire industries, and thus it is unlikely for GHRS to violate the free trade principles outlined in WTO rules. While providing funds or services may be an obligation under other trade or investment agreements, this paper exclusively concentrates on the principle of state sovereignty, so legal obligations in other bilateral or multilateral treaties are not the primary focus. As the commentaries of ARSIWA provide examples of retorsions such as "embargoes of various kinds",[36] it is reasonable to argue that the restrictive measure in GHRSRs, which involves forbidding the provision of funds, can also be considered an act of retorsion and thus lawful under international law.

3.2.2 Countermeasures

Countermeasures are defined as lawful measures in response to an internationally wrongful act according to ARSIWA. In order to be entitled to take countermeasures, one must have the right to invoke responsibility for the

[34] "Russia: Kremlin Promises Retaliation to UK's Magnitsky Act Sanctions." DW, published July 07, 2020, https://www.dw.com/en/russia-kremlin-promises-retaliation-to-uks-magnitsky-act-sanctions/a-54080668.
[35] Members of the Advisory Committee on Issues of Public International Law, Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression (Advisory report no. 41, 2022), published Nov 17, 2022, https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/11/17/legal-consequences-of-a-serious-breach-of-a-peremptory-norm.
[36] ILC, *Draft articles on State responsibility*, cited, p.128.

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wrongful act committed by another state. Article 48 of ARSIWA states that "any State other than an injured State is entitled to invoke the responsibility of another State... if the obligation breached is owed to the international community as a whole."[37] Article 48 of ARSIWS further states that when there is a breach of obligation owed to the international community as a whole, any State entitled to invoke responsibility by "cessation of the internationally wrongful act", "assurances and guarantees of non-repetition", and "performance of the obligation of reparation".[38]

Regarding the specific obligations Article 48 refers to, the commentary further explains that "such obligations have sometimes been referred to as 'obligations *erga omnes partes*'".[39] While there is an ongoing debate regarding whether the obligations of *erga omnes* and *jus cogens* share the same scope and regulate identical acts (Picone, 2011), *jus cogens* at the very least is a component of *erga omnes* obligations. According to Conclusion 17 of the Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) [draft conclusions of *jus cogens*], "Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*)."[40] Given the greater availability of international legal documents on *jus cogens* compared to *erga omnes* obligations, this paper has chosen to employ the narrower concept of *jus cogens* to streamline the discussion.

The draft conclusion of *jus cogens* presents a non-exhaustive list of widely accepted *jus cogens*, which includes the prohibition of genocide, crimes against humanity, slavery, and torture.[41] In addition to the four crimes

[37] ILC, *Draft articles on State responsibility*, cited, art.48.
[38] *Ibid*.
[39] ILC, *Draft articles on State responsibility*, cited, p. 126.
[40] ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, [2022] 2 Yearbook of ILC 2, U.N. Doc. A/77/10, p.64.
[41] ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, [2022] 2 Yearbook of ILC 2, U.N. Doc. A/77/10.

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mentioned in the list, the Special Rapporteur Tladi also recognizes "other norms that have been cited as norms of *jus cogens*" include the prohibition of enforced disappearance, the right to life, the prohibition of human trafficking, and other norms that have some level of support, such as the prohibition against arbitrary arrest.[42]

Since this paper does not focus on identifying *jus cogens*, it does not aim to delve into or repeat the discussion. The draft conclusions and the observations in the relevant reports are directly utilized in this paper to examine the targeted acts in GHRSRs. Based on these conclusions, it can be argued that many of the serious human rights violations listed in GHRSRs constitute breaches of *jus cogens*, including genocide, crimes against humanity, torture and other cruel, inhuman or degrading treatment or punishment, slavery, extrajudicial, summary or arbitrary executions and killings, and so on. However, "other human rights violations or abuses" stipulated in the US and the EU GHRSR are too wide to be included in the scope of the breach of *jus cogens* or obligations *erga omnes* and thus may be outside of the scope of Article 48 of ARSIWA. Having said that, it is not to indicate that sanctions measures against a state committing "other human rights violations" cannot be justified under international law, but simply serve as an acknowledgement that the examination in this paper regarding countermeasures is confined to the breaches of *jus cogens*.

Article 48 empowers any state to take action without specifying whether individual states can do so unilaterally. Article 54 attempts to regulate the "Measures taken by States other than an injured State", but there is no clear consensus in this regard. The commentaries of ARSIWA state that "There appears to be no clearly recognized entitlement of States to take countermeasures in the collective interest," and "leaves the resolution of the matter to the further development of international law."[43] It is a pity that in the recent draft conclusion of *jus cogens*, the International Law Commission

[42] *Ibid*.
[43] ILC, *Draft articles on State responsibility*, cited, p.139.

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(ILC) had the chance to sort out the development of international law in this regard but failed to do so. The Special Rapporteur Tladi, states in his 2022 report that the application of autonomous measures against breaches of *jus cogens* is still "controversial", and "their status in law is not settled".[44]

Thus, based on the legal document from the International Law Commission, there is no clear answer as to whether third-party countermeasures are lawful or not. Some argue that, based on the development of international law after the establishment of ARSIWA, there is enough state practice to support the use of third-party countermeasures. An example of this is the CAVV, which lists some state practices in its recent report, with an emphasis on the most recent sanctions on Russia, to justify such an argument.[45] Certain scholars, like Barber (2021) put forth the argument of "breadth of State practice in adopting unilateral sanctions in response to human rights violations and other matters regulated by international law" to justify unilateral sanctions, and Cleveland (2006) even argues that "the relatively frequent use of economic sanctions by the US and other developed nations since WWII makes it difficult to conclude that a customary international norm exists against the practice".

However, using the example of the current sanctions against Russia alone may not be sufficient to establish customary international law on third-party countermeasures against the breach of *jus cogens*, because the ground for those sanctions is much narrower than the breach of *jus cogens*. For instance, the sanctions on Russia could be explained as the use of unilateral sanctions as a countermeasure against the illegal use of force or acts of aggression, which cannot be used to explain GHRS. As Ruys (2017) correctly points out,

[44] *Fifth report on peremptory norms of general international law (jus cogens)* [2022] U.N. Doc A/CN.4/747, p.57.
[45] Members of the Advisory Committee on Issues of Public International Law, Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression (Advisory report no. 41, 2022), published Nov 17,2022 https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/11/17/legal-consequences-of-a-serious-breach-of-a-peremptory-norm.

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the examination of the state practice in relation to sanctions is "a complex endeavour", it is not feasible to arrive at an easy conclusion. I do not intend to delve into the state practice of unilateral sanctions over the past 20 years, as it is too vast a project for this paper. I believe a more reasonable approach is to analyse the contribution of GHRS to the formation of customary international law in this regard.

Before the examination, it is necessary to clarify what the substance and object of the review are. Based on the discussion above, if there is customary international law to support the use of GHRS, it could be phrased like any state other than an injured state is entitled to take measures against another state that breaches *jus cogens*. Some also use "collective countermeasures" to refer to third-party countermeasures (Hofer, 2020). However, Alland (2002) correctly points out that, in this context, "collective" mainly means that the countermeasures are based on collective interests, and "in reality, such collective countermeasures are really individual initiatives". GHRS are unilateral sanctions, and different sanctioning states have different targeted acts, resulting in different sanctioned persons. To avoid confusion, this paper will use the term "third-party countermeasures" instead of "collective countermeasures".

Based on the discussion above, since the visa bans and transaction restrictions can arguably be explained as retorsion, the only issue that needs to be justified is the assets freeze. As a result, the subsequent analysis should focus on determining whether state practice under GHRSRs, especially the freezing of the assets of an individual or entities from another state, can be considered as forming the particular rule of customary international law. The rule permits a non-directly injured state to impose countermeasures on a state for the breach of *jus cogens*.

In the draft conclusion of the Identification of Customary International Law by the ILC, Conclusion 8 lists the requirements of the generality of customary international law: "sufficiently widespread and representative, as

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well as consistent."[46] It is necessary to examine GHRS based on these criteria. Regarding widespread, since there is no specific number of states required to meet this criterion, it is debatable whether the establishment of similar sanctions regimes by 35 countries can be deemed as sufficiently widespread. Regarding the representative, it necessitates that state practice is not confined to states with specific characteristics. However, the countries that have adopted GHRS are mainly developed countries located in Europe and America. Thus, Xiao (2021) points out, that even if 34 countries have passed similar laws, GHRS cannot be considered an international agreement due to its limited geographical representation." However, as the Draft Conclusion on Identification of Customary International Law suggests, "the participating states should include those that had an opportunity or possibility of applying the alleged rule."[47] There are two main considerations for establishing a sanctions regime: one is political will, and the other is the capability of utilizing sanctions power. Establishing and implementing a sanction regime requires resources and a certain level of economic sacrifice, and that is one of the reasons only developed countries are the main sanctioning states. If only developed countries had the opportunity and capability to implement sanctions, the current state practice may not necessarily lack representation.

Rather than solely focusing on the geographic distribution of sanctioned countries, it may be more important to examine the sanctioned states. In the determination of a rule of customary international law, it is required to examine whether "States affected by the claim then react by affirming the legality of the action, objecting to it, or acquiescing (Roberts and Sivakumaran, 2018)". The ILC draft emphasises the practice from "specially affected states", which are those that have a higher degree of interest or are more directly affected than other states in specific practices (Worster, 2013). However, in the case of breaches of *jus cogens*, no state possesses special

[46] ILC, *Draft conclusions on identification of customary international law, with commentaries*, [2018] 2 Y.B. INT"L L. COMM"N 2, U.N. Doc. A/73/10, p. 120.
[47] ILC, *Draft conclusions on identification of customary international law*, cited, p.136.

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interests that set them apart from others. Therefore, every state is equally affected by the rule (if it were to exist). The objections raised by sanctioned states will have an impact but will not solely determine the formation of customary international law in this context.

For a similar reason, a state can hardly claim to be the persistent objector, especially in the circumstance of the violation of *jus cogens*. According to international law, if "a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection".[48] The concept of persistent objection "without prejudice to any question concerning peremptory norms of general international law (*jus cogens*)".[49] The recognition and enforcement of *jus cogens* supersede any claims of persistent objection.

Thus, there is no exemption or special treatment for any country under this potential rule of customary international law. However, within the context of GHRS, it is clear that certain countries face more sanctions. Since it is impossible to study all other countries, I choose to study the most important one, the state that gave rise to the Magnitsky case—Russia. In response to the Magnitsky Act, Russia has responded by adopting the Dima Yakovlev Bill, which prohibits US citizens from adopting children from Russia (Kramer and Puddington, 2013). This can be considered a form of retorsion, demonstrating Russia's opposition to the sanctions imposed by the US.

Another significant measure taken by Russia is the establishment of a "Guantanamo list", which imposes sanctions on US citizens responsible for torture or those who legitimize torture in Guantanamo Bay and Abu Ghraib,[50] which is called "retaliation with symmetrical measures" by Russia (Novosti, 2013). This act seems to be an objection to the sanctions from the US.

[48] ILC, *Fifth report on identification of customary international law,* U.N. GAOR. A/CN.4/717, (March 14, 2018), p.60.
[49] *Ibid.*
[50] "МИД РФ опубликовал список граждан США, которым закрыт въезд в Россию [The Russian Foreign Ministry has published a list of US citizens who are denied entry to Russia]." RIA Novosti, published July 19, 2014, https://ria.ru/20140719/1016693619.html.

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However, ICJ correctly points out in the Nicaragua case that "If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself then whether or not the State's conduct is in fact justifiable on that basis, the Significance of that attitude is to confirm rather than to weaken the rule."[51] The rationale behind Russia's "Guantanamo list" is exactly the same as GHRS, where Russia as a state other than the injured state unilaterally issued sanctions measures against the US for torture, which is a breach of *jus cogens*. Thus, although the "Guantanamo list" serves the purpose of expressing Russia's objection to the US unilateral sanctions against Russians, it also supports third-party countermeasures by practising them itself, which in fact confirms the rule.

In terms of consistency, the institutionalization of human rights sanctions, progressing from state-focused sanctions regimes to the global human rights sanctions regime, demonstrates the commitment of the sanctioning states to maintain a certain degree of consistency in their practice of imposing sanctions on human rights violations. However, it is crucial to note that the implementation of GHRS is not consistent. The Colombian-Peruvian asylum case highlights that a state practice cannot form a rule if it exhibits "so much inconsistency... and has been so much influenced by considerations of political expediency in the various cases".[52] As Gaston (2022) correctly points out, "the sheer number of individuals who would have to be sanctioned in order for the Magnitsky laws to be applied equally means that selective application is inevitable". A notable example is Canada, which passed the GHRSR in 2017 but has not issued any sanctions based on GHRSRs since 2018.[53] The shift is not due to the decrease in the severity of human rights

[51] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J.14, (June 27).
[52] Asylum Case (Colombia/Peru), Judgement, 1950 I.C.J, No. 7, Rep. 227 (Nov. 20).
[53] Government of Canada. "Consolidated Canadian Autonomous Sanctions List." Accessed June 03, 2023. https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/consolidated-consolide.aspx?lang=eng#dataset-filter.

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violations post-2018 but may instead be linked to a change in the prioritized focus of their foreign policy.

However, the rule under examination concerns whether the state possesses a right rather than an obligation to issue countermeasures. Consequently, there is no requirement for consistent and equal application to any state that is in violation of *jus cogens*. A right or entitlement implies that a state can opt to employ sanctions or refrain from doing so, and it can choose to use one sanction measure or the alternative. In this context, the establishment of the GHRSR against gross human rights violations can already be seen as a consistent practice, since the thematic sanctions regimes mean that the sanctioning state is willing to use sanctions against the breach of *jus cogens*. Having said that, as Portela (2018) correctly warns "Arbitrary and inconsistent listing practices would quickly endanger the credibility of a regime". Thus, while the inconsistent application may not jeopardize the formation of customary international law, it risks compromising the legitimacy of GHRS by undermining credibility.

Based on the above analysis, a definitive conclusion cannot be drawn asserting that the GHRS can establish customary international law regarding countermeasures. Simultaneously, it cannot be conclusively stated otherwise, as no state, including the sanctioned ones, explicitly indicates objection to the use of countermeasures against breaches of *jus cogens*. This suggests that there is room for arguing that GHRSRs can significantly contribute to the development of a new customary international law rule regarding the entitlement of third-party countermeasures, serving as an example for discussion alongside other state practices over the past 20 years to support such an argument.

For GHRS to be deemed as countermeasures, the sanctions measures should also meet specific criteria established by ARSIWA, namely proportionality, temporariness, and reversibility. Proportionality, as stated in Article 51 of ARSIWA, "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful

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act and the rights in question".[54] Ruys (2017) argues that "the proportionality of third-party countermeasures may be particularly hard to assess".

The degree of proportionality hinges on the extent of assets held by an individual or entity in a foreign jurisdiction. Given that GHRS primarily targets state officials and state organs, the question arises as to whether these individuals and entities actually possess any assets in foreign countries, let alone a large amount of them. Consequently, considering the gravity of the human rights violations outlined in GHRS, imposing the restrictive measure of asset freeze may be viewed as proportionate to the alleged wrongful acts in the majority of cases. However, a nuanced consideration emerges in instances where a sanctioned individual resides predominantly in the sanctioned state. In such cases, there is a pertinent concern regarding the proportionality of the imposed measures, especially considering more and more GHRS are issued by several jurisdictions. Special Rapporteur Crawford correctly points out that the collective impact of measures by all countries should be considered together when evaluating the proportionality of countermeasures,[55] as shown in Article 54 in the second reading version of ARSIWA: "Where more than one State takes countermeasures, the States concerned shall cooperate to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled."[56] Thus, it is crucial to uphold this principle as a safeguard against the potential misuse of sanctioning powers.

The other two requirements are also not a big issue for the assets freeze measures. The requirement of reversibility is addressed in Article 49(3) of ARSIWA, which states that "countermeasures, shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question."[57] Asset freezes inherently possess the potential for

[54] ILC, *Draft articles on State responsibility*, cited, art.51.
[55] Third report on State responsibility, by Mr. James Crawford, Special Rapporteur (2000) UN Doc A/CN.4/507 and Add. 1–4.
[56] State Responsibility, Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading (UN Doc. A/CN.4/L.600) 21 August 2000, Draft Article 54(3) [2000].
[57] ILC, *Draft articles on State responsibility*, cited, art.49.

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reversibility, making them compliant with this requirement. The freezing of assets can be lifted once the violating state demonstrates a willingness to rectify the human rights violations and fulfil its obligations. For example, under the US GHRSR, one of the conditions for lifting sanctions is for the sanctioning state to prosecute the individual subject to sanctions,[58] which is aimed at fulfilling the state's human rights obligation to ensure accountability for human rights violations. Temporarily stipulated in the same article, that "Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State".[59] Most GHRSRs include regular review provisions. For example, Article 14(4) of Regulation (EU) 2020/1998 states that "the list in Annex I shall be reviewed at regular intervals and at least every 12 months."[60] This provision helps address the requirement of temporariness by ensuring that the sanctions remain in place only for as long as necessary.

Furthermore, asset freezes are capable of achieving the aims outlined in Article 48, including cessation and reparation.[61] Sanctions can be viewed as a means to pressure the sanctioned state to cease the wrongful acts and comply with their international obligations. By imposing asset freezes, the goal is to create a deterrent effect and encourage the responsible state to halt human rights violations. Furthermore, the frozen assets can potentially serve as a source for future reparations to the victims of human rights abuses, and Canada already amended its GHRSR to make confiscating the frozen assets feasible.[62] This demonstrates that asset freezes are an appropriate measure within the context of GHRS, aligning with the requirements of cessation of the wrongful act and preparation for reparation.

[58] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(g), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US).
[59] ILC, *Draft articles on State responsibility*, cited, art.49.
[60] 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 14 (4).
[61] ILC, *Draft articles on State responsibility*, cited, art.48.
[62] Budget Implementation Act, 2022, No. 1 (S.C. 2022, c. 10) (Can).

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In summary, freezing assets can be generally considered to meet the criteria as a countermeasure, but in practice, sanctioning states should adhere to the standards - proportionality, temporariness, and reversibility – to ensure their legitimacy. Combining the analysis of state practices above, although a definitive conclusion cannot be drawn that the practice of GHRS has already formed an international customary law, it has at the very least provided a significant practical foundation for the development of third-party countermeasures on the breach of *jus cogens*. Particularly, Russia, as a major sanctioned state, has played a crucial role in shaping this potential customary rule through its response to the Magnitsky Act. It can be said that, in terms of state responsibility, the GHRSRs, as a novel form of unilateral measures, not only have not disrupted the existing order but have also provided essential analytical material for areas that were previously unclear in the established order.

4. Conclusions

To conclude, GHRS can be utilized to address both individual responsibility and state responsibility for the acts of human rights violations. When the GHRS concern individual responsibility, there is a need to discuss the legality of GHRS in relation to jurisdiction, and the main debatable issue is the legality of its legislative jurisdiction under international law. In the case of GHRS, since there is no adjudicative jurisdiction and the enforcement jurisdiction is based on either territoriality or nationality, the extraterritorial legislative jurisdiction should not be deemed a violation of state sovereignty.

When the GHRS concern state responsibility, there is a need to explore what kind of unilateral measures in international law could be used to justify GHRS. Within the spectrum of GHRS measures, the imposition of a visa ban and transaction restrictions could reasonably be construed as retorsion—a legally permissible yet unfriendly act in international law. Due to the lack of clarity in customary international law pertaining to third-party

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countermeasures, it is hard to complete the inquiry that revolves around whether freezing assets qualify as countermeasures under international law.

Thus, this paper seeks to examine the extent to which the establishment and enforcement of GHRS can contribute to the evolution of such a customary norm. By analysing state practices against the criteria of being "widespread, representative, and consistent", the paper suggests that GHRS has substantial potential in shaping international customs on third-party countermeasures against the breach of *jus cogens*.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Globalization and AI Data Gathering in/from Outer Space: Building upon Lessons Learned at the European Level

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ABSTRACT

Based on the growing use of Artificial Intelligence (AI) –capable of gathering an unlimited (in amount and content) number of data, improving its functioning and simplifying tasks–, humanity appears to be in the midst of a fourth technological revolution. When such activity is conducted in outer space i.e., by fifth generation observation satellites (Fu W. et al. 2020) using AI, capabilities are strongly optimized; however, the activity also seems to pose serious threats to privacy and to industrial or national secrets. As a response to this challenge, AI data gathering on Earth is subject to specific frameworks protecting privacy, both at the upstream and downstream ends, such as in the case of the EU. Unfortunately, the rules established therein do not seem to be wholly applicable to AI data gathering in/from space, mainly due to the fundamental freedom to conduct space activity. As a choice must be made between competing interests, this article aims at discussing some of the elements that should be considered, when debating on a legal framework potentially applying to space AI data gathering; to avoid conduct of said activity only to the benefit of a few stakeholders against the background of an emerging regime of techno-feudalism.

Keywords: space law, artificial intelligence, satellite data collection, globalization of data, space policy

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1. Introduction

Described in general terms, globalization may be depicted as "the increasing worldwide integration of economic, cultural, political, religious, and social systems" [1], whereas it is usually likened to an invisible spider's web covering the whole of the planet, on which strands "(p)eople, money, material goods, ideas, and even disease and devastation have traveled (…), in greater numbers and with greater speed than ever in the present age".[2] At the same time, it is common knowledge that technological advances are at the heart of the globalization process, despite the fact that these may sometimes lead to negative effects.[3] In this connection, attention is currently drawn to artificial intelligence (hereafter, AI), an innovative and even revolutionary technology, which allows for unprecedented opportunities for economic development.

In short, AI is based on the assumption that several aspects of human thought can be mechanized (Wasilow and Thorpe 2019, 37). Its most obvious feature – which separates it from earlier technologies – is the ability to act autonomously, without being bounded by the cognitive limitations of the human brain. It is expected that AI will soon be able to reach *"solutions that humans may not have considered, much less attempted to implement (…)*"[4] whereas, up until now, such systems have provided effective solutions for numerous applications in all areas of everyday life, such as intensive care unit (Hanson and Marshall 2001, 427-428), petroleum exploration and production (Gharbi and Mansoori 2005, 94-95), and in the food industry (Kakani, Nguyen, Kumar, Kim, and Pasupuleti 2020, 6-9). Undeniably, the

[1] Globalization, *Oxford Reference.* https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095855259.
[2] Globalization, *National Geographic.Education*, https://education.nationalgeographic.org/resource/globalization.
[3] "The benefits and disadvantages of globalization are the subject of ongoing debate. The downside to globalization can be seen in the increased risk for the transmission of diseases like ebola or severe acute respiratory syndrome (SARS)": Globalization, *National Geographic Education*. https://education.nationalgeographic.org/resource/globalization/.
[4] "The AI's solution thus may not have been foreseeable to a human, even the human that designed the AI" (Scherer 2016, 364).

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development and commercialization of AI (i.e., artificial intelligence and machine learning processes) in combination with the extended use of information and telecommunication networks has accelerated the global economy, making it possible to utilize and synchronize complex data resources, financial flows and business processes (Sevalnev and Tsirin 2022, 379). In other words, AI allows for faster solutions to complex problems in all areas of the activity and the economy, through data gathering, processing and automated decision making (Iyer 2021,1).

Hence, since we are growingly using the data gathering and flow schemes produced by AI, one may argue we are living in the *era of digital globalization*: nowadays, globalization is being accelerated and redefined by said flows of data,[5] whereas the use of AI techniques for data collection and processing is gaining in importance (e.g., as a significant tool for diffusion of knowledge and technology, as well as for enabling the distribution of production – of goods and services – across countries: Mattoo and Meltzer 2018, 770)[6]. In the context of global trade, the free and fast flow of data through AI systems can increase the benefits, provided that the "data transaction" remains trustworthy and the consumers do not face the risk that their data will be used for reasons beyond their knowledge or control.[7] In practice, collecting and processing data via AI allows to reduce the time spent in operations, while accelerating the production of results.

Interestingly, each time such activities are carried out from space – in addition to allowing collecting a broader range of data (i.e., satellites may

[5] Digital Globalization: The new era of global flows, *Mckinsey Global Institute*, https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/digital%20globalization%20the%20new%20era%20of%20global%20flows/mgi-digital-globalization-full-report.pdf .

[6] Meanwhile, the United States and many other nations (such as China, Israel, Singapore) are taking steps to ensure their competitiveness in AI in order to ensure their primacy from an economic and military perspective (Horowitz, Allen, Kania, and Scharre 2018, 8-9).

[7] Policy Department for External Relations (Directorate General for External Policies of the Union), Two briefings and an in- depth analysis on Data flows, artificial intelligence and international trade : impacts and prospects for the value chains of the future (2020) https://www.europarl.europa.eu/-RegData/etudes/IDAN/2020/653617/EXPO_IDA(2020)653617_EN.pdf.

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gather data from all corners of the globe) which maximizes the use of AI –, these may benefit from a more flexible regulatory regime. In fact, satellite data gathering can be freely engaged in, pursuant to Article I of the Outer Space Treaty signed in 1967, which established the freedom to use outer space for peaceful purposes.[8] Hence, up until now, two types of data-gathering activities may be conducted in/from space: Earth observation aimed at collecting information related to the planet's physical, chemical and/or biological features (Earth Observation/EO, or Remote Sensing/RS) or in reconnaissance activities, such as in the case of geospatial intelligence.

Nevertheless, no legal regime has been thus far established to specifically regulate the generation, use and/or protection of space big data (Von der Dunk 2013, 250). Regarding this particular field of activity, "space law is limited to the UN Remote Sensing Principles of 1986, which provide some general guidelines, but are of limited scope with regard to space big data. Moreover, laws on data and privacy protection, intellectual property and cyber security do not cover adequately the multi-faceted challenges presented" (Stefoudi 2017).

To clarify activities falling within each category, EO includes the currently popular Big Earth Data cloud processing platforms such as GEE,[9] Amazon Web Services (AWS),[10] Microsoft Azure,[11] NASA Earth Exchange (NEX),[12]

[8] Art. 1 Outer Space Treaty 1967: "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development".
[9] Google Earth Engine (GEE) is a cloud computing platform cloud that was launched by Google in 2010. It enables cloud computation and it is an effective tool for carrying out the analysis of global geospatial big data (Zhao,Yu, Li, Peng, Zhang, and Gong 2021, 2).
[10] Amazon Web Services (AWS) as an application of cloud computing provide services in the following sectors: (a) security identity and compliance, (b) compute, (c) storage, (d) database, (e) migration, (f) media services, (g) machine learning, (h) Internet of Things (IoT) (Hashemipour and Maaruf 2020, 42-46).
[11] Microsoft Azure as an overarching brand name for Microsoft's cloud computing services and especially Microsoft Azure Machine Learning (ML) provide a rich set of algorithms that can be used to process huge amounts of data and design, test and deploy powerful and predictive analytics (Copeland, Soh, Puca, Manning, and Gollob 2015, 3).
[12] The NASA Earth Exchange (NEX) project is a collaborative platform that combines data access and computing capabilities in order to provide researchers with community supported modeling, analysis, visualization software and large-scale computing power in conjunction

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Sentinel Hub (SH)[13] and Open Data Cube (ODC)[14] promoting the analysis and application of Big Earth Data, based on datasets acquired by EO satellites (Zhao, Yu, Du, Peng, Hao, Zhang, and Gong 2022, 1-3). At the same time, AI used for geospatial intelligence[15] may allow to collect huge amounts of data which are both of a non-critical and/or confidential nature (e.g., relating to States' infrastructure, communication, military activities etc.) (Soroka and Kurkova 2019, 131-134). Seen from this angle, data gathering using AI in space may be used as a means for unlimited access to information, disregarding national boundaries or secrecy, as well as personal privacy.

Be that as it may, growing awareness of the potential of AI data gathering also led to the emergence of concerns regarding privacy rights and privacy issues (namely, private and/or non-private data protection). Indeed, while RS may be regarded as inoffensive, collecting and processing other types of data – e.g., related to critical infrastructure, military activities or even citizens – through space could well result in violations; e.g., violations of fundamental human rights of that country's citizens, like the right to privacy (UDHR, Article 12)[16] and the principle of non-discrimination (UDHR, Article 2)[17].

with datasets that are common to Earth systems science domain (Huffer, Cotnoir, and Gleason 2015, 2177-2180).

[13] Sentinel Hub (SH) as a platform developed by Sinergise provides data access through certain OGC protocols, data processing and visualization services (Gomes, Queiroz, and Ferreira 2020, 5-6).

[14] Open Data Cube (ODC) is an open and freely accessible data exploitation architecture that has a potential to face the new data management and analysis challenges from the huge increase in data volumes about Earth Observation (Killough 2018, 8629).

[15]By the term "geospatial intelligence" we consider all aspects of geospatial data processing including intelligent methods and technologies to fuse/integrate data and products acquired by multiple heterogeneous sources using machine learning techniques and emerging big data and geoinformation technologies (Kussul, Shelestov, Basarab, Shakun, Kussul, and Lavreniuk 2015,2).

[16]Art. 12 UDHR 1948: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks".

[17]Art. 2 UDHR 1948: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty".

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Furthermore, the same activity, carried out on a regular basis, could well raise the question of whether it is in line with the general principle of non-intervention, established in the Declaration on the Inadmissibility of Intervention and Interference in the Internal affairs of States, signed in 1965[18] [still, given the "soft law" nature of the above instruments, there would be no breach of an international obligation – e.g., in case of a violation of individuals' privacy –, hence no international responsibility; this is the reason why scholars suggest that with respect to space-generated data and information, privacy is very much a national matter, to be addressed by domestic (hard) laws and regulations (Von der Dunk 2013, 245)].

As a result, the principal question arising is whether AI data gathering, which is a vital instrument and a major tool for pushing globalization, should be regulated in a harmonized and legally binding way when conducted in/from outer space – as it is regulated when conducted on Earth –, especially taking into account that AI data gathering is optimized when conducted from space (and is, therefore, offering increased possibilities for continued globalization). In reality, ensuring the proper use of AI in space, in accordance with the OST and international law – including the Charter of the United Nations (as laid down in the Art. III of the OST) and the principles established therein[19] –, is a challenge *per se*.

Against this background, this article aims at presenting first limits that were established as regards massive data gathering activities carried out via AI on Earth, on the basis of the EU data framework paradigm (Section 2). Subsequently, the unique issues resulting from the use of AI in space for the

[18] RES 2131(XX), Declaration on the inadmissibility of intervention in the domestic affairs of states and the protection of their independence and sovereignty. This principle is additionally linked to espionage, which is defined as the effort to discover the guarded secrets of another entity using concealed and clandestine methods (Nickolas 2019, 29-32). In truth, espionage or reconnaissance techniques are not traditionally regarded as a violation of international law. However, a "growing body of national decisions has steadily recognized that territorially intrusive forms of espionage violate the principle of territorial sovereignty (Baker 2003, 1091-1096; Navarrete and Buchan 2019, 898-905).

[19] The Charter goes on to envision a democracy of states that emanates from the founders' faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small (Joyner 1999, 337).

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purpose of data collection will be investigated, so as to define the problems encountered in the space environment (Section 3). The purpose of this article is to discuss possible solutions and approaches to ensure privacy protection, in the event of data gathering conducted via AI from/in space, as these will have to be addressed by policy makers (Section 4) and to formulate conclusions (Section 5).

2. Massive (AI) Data Gathering on Earth: Existing Approaches and Limits

It is difficult to know when the practice of large-scale data gathering really started. Be that as it may, the massive gathering of data gained ground recently in the context of administrative and judicial proceedings *inter alia*, and raised key concerns right from the outset. As this activity is mostly carried out through the use of AI, specific pieces of legislations and mechanisms were put in place to safeguard important human rights, such as privacy. In short, the growing use of robotics and/or AI, as well as their potential (negative) effects on citizens' privacy (Butterworth 2018, 258-264), is now widely regulated by Data Protection laws.

To name but a few examples, both US federal and State laws established a data protection policy in specific domains, such as the Health Insurance Portability and Accountability Act (HIPAA) or the Family Educational Rights and Privacy Act (FERPA) (Klosowski 2021). Similarly, the Australian Privacy Principles (APPs) of the Privacy Act 1988 established rules applying to the collection, use and correction of personal data (Zeller, Trakman, Walters, Rosadi 2019, 32-33). In this context, we suggest to focus and examine the EU data protection framework, considered sufficient to provide an overview of the issues at stake.

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2.1 Protection of Private Data: The Case of the EU Data Protection Framework

In European Union law (EU law)[20], a milestone was reached in 2016, with the adoption of the General Data Protection Regulation (GDPR)[21], regarded as more than a simple revision of the previous Data Protection Directive and less than a regulatory paradigm shift. More precisely, the GDPR regulates large scale data gathering, in the form of AI data collection (Ishii 2019, 515-517), when such process is related to individuals (Mitrou 2018, 32-33). Exceptions to the application of the GDPR are addressed in Section 5, Article 23 entitled "Restrictions", to take account of the need to safeguard *inter alia* national security and defense. Thus, it may be concluded by an *argumentum a contrario*, that each time the requirements of Article 23 are not met, the GDPR shall apply.

More precisely, private data may first be "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes", as established in Art. 5 of the GDPR; Art. 6 lays down that such personal data can be processed only following a clear and informed[22] consent of the individual. In fact, such processing is lawful only if "the data subject has given consent to the processing of his or her personal data for one or more specific purposes" and/or "to protect the vital interests of the data subject". Hence, the GDPR lays down rigorous conditions for the processing,[23] while use of data – namely, data collected and processed by AI – ought to be in line with the principle of non-discrimination (Charter of Fundamentals Rights EU, Art. 21)[24]. In addition, "[t]he data subject shall

[20] This analysis will draw on the paradigm of the EU data protection regime.
[21] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016) OJ L119/1
[22] Article 13 of the GPDR.
[23] The processing shall be laid down by EU law or member state law, on the basis of Art. 6.3 of the GDPR.
[24] For example, the use of algorithmic profiling for the allocation of resources is, in a certain sense, inherently discriminatory (Goodman and Flaxman 2017, 53-55). Some governments

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have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning it or similarly significantly affects it. In essence, this guarantees the right of the individual not to be subject to a decision based solely on an automated data procedure, with the exceptions referred to in paragraph 2", pursuant to Article 22(1) of the GPDR.

Secondly, it is mentioned that such activity is lawful in case "processing is necessary *for the performance of a task carried out in the public interest* or in the exercise of official authority vested in the controller" (GDPR, Art. 6; emphasis added), whereas Art. 23 lays down that the protection of personal rights may be restricted for specific reasons, such as for national security reasons.[25] In any case, the conditions of necessity – based on the EU Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8 (2) – and proportionality (see EU Charter of Fundamentals Rights, Art. 52) need to be fulfilled.

More precisely regarding the necessity to restrict a human right, the EU Court of Human Rights has ruled that: "'*necessary'* (is) not synonymous with indispensable (…) neither has it the flexibility of such expressions as admissible, ordinary, useful, reasonable or desirable".[26] Correspondingly, the principle of *proportionality* was fully developed by the European Court of Justice (ECJ) in the case *Internationale Handelsgesellschaft*,[27] where the Court underlined that the means chosen must meet a proportionality test

are already using algorithmic systems to classify people based on problematic categories (Latonero 2018, 11).

[25] Both the European Court of Human Rights (*Case of Big Brother Watch and Others V. United Kingdom* [GC], no. 58170/13,62322/14,24960/15, §274 -276, ECHR, 2021), the European Court of Justice (Case 623/17 *Privacy International V Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department, Government Communications Headquarters,Security Services, Secret Intelligence Service* [2020] ECR) and the German Federal Constitutional Court, (BVerfG, Judgment of the First Senate of 19 May 2020 – 1 BvR 2835/17) had decided in favor of a legislation on the use of bulk communications data for security reasons.

[26] *Handy side v United Kingdom* App No 5493/72 (ECtHR, 7 December 1976); emphasis added.

[27] Case 11/70 *Internationale Handelsgesellschaft vs. Einfuhr und Vorratsstelle für Getriede und Futtermittel* [1970] ECR 1125.

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consisting of three components: (i) appropriateness, as the measure must be appropriate or suitable to protect the interests that require protection; (ii) necessity, meaning that no measure less restrictive must be available to attain the objective pursued; and (iii) proportionality *stricto sensu*, in the sense that the restriction must not be disproportionate to the intended objective or result to be achieved (Milaj 2016, 116-121) (up until now, the ECJ has issued a significant number of decisions interpreting the concepts of proportionality[28] and necessity[29] in the context of personal data restrictions, that may be taken into account).

On this basis, it appears that collecting and processing personal data may be conducted either following a prior, free, informed and express consent of the person(s) concerned, or for specific reasons of public and/or national interest, within the bounds of data protection and general international law (e.g., in line with the principles of necessity and proportionality). Theoretically, any violation of privacy and of a fundamental data-protection principle could be addressed in the courts, *inter alia* on the basis of Art.12 of the UDHR, taking furthermore into consideration that Art. 2 of Resolution 53/144 dated 9 December 1988 reads that "[e]ach State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms…as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice".[30] Thus, States must ensure the protection of citizens' privacy as a fundamental human right, acting against any violation of their personal data as secured in the GPDR.

[28] Joined Cases C-465/00, C-138/01, and C-139/01 *Osterreichischer Rundfunk* [2003] ECR I-6041, Case C-101/01 *Bodil Lindqvist* [2003] ECR I-12971.
[29] Case C-524/06 *Huber* [2008] ECR I-9705.
[30] A/RES/53/144 Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

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In addition to that, according to the International Covenant on Civil and Political Rights General Comment 16 (1988)[31]:

> The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law… In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

Interestingly, though, the European Commission proposal for an EU regulatory framework on Artificial Intelligence (COM (2021)206 - 21.04.2021) regulated AI data processing, by suggesting a particular differentiation between 'AI systems' and 'high-risk AI systems'; said approach implied that AI systems which do not interact with humans, are not used to detect emotions or determine association with (social) categories based on biometric data or that do not generate and/or manipulate such content, are eventually harmless. On the other hand, it was also proposed – in the Report of the European Parliament (Report A9-0001/2021 - 04.01.2021[32]) on the military aspects of the use of AI –, that AI used in a military context "must be subject to meaningful human control, so that at all times a human has the means to correct, halt or disable it in the event of unforeseen behavior,

[31] UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.
[32]European Parliament, Report A9-0001/2021 on artificial intelligence: questions of interpretation and application of international law in so far as the EU is affected in the areas of civil and military uses and of state authority outside the scope of criminal justice (2020/2013(INI)).

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accidental intervention, cyber-attacks or interference by third parties with AI-based technology or where third parties acquire such technology", and in all circumstances used in line with international public law, in particular humanitarian law.

Hence, based on the EU paradigm, it appears that a detailed framework was established to oversee the collection, processing and exploitation of private data, even when the public interest is at stake. In other words, massive data gathering conducted within the context of said States is strictly regulated, as such data refer to "identified or identifiable *natural persons": they consist in sensitive data requiring special protection*. On this basis, the major role was given – for the specific purpose of private data protection – to the individual(s)' consent and authorization.

2.2 Defining the Importance and Role of the Individual's Consent

The fundamental principle of individual's informed consent, as established in Art. 7 of the GPDR, is one of the best-known legal bases for processing personal data.[33] The basic requirements for a valid legal consent are defined in Art. 7 of the GPDR and specified in recital 32 of the GPDR. According to these provisions, individual's consent must be freely given, specific, informed, auditable and unambiguous (Breen, Quazzane and Patel 2020, 22). It is noteworthy that the notion of a "free" consent implies the absence of any kind of inappropriate pressure or influence, while an informed consent "can be said to have been given based upon a clear appreciation and understanding of the facts, implications and consequences of an action" (Politou, Alepis, and Patsakis 2018, 6).

However, in case of any secondary uses of personal data for research (widely referred to as *derivative data*), the potential acceptance of a "broad consent" arises new challenges. Recital 33 of the GPDR states that "it is often not possible to fully identify the purpose of personal data processing for

[33]As described in Art.6 (1) of the GPDR, the other legal bases are: contract, legal obligations, vital interests of the data subject, public interest and legitimate interest.

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scientific research purposes at the time of data collection. Therefore, data subjects should be allowed to give their consent to certain areas of scientific research when in keeping with recognized ethical standards for scientific research. Data subjects should have the opportunity to give their consent only to certain areas of research or parts of research projects to the extent allowed by the intended purpose".

At the same time, according to Art. 29 of the GPDR Working Party Guidelines on consent under Regulation 2016/679:

> it should be noted that Recital 33 does not disapply the obligations with regard to the requirement of specific consent. This means that, in principle, scientific research projects can only include personal data on the basis of consent if they have a well-described purpose. For the cases where purposes for data processing within a scientific research project cannot be specified at the outset, Recital 33 allows as an exception that the purpose may be described at a more general level (…) When regarded as a whole, the GDPR cannot be interpreted to allow for a controller to navigate around the key principle of specifying purposes for which consent of the data subject is asked.[34]

Hence, it is apparent that the notion of "specific consent" remains a fundamental legal requirement for private data protection in both events; namely in case of the initial collection and processing of data, as well as in case of any secondary operations on said data.

Interestingly, Butterworth (2018, 261) underlines – in reference to big data processing – that:

> if the purposes of the data collection and analysis are unclear when data are collected, it makes it difficult to obtain meaningful consent as required by the GDPR: "freely given, specific, informed and an

[34]Article 29 Working Party, Guidelines on Consent under Regulation 2016/679, p.28, https://ec.europa.eu/newsroom/article29/items/623051.

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> unambiguous indication of the data subject's wishes". Consent will also be difficult to obtain (or re-obtain) where data is observed rather than directly provided by data subjects, as in this context it is unlikely that data subjects will provide the "clear, affirmative action" required by Article 4 (11).

In theory, pursuant to Art. 7(3) of the GPDR, all data subjects retain the right to withdraw their consent at any time. Thus, once such consent is withdrawn, individuals have the right to have their personal data erased and no longer used for processing (Maldoff 2016). However, in the case of deep learning and data processing, the withdrawal of consent coupled by the continuation of learning through processing, would constitute a violation of the GPDR. Seen from this perspective, scholars suggest that: "it is likely that the GPDR provision will result in either large scale AI regression or continual liability risks for those continuing to derive learning from unlawfully processed information" (Humerick 2018, 407).

Overall, the massive (AI) collection and processing of data is regulated in detail when it is carried out on Earth – namely at States level –, providing a minimum level of protection to individuals against human rights abuses. However, said activity is also being conducted in space, using infrastructure and equipment which is placed in this particular environment, such as satellites in orbit around the Earth. Data gathering activities conducted in this specific manner are subject to completely different rules that are worth being considered, especially taking into account that in case AI is being used, the storage and/or processing and/or use of data for a variety of purposes, will be further optimized.

3. Massive (AI) Data Gathering from Space: Different Context and Issues at Stake

Massive (AI) data gathering conducted from space mainly consists of RS (or EO). To put things into context, RS is used to collect information on a wide

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range of elements related to our planet, and for observing the Earth surface – as well as its weather and climate (Kumar, Arivazhagan, and Rangarajan 2013, 93-95) – while allowing to monitor numerous activities, like farming, agriculture (Weiss, Jacob, and Duveiller 2020, 2-3), fishing etc.

In recent years, RS has been revolutionized by AI (Gevaert 2022, 1-2). More precisely, since the mid-1950s, – when it was first developed as a branch of computer science –, AI marked significant growth rates, as it allowed to solve problems by using systems reproducing human intelligence features. In fact, AI's first key technological purpose was to mimic human intelligence, rather than to function as a copy of it (Martinez 2019, 1024). However, it developed into a "goal-oriented, problem-solving thinking process, with at least some human-level (or better) capabilities" (Abney 2020, 65) embodied by machine learning based on data; the continuing improvement of deep learning systems attracted public attention, and gave private companies the opportunity to use a ground-breaking technology while prompting State regulatory bodies to enact better adapted rules (Wang 2019, 2). As a result, AI was also used to full advantage in the context of space activity: regarding *inter alia* RS, AI allowed to collect increasingly accurate and reliable information – with the use of on-board advanced techniques such as the "change detection" method[35] –, in order to treat it automatically and without any human intervention.

Interestingly – and this feature may be regarded, from a certain angle, as a disadvantage –, RS does not initially (i.e., during data collection) distinguish between the types and significance of data: an *a priori* differentiation between public and private data is not possible for technical reasons, given that RS mainly consists in "photographs" taken from space objects. As a result, a religious site will be detectable, just as easily as a farm or a military activity.

[35] For example, in the specific context of data gathering and processing from satellites in outer space AI techniques offer the possibility to select only the data of interest for a specific application or to extract accurate information from specific data. Applying this technique an AI satellite can use applications such as "change detection" for on-board data processing in order to store and send to the ground only the useful images e.tc. for the specific activity (Guerrisi, Del Frate, and Schiavon 2022, 2-3).

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Hence, as RS may not be controlled in terms of the data being collected, questions seem to be raised as regards the massive data gathering from space, especially in the event that AI and AI processing are involved.

3.1 (AI) Data Gathering and Space: Inapplicability of the Distinction Private-public Data

Nowadays, space technology allows to remotely observe and monitor the planet, namely to capture the overall image of the Earth. In essence, RS is one of the oldest, most basic and essential activities, which may be defined as "a methodology to assist in characterizing the nature and/or condition or phenomena on, above or below the earth's surface by means of observation and measurements from space platforms; at present such methods depend on the emission and reflection of electromagnetic radiation".[36]

In reality, for practical and economic reasons, the technology which is being used for gathering data from space is dual-use: namely, in this specific environment, a single space object may in principle be used for both civilian and military[37] purposes (i.e., without that being the result of a malfunction). Hence, the same space technology may be used to collect all types of data, without having to overcome any administrative or other obstacles, and without (technically) requiring any consent for the collection of data. On this basis, the differentiation between private and public data appears – at first – to be meaningless as far as data gathering from space is concerned; and more importantly, said technology may theoretically be utilized to intentionally harm others, or in an imprudent or self-destructive way (Gabriel 2020, 412).

[36] Definition used in the Draft Report of U.N. Working Group on remote sensing of the earth by satellites, 2nd session, 8 February 1973, U.N. Doc. A/AC 105/C1/WG4/L4.

[37] The role of AI in future military applications consists a matter of great concern. For example, the utilization of artificial intelligence technologies during warfare, such as fully autonomous weapons, LAWs or killer robots, underscore serious moral and legal concerns, mainly due to their capacity to select and engage their target without human control. Legal discussions also focus on the capacity of autonomous weapons to comply with fundamental principles of international humanitarian law, such as the principles of distinction, necessity and proportionality (Martin and Freeland 2021, 3-5).

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Legally, data-gathering activities from space are governed by the rules of international space law, and especially by the Outer Space Treaty (hereafter, OST). Thus, account must be taken of Articles I-III of the OST laying down the freedom of States to conduct space activities[38] in general, in line with international law and the common aim of ensuring peace and promoting security and mutual cooperation,[39] and in conjunction with Article VI of the OST establishing the principle of the international responsibility of States with regard to their actions in carrying out their space activities.[40]

Yet, given the particular importance of this activity, RS was additionally regulated by more specific rules, namely by the *UN Remote Sensing Principles*,[41] established under UN Resolution 41/65 of 1986.[42] More precisely, according to said principles, a basic distinction was made between three categories of data depending on the degree of processing applying to them: "primary data", "processed data" and "analyzed information"[43] (Principle I).

In practice, this categorization has certainly served as a reference for space policy-makers and space practitioners in a few States, despite the fact that

[38] OST, Art. I (3): "There shall be freedom of scientific investigation in outer space … and States facilitate and encourage international co-operation in such investigation".
[39] OST, Art. III: "States Parties to the Treaty shall carry on activities in the exploration and use of outer space (…) in accordance with international law (…) in the interest of maintaining international peace and security and promoting international co-operation".
[40] OST, Art. VI: "States Parties to the Treaty shall bear international responsibility for national activities in outer space (…) whether such activities are carried on by governmental agencies or by non-governmental entities (…)".
[41] It should be noted that the term "remote sensing" is often used interchangeably with the term "earth observation".
[42] Principles Relating to Remote Sensing of the Earth from Outer Space, G.A. Res. 41/65, U.N. Doc. A/RES/41/65(Dec. 3,1965), (thereafter Res. 41/65). UN Resolution 41/65 in not binding. However, as domestic laws have "regularly deferred to Resolution 41/65", its principles are generally perceived to constitute customary international law (Von der Dunk 2009, 417). Be that as it may, most authors underline the non-binding nature of Resolution 41/65. More specifically, Lyall and Larsen (2017, 370) argue that "it still seems to us premature to suggest that in toto the UN Remote Sensing Principles constitute customary international law; they may be soft law, and it is true that states which have not adopted national legislation have only the UN Principles and general international space law as their guide".
[43] Art. I Res. 41/65: "(b) "primary data" means those raw data that are acquired by remote sensors borne by a space object (…); (c) "processed data" means the products resulting from the processing of the primary data (…); (d) "analyzed information" means the information resulting from the interpretation of processed data".

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national approaches to precisely defining RS data sometimes diverge (Doldirina 2015, 75). For example, the US Land Remote Sensing Policy Act adopted a similar distinction between data and information – i.e., depending on the processing applied –, and defined EO as an activity aimed at the 'collection of data which can be processed into imagery of surface futures of the Earth'.[44] On the contrary, the German Satellite Data Security Act (SatDSiG) released in 2007, and the Satellite Data Security Ordinance (SatDSiV) of 2008, negated the importance of the distinction between raw and processed data, or information, by defining EO data as "signals of satellite sensors and all products derived from them, notwithstanding the level of processing and the mode of their storage and presentation" (Doldirina 2015, 75).

Hence, it appears that international space law has not – up to now – addressed the topic of data gathered from space in a holistic and comprehensive manner, taking into account all the issues at stake. On the one hand, it does not regulate potential violations of individuals' right to privacy [the OST does not provide much specific guidance about addressing possible privacy concerns (Von der Dunk 2013, 245)] neither do the other international law rules applicable to space activity on the basis of the OST (e.g., the UN Charter mainly considers gross-scale violations of human rights: *ibidem*). On the other hand, the issue of data related to the natural resources of States were hotly debated early enough, showing in truth that the positions of States substantially diverged. More precisely, the dichotomy – underlying much of Resolution 41/65 – was between States which feared that other States' RS activities would encroach upon their permanent sovereignty (especially in the context of natural resources) namely sensed States, and States wishing to access the data (Von der Dunk 2013, 417). Thus, Latin American nations argued that the sovereignty over their natural resources should be combined with the sovereignty over the data concerning those resources gathered via

[44] H.R. 6133 – Land Remote Sensing Policy Act 1992.

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RS operations; contrary to that, the United States opposed a consent-driven position, arguing that Art. I of the OST established absolute freedom in outer space (Sinha 2012, 253).

The result was that Principle XII of Res.41/65[45] established no strict obligation of the sensing State to request the "prior consent" of the sensed State before passing over it and monitoring its territory (Bohlmann and Soucek 2018, 187). Hence, the issue was addressed in a pragmatic and realistic way, as it was argued that sovereignty may be regarded as "almost meaningless if other states obtain superior quality information regarding the developing state's territory and the resources therein" (Von der Dunk 2009, 417). In this context, one may as well argue that the question of the consent or authorization of the sensed subject (i.e., of States and/or possibly of persons) to data collection and processing was not addressed in a fully satisfactory manner;[46] and this position has not changed despite the fact that data-gathering activities from outer space (namely EO or RS) are being more complex and intrusive, given that they are growingly based on the use of AI systems in space.

Be that as it may, RS activities have now led to the creation of important data bases, making the most effective use of information-gathering space technology. By way of illustration, massive public data gathering activities – requiring enhanced collaboration within a context of ever-accelerating globalization – resulted on the creation of the *Group on Earth Observations* (GEO) as a voluntary partnership of more than 100 national governments and in excess of 100 participants Organizations aimed at achieving the operation

[45] Art. XII Res.41/65: "the sensed State shall have access to them on a non-discriminatory basis and on reasonable cost terms. The sensed State shall also have access to the available analyzed information concerning the territory under its jurisdiction in the possession of any State".

[46] Arguably, the perspective of the protection of personal data and privacy could then have been discussed, given that: "when the space law era was ushered in during the late 1950s, it was already clear to some observers that, sooner or later, life on Earth, would be monitored from a distance without those living on it necessarily knowing about it – Big Brother in *optima forma*" (Von der Dunk 2013, 243).

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of a *Global Earth Observation System of Systems* (GEOSS)[47]: that is, a set of coordinated, independent EO, information and processing systems that interact and provide access to diverse information for a great number of users while governed by the principles of openness,[48] effectiveness,[49] flexibility,[50] sustainability[51] and reliability.[52]

Overall, GEOSS was implemented as a global hub for EO allowing to collect relevant data and information and is currently regarded as a platform aimed at "easing discovery and access to the many datasets made available by national and international organizations" (Boldrini, Nativi, Hradec, Santoro, Mazzeti, and Craglia 2023, 716). Therefore, taking into account the undisputable success and utility of this initiative, the question arises as to whether it would be opportune to propose conditions and limits to massive (AI) data gathering from space – and to regulate and respond to what precise sorts of threats – as an *a priori* rule.

3.2 Threats Posed by AI in the Context of RS: Optimization Without any Limits

A key feature to the RS activities as carried out today is that advances in spatial resolution have been coupled with advances in image processing (i.e., through AI data processing algorithms) providing new research possibilities. The continued progress in satellite RS and the initiative of building next-

[47] More info on GEO and GEOSS available on : https://www.earthobservations.org/geo_community.php

[48] Openness: The architecture shall be open and allow interoperability among multiple stakeholders to contribute their data and services and add value to the GEOSS, GEO Strategic Plan 2016-2025: Implementing GEOSS, in https://www.earthobservations.org/documents/open_eo_data/GEO_Strategic_Plan_2016_2025_Implementing_GEOSS_Reference_Document.pdf.

[49] Effectiveness: The architecture shall be capable of sufficient performance in all areas to support the Strategic Objectives of GEO in the implementation of GEOSS (*ibidem*).

[50] Flexibility: The architecture shall be scalable, to meet current and future requirements; flexible, to meet a broad variety and scale of GEOSS requirements; and agile, to be able to provide solutions across GEOSS with minimum tailoring and re-architecture (*ibidem*).

[51] Sustainability: The architecture shall provide the solution for the near and long term in a cost-efficient manner, as technology, policies, and data providers change (*ibidem*).

[52] Reliability: The architecture shall be robust and allow GEOSS to meet users' expectations and effectively manage risk (*ibidem*).

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generation intelligent satellites increased the resolution of remote sensing satellite data in the spatial, spectral and time dimension (Zhang, Wu, Zhao, Chanussot, Hong, Yao, and Gao 2023, 1814). At the same time, the satellite image quality and precision[53] has strongly increased, along with the speed of real-time analysis.

Given this background, policy makers should take into account concerns associated with the use of AI systems, in general. More precisely, space scientists and policy makers must consider that the multifaceted nature of AI has caused great controversy and confusion among scholars – e.g., in the fields of computer science, philosophy, mathematics – regarding the technology's clear nature, definition and scope. Thus, the prevailing view is that AI may be divided into four broad categories, based on the fundamental differentiation between systems able to think or act like humans, from those able to think or act rationally (Kok, Boers, Kosters, and Van der Putten 2009, 1-5; Hassani, Silva, Unger, TajMazinani, and Mac Feely 2020, 146-147)[54]. However, a more practical approach suggests distinguishing AI systems taking only into account the algorithms being used, in light of their capacity to replace the human brain; in this case, AI devices are divided into three broad categories, that is, Narrow Intelligence, Human level Artificial Intelligence and Super-intelligence (Fourtane, 2019).

Hence, according to the latter approach, the first category (i.e., Narrow Intelligence) is the one including most AI systems today, as these are mainly devices able to directly provide us with the solution of a specific problem, such as when they are programmed to recognize the biometric data of an individual, or his/her face. In theory, using this category of smart devices – which are significantly different from conventional computer programs, given their ability to learn – can bring major benefits for the national security

[53] Von der Dunk (2013, 243-244) argues that the resolution of very high resolution (VHR) data freely available on the commercial markets has recently dipped below the 0,5 m mark, and continues to evolve "downwards".
[54] For the Turing approach to "intelligent", proposed in 1950; see analytically Ertel (2017, 4).

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policy, and allow to face, in a timely fashion, threats against States and citizens (e.g., terrorism). For comparison purposes, it may be noted that the second category (i.e., Human level Artificial Intelligence) refers to devices with human-like intelligence capabilities, such as those able to understand different languages in oral communication, promote a dialogue and develop specific thoughts; however, the greatest interest is currently focused on devices of the third category (i.e., Super-intelligence) which are still under development (according to scientists, Super-intelligence will be able to significantly exceed human mental abilities, discover new scientific methods and create new products and ideas). Therefore, up until now, it is Narrow Intelligence which is mainly being used in the context of space activity and exploration as well, as it is shown by SpaceX using (narrow) AI to find patterns in satellites, planets and space debris in order to keep their satellites safe in space (Lian 2022).

It is undisputable that AI used in RS will allow to strongly optimize information-gathering space technology, and that such a trend will be even more pronounced in the future. Nonetheless, it also appears that the combined use of RS technologies and AI data gathering techniques may infringe on specific privacy rights, such as information privacy and location privacy: more precisely, the first one "rests on the premise that information about ourselves is something over which individuals may exercise autonomy" (Maniadaki, Papathanasopoulos, Mitrou, and Maria 2021, 3), while the second one refers to "the right of individuals to move in their "home" and other public or semi-public places without being identified, tracked or monitored" (*ibidem*). In particular, the concern that the use of AI data processing combined with satellite imaging and VHR may pose threats to individual privacy is based on the fact that such tools can allow for large-scale facial recognition-based identification and unprecedented public surveillance, whether by a governmental or by private entities (Gal, Santos, Rapp, Markovich, and Van der Torre 2020, 14-17).

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From this particular angle, it is feared that the uncontrolled use of AI devices could – intentionally or unintentionally – cause significant risks to the safety of citizens and States, such as by putting in danger persons' privacy or even the public interest, independently of the sector in which they are being exploited.[55] Put differently, the challenge is now to find a way forward which will strike a balance between on the one hand technological development and high-resolution massive data gathering (which remains the clear direction to follow, in the context of globalization), and individual's legal and ethical rights to privacy (Coffer 2020, 6453-6454) on the other hand.

4. Globalization, (AI) Data Gathering, Privacy Protection: Potential Solutions

Undoubtedly, activities pertaining to massive (AI) data gathering are enhanced by the accelerating pace of globalization and facilitated[56] by the use of space technology. Indeed, cross-border data flows are the hallmarks of the 21stcentury globalization[57] as, according to IDC, the Global Datasphere will grow from 33 zettabytes in 2018 to 175 zettabytes by 2025 (Reinsel, Gantz, and Rydning 2018, 3). Literally, massive data gathering is both a result of globalization, and a necessary tool for the improvement of technology – which is, as initially mentioned, at the heart of the globalization process –, such as deep learning applications and data-centric AI (Whang, Roh, Song, and Lee 2023, 794-795).

In this context, AI, machine learning methods and algorithms used in satellites seem to provide a promising solution which, however, raises a

[55] What is artificial intelligence and how is it used?, in *European Parliament website* (2020), https://www.europarl.europa.eu/news/en/headlines/society/20200827STO85804/what-is-artificial-intelligence-and-how-is-it-used.
[56]For example, some authors support that: "a new wave of commercial satellites imaging companies is collecting upwards of 100 terabytes of data per day" (Monhey 2020). Meanwhile, NASA's Earth science data archive was around 40 petabytes in 2021 and is expected to hold more than 245 of data by 2025. More info available on https://www.jpl.nasa.gov/news/nasa-turns-to-the-cloud-for-help-with-next-generation-earth-missions.
[57]Cp. supra note 5.

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number of concerns. Effectively, as analyzed above, the application of data protection laws and regulations for data gathering and processing through AI in outer space remains a challenge, given that the use of AI in space allows to escape the limitations of territoriality. At the same time, such regulation seems to be necessary, due to the potential risks posed by AI technology, especially taking into account the fact that data gathering through the use of advanced-technology satellites is not any more a state's monopoly (and is therefore beyond the strict control of States[58]).

By way of illustration, two of the most significant private satellite companies are Digital Globe and Spot Image; these commercial entities use their remote sensing satellites to gather various sorts of data – i.e., images, location data and real-time surveillance data – and then sell that satellite data to both the private sector and governments (Mckenna, Gaudion, and Evans 2019,612). Along with that, it is clear that all kinds of small satellites shall be increasingly used in the next years for EO and communication (Larsen 2017, 276-279), and that such development will facilitate an even greater involvement of private space actors.

Therefore, against the background of an increasing interdependence between globalization – requiring globalized markets and communication – and the massive collection and processing of data, as currently encouraged by cutting-edge space technologies, the question arises as to whether limits should be set for the conduct of such activity and, in case, what kind of limits.

As regards the first question, it is beyond doubt that the protection of personal data and privacy in the context of new technologies has become a key priority for most countries. Hence, the most probable scenario is that governments shall be challenged to ensure that their policies and legislation will ensure a minimum level of protection of personal data, even when these

[58] Private entities gather huge volumes of personal data and data breaches affecting millions of users are far too common. For example, a data breach from Yahhoo in 2013 had an impact on 3 billion accounts and two recent data breaches from Linkedin and Facebook (in 2021 and 2019) had an impact on 700 million and 533 million users (Hill and Swinhoe 2022).

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are collected via space technology. However, the framework in which this protection may be achieved remains to be defined.

As a response, a few approaches (i.e., in reference to the second question) could be discussed; in particular, these could be classified into two categories: (4.1) application of existing legal tools to massive (AI) data gathering form space, and (4.2) adoption of a new legal instrument, taking into account the particular nature and the dynamics of said activity.

4.1 Use of Existing Instruments to Regulate (AI) Data Gathering from Space

As mentioned above, one of the key features of the regime applying to space activities is the freedom to use and exploit space for peaceful reasons, established as a principle first in the U.N. General Assembly Resolution 1721 (XVI) adopted in 1961,[59] and reiterated in the OST. Namely, Art. 1 (b) of the Resolution clearly noted that: "Outer space and celestial bodies *are free for exploration and use* by all states in conformity with international law …". On this basis, any massive (AI) space data gathering activities are *ab initio* lawfully conducted under international space law, provided they are carried out for peaceful purposes.

Seen form this angle, it additionally appears that massive (AI) data gathering is not precisely addressed by Resolution 1721, the OST or by international space law in general, leaving individuals unprotected from potential risks or harms that could result from this activity. In truth, the OST, its follow-on treaties developed through COPUOS and Res. 41/65 on the Principles on Remote Sensing Activity, do not provide any direct or indirect limitation to the generation and distribution of satellite data (including VHR) specifically addressing possible concerns of individuals or companies' privacy (Von der Dunk 2013, 243-244). However, some kind of protection could still be granted based on some general provision of the OST; therefore, a first solution would be to ensure the legal protection of individuals' privacy by applying to AI data collection in outer space some specific rules of the

[59] RES 1721 (XVI), International Co-operation in the Peaceful Uses of Outer Space.

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OST. This option could be grounded on two different approaches and legal bases, as developed below.

4.1.1 Application of National Laws on the Basis of Art. VIII of the OST

According to Art. VIII of the OST, each State of Registry shall retain "jurisdiction and control" over their space objects and "over any personnel thereof, while in outer space or on a celestial body".[60] On this basis, limits established in the national laws of the State of Registry could be imposed on massive (AI) data gathering carried out onboard space objects. In other words, States will be able to apply *mutatis mutandis* the same limits as the ones that were initially adopted in their domestic laws to regulate massive (AI) data gathering activities conducted in or *via* outer space; still, said national rules will apply in space only provided a State qualifies as the State of Registry.

Notwithstanding, in this case, all the weaknesses in the national laws will be – by the same token – transposed in the new context. To just take one example, there is no consensus in the legal literature on a definition of the right to privacy.[61] According to some experts, privacy should be considered as "the right to be le(f)t alone" (Warren and Brandeis 1890, 193-195), whereas others define said concept as "the control over when and by whom the various parts of us can be sensed by others" (Parker 1974, 281). Thus, divergences from one legal system to another in the interpretation of concepts and terms may be detrimental to homogeneity and legal certainty, while entailing a risk for forum-shopping (in this case, "State of Registry-shopping"). Contrary to that, international space law aims at establishing uniformity to enable the conduct of space activity, to guarantee the protection of fundamental values and to encourage collaboration between States and

[60] States of Registry are defined in line with Art. I (c) of the Registration Convention, as "a launching State on whose registry a space object is carried in accordance with article II"; Art. II para. 1 of the Registration Convention clarifies that 'the launching State shall register the space objet".
[61] Art. 12, Universal Declaration of Human Rights, Paris, UN GA Res. 217 A (III) of 10 December 1948. A/RES/217; Art. 17 International Covenant on Civil and Political Rights, New York, done 19 December 1966, entered into force 23 March 1976.

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actors. As a result, applying national protective measures on the basis of Art. VIII of the OST would not only undermine said goal of uniformity but the core spirit of international space law, especially considering the uncertainty caused by divergences in the interpretation of legal concepts.

As an alternative, a broad interpretation of the initial OST provisions (that is Art. I and III) could be used to introduce the idea that all space activities must be conducted in accordance with international law, including the protection of privacy and personal data.

4.1.2 Broad Interpretation of OST Articles: Applicability of International Law

On the basis of the OST, Art. I[62] and Art. III,[63] all space activities must be carried out in accordance with international law *lato sensu*; the obligation applies to both governmental and non-governmental entities (i.e., it applies directly to States and State operators, as they are bound by international law; and indirectly to non-State operators, given that Art. VI of the OST stipulates that all kinds of space activities are imputed to States and involve direct State responsibility)[64]. However, neither the OST nor the other treaties of international (space) law may literally be used for the purpose of data protection; in truth, said instruments were drafted long before the time of data and data markets, and they did not even begin to address the challenge of the commercial use of outer space for *inter alia* data gathering and/or data processing (Zoltick and Colgate 2019, 9-10). Hence, the question arises of whether data protection rules could be regarded as part of international law,

[62] OST, Art. I para. 2: "Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law".
[63] OST, Art. III: "States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law".
[64] States usually ensure that private space operators abide by international space law treaties, so as not to be held responsible for any internationally wrongful act of said operators.

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and be in an indirect way binding upon entities which are collecting data from outer space pursuant to the OST, Art. I and III, and/or Art. VI.

In response, it must first be highlighted that – despite its importance – there is not yet any international legal instrument to address the issue of private data protection. Nonetheless, as mentioned above, regional data privacy laws were adopted and are applicable within specific boundaries, such as the EU General Data Protection Regulation (GDPR)[65]. Interestingly, data protection laws usually include specific provisions allowing to apply the rules that they adopt to non-residents on the basis of extraterritorial applicability provisions. By way of illustration, Art. 3 of Brazil's LGPD states that: "This Law applies to any processing operation carried out by a natural person or a legal entity of either public or private law, irrespective of the means, the country in which its headquarter is located or the country where the data are located, provided that: (i) the processing operation is carried out in the national territory; (ii) the processing activity is aimed at the offering or provision of goods or services, or at the processing of data of individuals located on the national territory; or (iii) the personal data being processed were collected in the national territory. Similarly, Art. 3 (2) of the GPDR reads that 'this regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behavior as far as their behavior takes place within the Union".[66] Hence, Art. 3(2) increases the scope of EU data protection rules in a unilateral way, "and to a greater extent than any other

[65] Furthermore, following enforcement of the GPDR, some other countries adopted similar laws, such as Brazil (General Data Protection Law – LGPD), South Africa (Protection of Personal Information - POPIA) and Canada (Personal Information Protection and Electronic Documents Act – PIPEDA). More info available on: https://securiti.ai/data-privacy-laws.
[66] According to Recital 24 of the GPDR: "The processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union should also be subject to this Regulation when it is related to the monitoring of the behavior of such data subjects in so far as their behavior takes place within the Union".

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jurisdiction in the world has done until now" (Azzi 2018, 130). Be that as it may, this is far from being rules of international law that could apply to space activity on the basis of the OST provisions mentioned above.

Alternatively, the obligation to take into account the protection of individuals' privacy while conducting data gathering within the context of space activity could be inferred from Art. VII of the OST; said provision stipulates that "Each State Party (…) that launches or procures the launching of an object (…) is internationally liable for *damage* to another State Party (…) or to its natural or juridical persons by such object (…) on the Earth, in air space or in outer space".[67] Hence, a country could be held liable to another one, in case an object launched from the first country resulted in a data breach of "juridical persons" of the second one; still, States (and space operators) should only be responsible in the event that the data breach occurs by launching an object into space (Zoltick and Colgate 2019, 8). From a practical perspective, such a situation is for the time being more or less unlikely.[68]

In addition to that, a major downside of approaches based on a broad interpretation of specific OST or other treaties articles, is that they lack efficient enforcement mechanisms (Isnardi 2020, 512-515). Effectively, international space law does not provide a dispute resolution body, apart from the Liability Convention (1972) and the Registration Convention (1976) creating enforcement authorities with a very specific competence.

By way of illustration, the Liability Convention established in Art. IX to Art. XX a dispute settlement system comprising both a diplomatic[69] and an

[67] Emphasis added.
[68] "The proliferation of emerging digital technologies is expected to render more relevant/significant in the future types of material or non-material damage (e.g., economic losses or damage to or destruction of data that could be considered a property loss) which are considered currently as falling outside the restrictive scope of recoverable damage under the Liability Convention" (Kyriakopoulos, Pazartzis, Koskina, and Bourcha, 2021).
[69] Liability Convention of 1972, Art. IX: "A claim for compensation for damage shall be presented to a launching State through diplomatic channels. If a State does not maintain diplomatic relations with the launching State concerned, it may request another State to present its claim".

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arbitration[70] phase, before a Claims Commission; this mechanism has been tested once in the Cosmos 954 incident (Beck 2009, 15). However, as no enforcement procedure was established by the Liability Convention – i.e., the Claims Commission only has a quasi-judicial power;[71] according to Art. XIX (2)[72] its decisions shall be final and binding only if the parties have agreed so[73] – the implementation of its decisions depends to a large extent on political pressure and criticism. On this basis, said mechanism was regarded to be ineffective and widely criticized (Gomez 2012); it may therefore not be considered to be a viable judicial system that could be furthermore applied to novel issues.

Overall, there is no doubt that approaches based on the possible application of existing instruments are both interesting and defendable, but they also have a significant weakness which lies in the fact that all treaties of international space law were adopted for a general purpose and they do not seem to be well adapted to regulate massive (AI) data collection from space, for all the reasons explained above. At the same time, there are concerns that the use of AI may be problematic (e.g., abusive) *per se*, due to the opaque nature of the systems leading to an inability for an individual to understand how the results of AI processes came about, also referred to as the black box AI problem (Blasch, Sung, Nguyen, Daniel, and Mason 2019, 2).

Hence, as the reliance on AI systems is regarded as inherently risky – which is illustrated by the fact that States have already regulated many of its uses – a different possible approach would be to take into account that AI is

[70] Liability Convention of 1972, Art. XIV: "If no settlement of a claim is arrived at through diplomatic negotiations as provided for in Article IX, within one year (…), the parties concerned shall establish a Claims Commission at the request of either party".
[71] Namely, the Claims Commission's does not have the same authority as a judicial court (Isnardi 2020, 513-514).
[72]Liability Convention of 1972, Art. XIX (2): "The decision of the Commission shall be final and binding if the parties have so agreed; otherwise, the Commission shall render a final and recommendatory award, which the parties shall consider in good faith".
[73] Hence, this alternative dispute resolution method cannot be considered as "genuine arbitration" since the binding effect of the award depends on the common will of the parties. One of the fundamental distinctive features of an arbitration award is that is binding to the parties, so they are not at liberty to accept or reject it (Ikeyi and Maduka 2014, 328).

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a topic that really needs specific attention. Thus, it may be argued that a coordinated and unified approach is required, able to potentially result in the adoption of a new instrument regulating massive (AI) data collection precisely in case such activity is carried out in/from space.

4.2 A New Instrument that Would be Applicable to Data Gathering From Space

It is only logical to argue that the scientific developments in the field of AI should give fresh impetus to international negotiations, aimed at the development of more specific and well-adapted rules of international law applying precisely to massive (AI) data gathering from space. In particular, States could agree to adopt a new agreement, to regulate the scope and limitations of such activity while insisting on proper protection against abusive collection and processing of private data. Such agreement could be finalized in a treaty, perhaps similar to the Nuclear Test Ban Treaty[74] prohibiting the conduct of nuclear explosions in space.

The rationale for adopting a specific treaty would be that most legal instruments in place do not address the topic of private data protection, in case such activity is conducted in or via outer space. By way of illustration, Chapter 5 of the GPDR entitled "[t]ransfers of personal data to third countries or international organizations" remains silent with respect to transfers of data outside of the Earth (Zoltick and Colgate 2019, 9); as a result, neither public nor private space operators may be subject to the GPDR mandatory provisions in case of transfers of personal data to or via outer space. Put differently, a new regulatory scheme seems to be required to fill this type of gap (*ibidem*).

Such a solution would entail uniformity and legal certainty, however under the condition that States would effectively ratify it. In truth, "no additional

[74] Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (Partial Test Ban Treaty - PTBT), 5 August 1963, UNTS 480 (43) (EIF 10 October 1963), Art. I.

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treaties have been concluded – through the UNCOPUOS or other similar fora – in international space law, since the Moon Agreement was adopted in 1979; in a world where competition for space matters is growing, soft law guidelines and codes of conduct have proven more adequate".[75] Be that as it may, taking into account the wide-scale adoption of the Paris Agreement signed in 2015, whereby all member States committed to taking action on climate change due to the growing public awareness of this issue, the possibility of adopting a treaty reflecting an international consensus on the acceptable uses of AI in the context of space data gathering, and abiding by it, should not be *a priori* excluded. Otherwise, a non-binding instrument (namely, based on a bottom-up initiative) comparable to the guidelines on space debris mitigation could be considered (Stokes, Akahoshi, Bonnal, Destefanis, Gu, Kato, Kutomanov, LaCroix, Lemmens, Lohvynenko, Oltrogge, Omaly, Opiela, Quan, Sato, Sorge, and Tang 2020, 326-328); indeed, the guidelines – first adopted by space operators within the IADC[76] – are now largely applied and endorsed by the ITU (Perek 2004, 223-224), due to their efficiency and practical feasibility.

In essence, the principal issue to address would be the fact that collecting sensitive data by AI in/via outer space does not – technically – require any consent from the subject concerned. From this perspective, some scholars argue that massive (AI) data collection based on the use of high-resolution satellite imagery could pave the way for mass surveillance and result in the abolition of autonomy in the new digital world (Franckiewicz 2023). Thus, "resolving these many challenging legal questions will require creative and flexible solutions as soon as possible (Jasentuliyana 2001, 21)".[77]

Taking these points into account, a new regulatory framework should build upon the existing principles enshrined in data protection laws, to ensure that

[75] There has been a strong tendency towards the development of soft law guidelines and "codes of conduct" for space-related matters, notwithstanding the inherent risks that this (potentially) brings of greater "on-compliance" (Jakhu and Freeland 2016).
[76] Inter-Agency Space Debris Coordination Committee (IADC). IADC space debris mitigation guidelines, IADC-02-01, Revision 2, March 2020.
[77] In the same vein, see also Koskina and Angelopoulou (2022, 39).

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any development and use of AI is compatible with the protection and fulfillment of fundamental human capacities and goals (Montreal Declaration, 2018: see Soroka and Kurkova 2019, 137); alternatively, AI systems must be used in line with the laws ensuring the effective application of fundamental rights, such as the rights to privacy and data protection (e.g., EU principles of proportionality). This, in conjunction with the fact that fundamental protective principles – e.g., the classification rules for high-risk AI systems as proposed by the European Commission[78] and the fairness and transparency (Walmsley 2021, 586-589) of AI data processing applications – should be recognized, and priority given to an effective (that is, human) control of AI and AI uses. Indeed, pursuant to Art. 14 of the Commission's proposal, "high-risk AI systems shall be designed and developed in such a way, including with appropriate human-machine interface tools, that they can be effectively overseen by natural persons during the period in which the AI system is in use". In line with this, it is noteworthy that the new Greek legal framework on emerging information and communication technologies[79] establishes the obligation of public authorities to disclose information about the commencement of operation and the operating parameters of the AI system as well as on the decisions taken through AI.[80]

In any case, the establishment of a law enforcement mechanism (of a quasi-judicial nature, or even based on arbitration) would be necessary under a new international treaty in order to ensure the protection of public and private rights via final and binding awards. Overall, the final aim should be to ensure the use of outer space in a manner that would be respectful of both stakeholders' interests and fundamental human rights.

[78] COM/2021/206, Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206.
[79] Greek Law nº 4961/2022 "on emerging information and communication technologies, the reinforcing of digital governance and other provisions" (GG 146/A/27-07-2022).
[80] Art. 6 of Greek Law nº 4961/2022.

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5. Conclusive Remarks

As the foregoing analysis suggests, the extensive use of artificial intelligence techniques in the context of data gathering and processing in/from space may be regarded as one of the greatest challenges facing humanity today. Hence, there is an urgent need to strike a balance between the development of (AI) data collection technology and the protection of the fundamental rights of both individuals and States, especially given the fact that technologies – such as AI – and innovation are the most dynamic force behind globalization.

In the era of digital globalization, cross-border data flows coupled with the distribution of personal data derivatives create more and more complex issues. On this basis, the first step would be to strengthen transnational cooperation under the auspices of the United Nations in order to foster the adoption of commonly accepted principles for AI data gathering in space; special attention should be given to the role of developing countries with the aim to gradually reduce the technological gap between them and the developed economies. Still, a second step should be the adoption of a new international agreement with well adapted provisions, coupled with an efficient dispute resolution mechanism eventually building upon existing data protection laws (e.g., the GPDR may be a useful tool for the development of such a framework).

Be that as it may, basic concepts like the 'informed consent' by individuals and, the principle of proportionality and transparency in the use of artificial intelligence must be the basis of such a new framework. Nevertheless, in the event that including such rules as those ensuring the data subject's consent or AI transparence proves impossible in case of massive (AI) data gathering conducted in/from space, the suggested framework should incorporate human control over said the way AI systems are used in order to provide a minimum level of protection.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Global Governance: *Adjustment* or *Reform* of the International Monetary System?

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ABSTRACT

Global public goods and the contrast to global public bads require a dramatic change in the international monetary system, enforcement capacity, democratic legitimation, the return to regionalism and multilateralism. Pending the emergence of a more equitable global reserve and payments system, an increased use of the Special Drawing Rights, channeled through Multilateral Development Banks, may help managing the transition towards the provision of such global public goods. This would also provide a guidance for the reduction of Central Banks' balance sheets, the financialization of the economy and an increase of real investment, thus anchoring the whole international economy to a less vulnerable and volatile monetary structure.

Keywords: global public goods, international monetary system, special drawing rights, multilateral development banks

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1. Introduction

There are a few doubts that climate change is currently widely recognized as a global public bad. Awareness is also rising as concerns the fact that, without concerted action by all humankind, any attempt to stop global warming and reducing lethal carbon emissions cannot effectively affect the whole planet.

The issue we are dealing with in this note is if the current architecture of the international economic and monetary governance is fit for providing global public goods and contrast global public bads. I anticipate that the answer is negative, but that there are a few steps that may be taken in the coming years to avoid wasting precious time for human survival.

Technicalities concerning, for example, the current status of reserve assets for SDRs can be rather easily overcome by political consensual decisions, and the negative impact of currently high interest rates on SDRs net positions can be reduced by a simple choice of the executive board of the IMF, as was suggested by Joe Stiglitz at the Emerging Market Forum meeting in Marrakech in October 2023. Some of these changes should take place before Multilateral Development Banks can intervene, but we believe that the current global political situation of increasing conflict should suggest that a consensus on a peaceful evolution might be found, the alternative being a dramatic change and fragmentation of the international economic and financial system that would hinder growth and progress.

I will start illustrating the problem of collective action at the international level and provide an overview of the evolution of attempts to reform the system (first section). I will then explain the potential role of (a modified version of) the Special Drawing Rights (SDR) in boosting investments related to the provision of such goods (second section); underline the opportunity given by the need to reduce the width of Central Banks' balance sheets to divert resources from short-term speculation to long-term investment (third section); before briefly illustrating that an interesting instrument for this,

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pending a major reform of the international monetary system, is an increased use of Multilateral Development Banks through which SDRs might be channeled (forth section).

2. A Common Commitment for Global Public Goods

The global nature of issues related to climate change (and other public goods/bads) and the problems associated with their production are well described in the economic literature (Kaul et al., 1999). Public goods are usually underprovided: free riders are likely to emerge each time externalities are not fully internalized, and social marginal benefits/costs do not reflect private marginal benefits/costs (Pigou, 1920).

While within nation-States (that match the administrative dimension in which policies can be enforced) this process of free riding can be effectively reduced, the production of transnational (public and/or merit) goods clashes with the usual problem of collective action (Sandler, 1998). As unanimity or consensual decision is the rule in supranational decision-making, collective choices concerning the provision of global goods ends up being set at sub-optimal level (Sen, 1970).

Hence the question whether the current architecture of the international economic, financial, and political governance is fit for the provision of the necessary amount of global public goods. And, in case it is not, whether such architecture requires only small adjustments or needs a dramatic change in nature, scope, and structure. This note, as I anticipated, suggests that the latter is the correct answer, although the path towards reform is neither easy nor plausible in the current geopolitical framework; some steps to manage the transition towards such goal can nevertheless be effectively implemented.

This issue is not new. It was raised several times in the past, since the emergence of widespread awareness of the global (or transnational) nature of some public goods, such as: resource constraints on growth in the early 1970s (Tinbergen, 1976) and sustainability issues since the late 1980s (Brundtland,

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1987); and financial stability after the 2007-08 financial crisis. The covid-related emergency further strengthened the perception that a wide-range of public goods are global in nature. During the financial crisis, demands for a major reform of the international economic and financial governance forcefully emerged in public debate and global institutions (Zhou, 2009).

At the G20 in London in April 2009 pressures were mounting for convening a Bretton Woods 2 conference, to reshape the balance of powers and redesign the governance of the international monetary system (IMS). On September 21, 2009, the UN Stiglitz Commission published its Report on Reforms of the International Monetary and Financial System suggesting new regulatory global institutions and a dramatic change of the nature of the economic and financial global framework.

In the meanwhile, suggestions were made for an increasing role of the IMF's multicurrency basket unit of account, such as an amended SDR to reflect the evolving balance of economic power in the world. The debate and proposals soon faded away, although pressures led to the insertion of the Chinese renminbi in the SDR's basket. The world had to wait until the covid pandemic to see the IMF issue the unprecedented amount of $650bn in SDRs in August 2021, six months before the Russian invasion of Ukraine halted any further attempt towards multilateralism.

Although the conflict froze concrete proposals towards multilateral governance of the international economic and political system, a renewed bilateral confrontation clashes against the need for global collective action and, sooner or later, a profound revision of the international system is needed. In this framework, we suggest that SDRs are a reasonable instrument to relieve multilateralism, especially if used to finance development and redistribution projects worldwide.

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3. A Potential Role of the SDRs

The SDRs were the result of an intellectual struggle that lasted for a few years during the 1960s. Thanks to initiatives led by Machlup, Fellner and Triffin (Connell, 2014) several groups of academics and policymakers reflected on possible reforms of the IMS in order to escape the so-called Triffin dilemma: the fact that international liquidity cannot be provided uniquely by an hegemonic country because, when demands for liquidity increase, the only way to provide it is through domestic and foreign payments unbalance in the pivot country (the USA), thus leading to the end of convertibility (Triffin, 1960).

The proposal to issue SDRs was therefore meant to supply a new, multilateral instrument for international liquidity. SDRs were indeed first issued between 1970 and 1972 (during the historical phase that brought to the end of the Bretton Woods regime and towards flexible exchange rates) precisely to provide non-gold (whose supply is inelastic) and non-dollar (whose extreme supply elasticity undermines the credibility of the system) liquidity to the international economic system. US hegemonic interests determined, until recently, an under-provision of SDRs, a typical example being the failed attempt by the then Managing Director of the IMF, Michel Camdessus (2014: 185-192) to issue some tenth billion dollars in SDRs in 1994.

SDRs are a basket currency, now including (differently weighted) five major currencies: US dollar, euro, renminbi, yen, and pound sterling. SDRs are issued by the IMF and distributed to each country following the capital key rule: each country receives a share of the issue depending on its share in the IMF capital. This means that the largest recipient of SDR is the USA, followed by other industrialized countries, implying that unless some redistributive measure is taken, this currency cannot be used to promote development in underdeveloped or developing countries. But it can be used to promote the production of global public goods, assuming that the most

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advanced economies contribute to their provision more than others.

When they were designed, during the Sixties, SDRs were thought of (also) as a source of potential financing to the economy, not as a mere reserve asset, and as a potential anchor to the international monetary system. Their current nature is still that of a reserve asset; but after the Covid a debate emerged as to the means to transform this money into spendable liquidity, not just as mere settler of international payments.

In August 2021 this debate culminated in the issue of $650bn of SDRs and suggestions emerged as to the ways to use this money to support development, increase the resilience of financial safety nets in specific areas, etc. Many countries in fact do not need balance of payments assistance and would simply keep SDRs as a reserve asset, without letting them circulate in the economy, which is economically inefficient. Hence the emergence of proposals to channel such SDRs for reducing development gaps and asymmetries, and promoting sustainable goals (Plant, 2021; Wolf, 2021; Masini, 2022).

One further step for their greater use would imply establishing a multilateral clearing for SDR operations, as was the case with the Bank for International Settlements (BIS) for ECUs. Again, it could be the BIS to take up the responsibility of this. This would pave the way to the private use of SDRs, assuming they are made convertible into claims held by central and private banks.

Let me add one remark on global liquidity and safe assets. We are living in an era of excess saving over investment, and these resources are channeled towards the only safe asset available worldwide: the US Treasury bond. This is happening also in these very years when the US GDP has been decreasing in global terms. This might eventually be leading to the impossibility for the US T-bond to keep pace with safe asset demand, the only viable alternative being euro-denominated T-bonds, irrespective of attempts by the BRICS to create alternative solutions. Nevertheless, euro-denominated T-bonds still represent only a tiny share of global liquidity and meet ideological resistance

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to EU indebtedness. The only viable alternative to the dollar and euro is an increasing role of the SDRs, so as to create some form of – flexible, as SDRs can be both issued and withdrawn – debt for the global economy, directed to the provision of global public goods.

4. From Financial Speculation to Investment

One of the most pressing worries of economists and policymakers in the last years has been understanding why Central Banks (CBs) seemed unable to counter undesired price dynamics, both deflation and inflation. The liquidity trap during the years of the quantitative easing before 2020 and the current inability to push inflation down seem to weaken the credibility of monetary policy as an effective policy tool.

Quantitative easing only resulted in an increasing financialization of the economy and an explosion of Central Banks balance sheets (Ghymers, 2021). Most commentators underline how the rush to the bottom of interest rates, even negative in some cases, pushed markets to abandon long-term investment (with promising but late-coming returns), and prefer high-yield short-term speculation (de Larosiere, 2022). In turn, this decreased aggregate demand, thus requiring new monetary expansions in the attempt to ignite growth. In a vicious circle that seemed to be unstoppable.

Following Wicksell's logic, market rates below the natural ones resulted in overinvestment; more accurately, in misallocated investment in hot money, until and (mostly) exogenous events took place. Skyrocketing energy prices and upset global value chains, exacerbated by the Russian invasion of Ukraine, made inflation suddenly rise. Accordingly, Central Banks were forced to raise interest rates, thus further weakening any perspective for long-term investment in the real economy and dampening projects with long-term returns on investment.

There are several flaws in this – today dominant – logic. The first is that only in a neoclassical perspective interest rates do play a significant role in

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investment decisions, while in a Keynesian perspective they depend on the marginal efficiency of capital: a highly unstable and unpredictable, subjective assessment by entrepreneurs of the relative role of the cost of debt and cash flows deriving from returns on investments. If future demand is high and stable, companies do invest, despite the (high) absolute level of the cost of money. As a counterfactual testimony of this Pangestu, Pazarbasioglu and Stern (2023) observed that despite declining interest rates in the last two decades, real/productive investments dropped.

When uncertainty about the future prevails, a portfolio reflecting subjective propensity to balance risk choosing zero-yield risk-free bonds with high-yield speculative assets is preferred to long-term productive projects. Declining investment in the real economy, especially in Europe, reflected the endogenous flaws of its economic and strategic governance, that relies on unanimity decision-making processes, therefore uncoherent with the other major global actors. Had a supranational European budget existed, it would presumably have followed the USA and other regional aggregates in implementing strategic investments, thus reducing the fragility of both the real and financial sectors.

This leads to the second flaw, which concerns the role of fiscal policy, usually neglected in debates on the effectiveness of monetary policy. Monetary policy may fail in pushing to produce specific supranational (merit) goods, but an ad-hoc policy mix of coordinated fiscal and monetary policy might be quite effective. Again, the governance of the EU is uncoherent with the need to take timely and efficient decisions. Is there any way out, both at the European and global level? We suggest that a special role, in this process, may be played by Multilateral Development Banks (MDBs).

5. Managing the Transition: The Role of MDBs

The provision of a few global public goods is key for the survival of humankind. And cannot be waiting for a new institutional architecture that

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implies a deep revision of the geopolitical balance of power in the world. Managing the transition towards such goals becomes crucial.

One key actor that may help revitalizing multilateralism, at the same time strengthening regional ties and promoting long-term development investments, are MDBs (Andrews, 2021).

Considering that they are financial institutions, whose shareholders are groups of nation States, MDBs do not directly represent global choices; but they are particularly fit for a few steps that might be taken immediately in that direction.

Firstly, they are all prescribed holders of SDRs. The IMF recently added five more MDBs to the list of institutions that are allowed to hold and deal with SDRs, making them the most powerful agents in a transition towards greater use of such currency in development projects. Changing also the perspective concerning the global economic and financial architecture in a multilayered structure with the IMF at the central level and MDBs at regional level.

Second, they are precisely devoted to finance investments related to real-economy projects, such as infrastructure. From this point of view, they can ensure the landing of resources to the real economy. Third, they can mobilize and attract private capitals, thanks to their solidity (being assisted by national governments for their collateral) and the return on investment that investment projects ensure, providing also a potentially efficient mediation between State intervention and market forces.

In development projects, as well as in regional integration dynamics (Georgiou, 2022), private agents and their interests do represent a key element for the advancement of both. MDBs can provide the venue for such virtuous synergies to emerge between market, bottom-up pressures, and governmental, top-down choices.

Forth, being mostly characterized by geographical proximity, they allow for a better and more effective control, without the need to resort to strict and explicit conditionality rules, thus being more acceptable as a source of

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financing and more efficient in tackling regional spillover effects that usually characterize development projects.

6. Concluding Remarks

The IMS needs profound reforms to fix its shortcomings and face the current and forthcoming global challenges, that require a much more efficient structure than only relying on loose international cooperation. Enforcement and democratic legitimacy are urgent. As is manifest once again, once conflicts prevail over diplomacy, global public goods cannot be provided, and the world cannot afford delays in many areas, such as the struggle against climate change.

Pending a more radical reform of the IMS, we highlighted how an increased role of the SDRs as international money could help rescue multilateralization against bilateral confrontation. We also suggested that further channeling SDRs to MDBs might help strengthening regional integration and investments in the real economy, thus also providing a guidance for the sustainability of the increased CBs balance sheets.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Introduction: Looking Forward

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EDITORIAL NOTE

Due to the introductory nature of the manuscript, this paper has not been subjected to the double blind peer-review process.

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The current issue marks the introduction of a dedicated section on supranational democracy—an idea rooted in legal, philosophical, and political thought. This concept suggests that democracy can extend beyond the national dimension, transcending borders to manifest itself in a broader political sphere. While not an entirely new notion in Europe, where the European Union serves as a reference point, it is essential to clarify that the EU is not necessarily a model or a direct path to broader and more widespread democratic spaces. Instead, it could function as a laboratory where intriguing experiments or unconventional legal solutions are explored.

In an era characterized by profound interconnection and interdependence among economic systems and regions of the world, with much communication travelling through global social networks, the notion of democracy beyond national borders is, strangely enough, still considered futuristic or even utopian. This is even more worrying when juxtaposed with the fact that national democracies are grappling with a profound crisis. This crisis is evident in the ongoing democratic regression in various countries and a growing disenchantment with voting in mature democracies, as evidenced by escalating abstention rates.

It may appear paradoxical that the creation of transnational spaces could be perceived as a threat to national democracies. Some argue that such spaces divert attention and polarize citizens, hindering their ability to approach national problem-solving with a critical and positive mindset. Simultaneously, the globalization of markets erodes states' tax revenue, creating a growing chasm between citizens and economic political elites.

This fragmentation is exacerbated by algorithm-generated "bubbles" in political discourse, a consequence of social media political profiling. These bubbles allow manipulation, the spread of fake news, and an "us versus them" mentality, legitimizing the dismissal of competences and skills. Furthermore,

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they fuel hate speech and conspiracy theories, contributing to the dropping of trust towards political and legal structures.

In this gloom scenario, much contemplation goes on quietly behind the scenes: social science scholars are fervently exploring potential remedies. Democracy, though not antiquated, is undergoing a transformation. In the 21st century, marked by interdependence, threatened global commons, and the need to address overarching global issues, simply holding on to existing institutional structures in the hope of restoring their previous efficiency is no longer sufficient. The time has come to gaze forward.

Five years ago, in 2018, the first edition of the Supranational Democracy Dialogue (SDD) event was inaugurated at the University of Salento. This event serves as a platform for dialogue among scholars, civil society, and creative thinkers, all focused on democratic solutions to global challenges. Over the years, the event has experienced continuous growth, attracting intriguing voices and forming prestigious partnerships. Its journey, spanning five editions, aligns with the topics and values expressed by the Athena journal—created specifically to address topics at the crossroad of law, philosophy, and globalization- a much needed space for contemporary reflection. Interdisciplinarity, the imperative to think beyond conventional boundaries, and a keen eye for innovation will characterize this section, dedicated to the most structured interventions presented at the annual SDD event.

Our aspiration is for this section, the magazine, and the annual event to grow synergistically. Above all, we hope to foster awareness of the epochal challenge at hand: the imperative to save democracy by reinventing it for the 21st century.

The over thirty contributors to the V Edition “Focus on tools”, in May 2023, shared their thoughts about several democratic instruments for collaboration and promotion of democracy and general interest across national borders, the articles which follow are perfect examples of this conversation.

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The first precondition for real, genuine active citizenship at all levels is the existence of a political space beyond borders, where ideas may be exchanged, and political positions built.

Unfortunately, social media are global, TV channels and news programs are focused on the national dimension. Even if the European Union is a legal order and a space where European citizens' rights find their protection, we are still far from a genuine European public sphere where civic and political rights are expressed. The building of a political sphere appears to be a priority, it requires movements, parties, and associations that interact transnationally. Europe would set an example if only European elections were to become truly European, with European transnational parties, European electoral law, and a truly European political debate.

Still, such progress at the European level (as well as the most needed and lacking ones at the global level) even if encouraged by the appropriate reforms, cannot just be top-down. There is a need to complement them bottom-up through civic engagement. There are many ways to participate in public conversation in a public space, from demonstrating to signing petitions, from blogging and interacting through public platforms to joining transnational movements and parties. There are many online platforms in Europe to ease the way and spreading knowledge about them is another of our citizens' duty. They include The European Citizen's Initiative, Together for Democracy, Fit for Future Platform (F4F), Have your Say, the Conference on the Future of Europe. The latter has been a stunning example of citizens' involvement. Technology plays a fundamental role both in allowing a multilingual conversation, thanks to the automatic translation, as in organizing and making sense of the amount of data and contributions collected, through digital tools for data mining and mapping of ideas. In the contribution by Francesca Martines this topic is well explored.

Litigation, claiming mechanisms, spreading information and countering fake news and hate speech, and unmasking manipulation are all ways to participate, individually and in the aggregations of civil society. Aude

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Bouveresse aims to assess to which extent the European Court of Justice (ECJ) is able to play an effective role just like some national courts are doing. Courts may be precious in supporting individuals ready to take a stance for the collective. Climate litigation is clear evidence of what courts and civil society may achieve together. Taking a stance for collective rights, exposing governance flaws, claiming old and new rights, and addressing the lack of implementation of existing rights (see – as a tool - the referring for preliminary ruling to ECJ in EU case law), all require adequate laws to allow actions and class actions, but also protecting whistleblowers (in need of effective guarantees about their own fundamental and labour rights) and journalists exposing corrupt politicians and powerful manipulators. There is a need for laws effectively stopping the strategic lawsuits against public participation (so-called SLAPP), intended to silence, intimidate or impoverish those who have courage enough to expose powerful enemies of the public interest through abuse of legal instruments.[1] The contribution by Marco Pasqua is dedicated to the analysis of lights and shadows in the European Directive that is but a first attempt to stop the phenomenon.

Artificial intelligence is a precious tool to use with caution to make sense, for instance, of the large number of inputs collected through participatory and deliberative democracy channels – see CrowdLaw – as well as to check facts. An example may be provided by iVerify, the UNDP's automated fact-checking tool that can be used to identify false information and prevent and mitigate its spread. It is supported through the UNDP Chief Digital Office and the UNDP Brussels-based Task Force on Electoral Assistance. Yet, a force for good may be misused as a force for evil, and like many tools, it is neutral in essentials.

Balancing ethics and technological advancement are widely understood as one of the current challenges, a topic we can only briefly touch upon here.

[1] See e.g. the EU Commission's Proposal for a Directive of the European parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), 2022/0117 (COD), 27 April 2022.

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Another need, not less important, is the improvement of internet governance to guarantee access rights as well as fair conditions to all.

Democracy is a multifaceted system that involves managing complexity across various aspects of governance. It encompasses designing policies, adopting legislation, interpreting legislation, choosing the most effective enforcement tools, and managing conflicts. One key aspect of democracy is mapping needs, which involves understanding the diverse requirements and priorities of the people. By adopting a needs-based approach, policymakers can better identify the issues that require attention and formulate policies accordingly. Furthermore, digitalizing governmental processes can enhance efficiency and accessibility, ensuring that decision-making is transparent and inclusive.

Another crucial element is prioritization, where democratic systems must weigh different concerns and allocate resources accordingly. For example, environmental protection can be prioritized to address pressing ecological challenges. To accomplish this, building partnerships is essential. Initiatives like the UN Partner Portal facilitate collaboration between governments, international organizations, and civil society, fostering coordinated efforts to tackle global issues effectively.

In the democratic context, building synergies is crucial for sustainable development. Balancing environmental policy, economic growth, and human development is a complex task, but it is necessary to ensure comprehensive and well-rounded progress. By identifying common goals and aligning strategies, policymakers can work towards mutually beneficial outcomes.

Building structured dialogues among stakeholders is an important element in this strategy, and it is vital in a democratic framework. This can be achieved through various means; an example is provided in the EU by the AI Alliance, well explained in the article authored by Gabriele Rugani.

However, democracy also entails trade-offs. It is impossible to please everyone, and conflicting interests and opinions are inevitable. Therefore, it becomes crucial to manage these trade-offs effectively using all the

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mentioned tools and approaches. Carlo De Stefano addresses this conundrum through the powerful example of international investment agreements and the need to assess (somehow) their compliance with climate engagements.

In summary, democracy entails managing complexity across different stages of governance. Through needs mapping, digitalization, prioritization, partnerships, synergies, structured dialogue, and managing trade-offs, democratic systems can address societal challenges and ensure inclusive and effective decision-making. Yet, much work is needed, and many legal challenges await us.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Transnational European Public Spaces and EU Democracy

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ABSTRACT

This paper aims to develop some considerations on transnational European public spaces and their contribution to the refinement and development of democratic principles within the European supranational legal order. The notion of transnational European public space adopted in this paper, which it is distinguished from the idea of a European Public sphere, is that of a mainly virtual space (although EU Panels have been included) created by EU Commission and Parliament where citizens from all EU Member States have the opportunity to engage in activities that are mostly related to EU decision-making. These spaces are of particular interest when they give EU citizens the opportunity to make their voices heard and publicly exchange views on all areas of EU action, and when they contribute, albeit in a limited way, to strengthening principles such as transparency, participation and control that are crucial in the democratic life of a polity.

Keywords: Public Sphere, participatory democracy, European Citizens 'initiative, petitions, Conference on the Future of Europe

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1. Public Sphere and the Notion of Transnational European Public Spaces and European Union Democracy

In this paper public space is defined as a space that is open to all who wish to access it and participate in the activities that take place there. In the physical sense, it is constituted, for example, by the squares and streets where young people gather to demonstrate against the lack of action on climate change, against the adoption of a law or the conclusion of an international agreement, where people assemble to affirm their identity, to demand action from public authorities, to make proposals, addressed to government bodies, understood in the broadest sense. In a virtual sense it can be a platform for online petitions.

The addition of the attributes "European" and "transnational" to the term "public space" is intended to reflect the fact that the issues discussed fall within the competence of the EU and are debated between citizens of the Member States as matters of interest that transcend the national context. The use of the plural form is due to the fact that there are a number of public spaces.

Public space and public sphere are often considered and used as synonyms, but the notion of (transnational European) public space referred to in this paper is a more limited and different concept from the well-known notion of the public sphere coined by Habermas (Habermas, 1962,1989, 1996, 2008). The latter refers to a public sphere that was conceived within the framework of a sovereign State and a public opinion embedded in a specific historical and institutional context. His deliberative model refers to a national public opinion - which plays a crucial role in democracies. Although it is difficult to synthetize Haberman's notion of public sphere (1964, 1989, 1992), this refers mainly to the creation of an open space for public debate and deliberation (Habermas, 2008, 158) created through forms of public participation and communication where all citizens can participate in a debate on issues of

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common concern, and where the media play a major role in shaping public opinion and enabling the public to make more informed decisions. In synthesis, the public sphere is a space for the communicative generation of public opinion (Fraser, 2007, 6), connecting the media to democracy and legitimacy. The public sphere is therefore conceived, as a "communicative space (or spaces) where unconstrained debate takes place and where the political order is analysed and criticised" (Littoz-Monnet, 2008, 31).

As regards the formation of a European public sphere, Habermas (2001, 17) argued: "There will be no remedy for the legitimation deficit, however, without a European-wide public sphere – a network that gives citizens of all Member States an equal opportunity to take part in an encompassing process of focused political communication" (Schlesinger and Fossum, 2007, 1; Wright 2007, 1167; Fraser, 2007, 6). Indeed, the creation of a transnational public space requires a rethinking of both the forms of democracy beyond national experiences and public spaces.

The Public sphere is conceived as made up of several components, including a media system and political parties (Laude, 2021, 1151). Eriksen (2004, 5), referring to Haberman's (1996, 337) specifies that public sphere "consists of different assemblies, forums, arenas, scenes, and meeting-places where the citizens can gather. Today the public sphere is a highly complex network of various public sphere segments, which stretches across different levels, rooms, and scales".

A similar idea of the public sphere can be found in a resolution of the European Parliament (European Parliament, 2010) which used this expression to refer to a:

> space in which public policies may be better understood by, and discussed with, all EU citizens and all sections of the population, in all its diversity, with a view to meeting their expectations more effectively, and whereas it must be a venue both for the provision of information and for wide-ranging consultations transcending

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> national borders and fostering the development of a sense of shared public interest throughout the EU (letter G).

For the EP, the creation of a European public sphere is "closely related to the existence of pan-European or transnational media structures" (letter K).

The Public sphere has been defined by the Commission (European Commission, 2020, 1) as a "public space where a plurality of views can be expressed freely and where free media, academia and civil society can play their role in stimulating open debate, free from malign interference, either domestic or foreign".

The notion of Transnational European public space adopted in this paper is not entirely unrelated to the above definition of the public sphere insofar as the actions that take place in these physical or digital spaces contribute – albeit still imperfectly at the moment given the small number of participants and the limited visibility of the activities carried out - to the formation of a general debate. Rather than a single public space, we can speak of public spaces as a part of a broader network, in the same spirit of Habermas' (1996, 373) and Eriksen's (2005, 341). For Van de Steeg (2010, 30) a public sphere is a "collection of common spaces or fora in which citizens can publicly exchange ideas, opinions and information on problems they encounter while living together in the same polity". For this author a public sphere exists if "the same topics are discussed at the same time with the same intensity and structure of meaning" (Van de Steeg, 2002, 499).

There is, however, a further relevant distinction between the notion of the public sphere in the sense described above and the public spaces referred to in this paper. This difference lies in the fact that the transnational spaces we consider here, are not generated by private individuals in opposition to the power structure of the EU Polity but are created and managed by the EU institutions, and, in particular, the Commission and the Parliament.

In order to further clarify the notion of public space(s), this paper takes as its starting point some definitions used by the Commission and by other EU institutional actors.

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In the 2001 the Commission (2001, 12) declared that:

> Providing more information and more effective communication are a pre-condition for generating a sense of belonging to Europe. The aim should be to create a trans-national "space" where citizens from different countries can discuss what they perceive as being the important challenges for the Union. This should help policy makers to stay in touch with European public opinion and could guide them in identifying European projects which mobilise public support.

Indeed, this proposition seems to anticipate some experiments such as the recent Citizens' Panels in the context of the Conference on the Future of Europe.

It should be noted that the Commission refers to various activities that would take place in a transnational (public) space: information, communication, debate on the definition of the Union's agenda. It is also worth noting that the aim of a transnational European public space would be to forge a common identity (the sense of belonging to the EU) on the assumption that this would obviously be based on bonds different from those created by national citizenship; the definition of some common elements of identity is therefore a pre-condition for the creation of a space but at the same time the latter contributes to the formation of a horizontal link between citizens (Littoz Monnet, 2008, 31).

Another Commission communication refers to an idea of public sphere (curiously, the Italian version of the document uses the term "Piattaforma") which seems to correspond more to the concept of public space referred to in this paper than to the public sphere in the Haberman's' sense. The Commission (European Commission, 2005, 3) defines it as a space where "citizens are given the information and the tools to actively participate in the decision-making process and gain ownership of the European project". Again, the reference is to very different actions, i.e. information and participation in the decision-making. Within this space (or at least within

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some of these spaces) citizens can also take initiatives and adopt a proactive approach.

More recently, Vice-President Šuica, in her speech on the Conference on the Future of Europe (COFE) stated that the Conference **"**provides a safe, inclusive, transparent and transnational public space for in-depth deliberation". The COFE Joint declaration also states: "The Conference on the Future of Europe will open a new space for debate with citizens to address Europe's challenges and priorities".[1] In another Communication (European Commission, 2022, 1) the Commission declared:

> the Conference and its participants reflected both the value and the need to better involve citizens in shaping the policies that affect their lives. It breathed new life into the way Europe's layered democracy works and showed the potential of a real European public space for people across the Union to engage on what matters most to them.

It further stated: "the Conference also gave a snapshot of how a European public space can flourish and how our democracy can be enriched, at European, national, regional and local level, by involving citizens" (European Commission, 2022, 5).

Irrespective of the terms used, all the above-mentioned documents refer to a concept that exists in the EU legal order and in the vocabulary of the institutions involved in the decision-making processes. It is possible to extrapolate some common structural elements of these spaces: openness and inclusiveness, transparency, and, of course, transnationality. In terms of actions, citizens participate in different activities: they receive information, are involved in agenda setting, in consultation processes and in deliberation. Although all these activities contribute to reinforcing the participatory dimension of democracy (as set out in Article 11 of the TEU) (Garcia Macho, 2013, 449) they are different in terms of creating spaces for interrelation among citizens and sharing of values.

[1] Joint Declaration on the Conference on the Future of Europe.

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On the basis of these elements, we define (and consider) the transnational European public space as a physical or virtual space created by the European institutions in which the EU citizens meet on a voluntary basis according to the principles of inclusiveness, equality, transparency (with the clarifications we will make later on representation) to take part in the activities for which these spaces have been established.

The perspective adopted in this paper intends to highlight the opportunities offered by the Platforms (and Panels) to European citizens to interact with each other, to be and feel part of a community of values. These values are those set out in initiatives or proposals made to the EU institutions (think, for example, to ECI initiatives or petitions), but also the value of democratic participation itself.

Of great value are those activities carried out in the Platforms or other physical spaces such as Panels that create or promote a form of interaction between citizens, exchange of opinions, sharing of ideas and deliberation and that introduce new issues and themes for the decision-makers.

These transnational European public spaces are linked to the value of democracy in the EU as they allow citizens to take part in the activities that implement the principle of democracy, particularly in its participatory dimension. Let us briefly recall that participatory democracy is conceived as a complement to representative democracy,[2] as it was introduced, codifying the Commission's proposal defined in the White Paper (European Commission, 2001) to overcome the structural limitations of representative democracy at the European level (accountability deficits, absence of demos, flaws in the European Parliament's elections, to name but a few) (Marxen, 2015, 151). One of the key principles, in addition to participation, is transparency, which applies to the actions of the institutions and that is clearly

[2] Article 10(1) TEU declares representative democracy to be a principle on which the functioning of the European Union is based. The key concepts in Article 10 TEU (Porras Ramirez 2013, 417) are representation and accountability. There is no reference in Article 10 TEU to accountability mechanisms for other EU institutions and bodies, but these are provided for in the EU legal order.

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related to accountability. From the citizens' point of view this means that they have the right to access to information either by contacting the institutions directly or by requesting access to documents of the institutions (reg. 1049/2001) and that institutions and bodies must explain and justify their conduct (Brandsma, Heidbreder and Manstenbroek, 2016, 621).

Transparency and accountability are crucial to the notion of transnational European public spaces, which, in their turn play a pivotal role in enhancing EU democracy in, obviously, its participatory dimension (Cafaro, 2018, 639) but also in reinforcing representation (for instance if a stronger link were to be created between the citizens' initiative mechanisms (the ECI) and the European Parliament right of indirect legislative initiative (Article 225 TFEU) (Maurer and Wolf, 2020).

2. Transnational European Public Spaces in the EU

European Citizens are offered the possibility to interact and create a community through their participation in digital Platforms created by the EU institutions (Commission and Parliament). We are considering such public Platforms to be particularly valuable as they are connected to the EU decision-making processes and provide mechanisms for institutional feedback.

The EU digital platforms discussed in this paper as transnational European public spaces also include the Multilingual Platform of the COFE, even if it is no longer active.

Although all the above-mentioned spaces are set up by EU institutions, a distinction can be made between re-active and pro-active contributions by citizens, i.e. between activities carried out in response to input from the institutions (top-down), such as consultations on "have your say" Platform, and activities where input comes directly from citizens such as petitions addressed to the European Parliament, the ECI, demands for action in the "ask the EP" Platform (bottom-up). From the perspective of participation and input legitimacy the latter category is of particular interest as citizens are free

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to express their requests, proposals, needs, while in the former case they react to input from the Commission.

The three recently created Citizens' Panels, on food waste, virtual worlds and learning mobility, have been modelled on those of the COFE to deliberate or made recommendation on certain key proposals of the Commission could also be considered transnational European Public spaces. The difference with the EU Platforms is that they are not virtual but physical space.

The four COFE panels were each composed of 200 citizens from all Member States (the principle of degressive proportionality was applied), selected on the basis of criteria relating to education, gender, age (one third of participants were under 25), urban/rural background, in order to reflect the composition of the EU population (Rules of procedures of the Conference, art. 5). Therefore, the citizens interacting in a discussion room were pre-selected citizens who participated on a voluntary basis.

COFE Panels and those recently established are to be distinguished from Citizens' Dialogues, which lack transnational character as they were public debates with European Commissioners and other EU decision-makers, but also regional and local politicians organised on a national level.

2.1 The Open Nature of TEPS

A transnational European public space is defined as a place open to all citizens from all Member States who wish to participate in the activities promoted therein. All activities in the Commission's and EP's platforms are accessible to all citizens based on the principle of equality, with some further specification on barriers which will be considered later in this section.

The *European Citizens Initiative* platform of the Commission, once the ECI has been registered,[3] it is open to signature by all citizens of the EU, the

[3] Registration can be refused by the Commission if the initiative is manifestly frivolous, abusive or vexatious, or is contrary to the values of the EU as set out in Article 2 TEU, if procedural requirements have not been met or if the proposal falls outside the Commission's power of initiative. Judicial or extrajudicial remedies are available against the Commission's decision.

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same openness characterizes the *e-petition* Platform and *Ask the EP* of the European Parliament. Moreover, petitions can be addressed to the Parliament by any resident (also minors) in the EU. General consultations[4] in the "Have Your Say" Platform are open to all citizens. However, there is one significant feature: it is the Commission that decides when to make a consultation open to all citizens.

There does not seem to be any contradiction between the fact that the platforms are open to all citizens and the fact that there is a registration requirement which is usually a prerequisite for participating in the activities of any EU Platform. A user account must be created by anyone wishing to submit or support a petition to the EP. Registration is also required to send contribution in "Have your say" in Europe of the Commission, whereas previous registration is not necessary to support an ECI initiative, but the supporter leaves his/her identification data or use his/her digital identity.

A form needs to be filled with personal data when submitting a question to the Parliament. A privacy statement explains how personal data will be collected and processed by the EP and a privacy statement of the Commission is available online.[5]

In addition to registration, the signature of the Charter of the Conference was required to participate in the Multilingual Platform. A similar requirement could (and should) be included in a future similar Platform (see section 3). The Charter is a declaration of intent that recalls the European values enshrined in Article 2 TEU; it includes a commitment by participants to submit constructive proposals, to refrain from disseminating illegal content and from using the Platform for commercial purposes. The Charter also sets out the principles to be respected by participants and event organisers.

These are: inclusivity, transparency, pluralism, multilingualism. In order to prevent hate speech and false information or contributions contrary to the

[4] Some consultations are reserved to specialized stakeholders.
[5] https://ec.europa.eu/info/law/better-regulation/specific-privacy-statement_en.

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principles and values set out in the Charter from being uploaded to the Platform, a team of moderators was in charge of intervening in the content, removing errors or hate speech, political, manipulative or false content, checking it on a case-by-case basis (an appeal to the Conference Secretariat was possible). Thus, the open nature of the participation seems to have been strengthened and aligned with the value of democracy in the EU by respecting the principles mentioned in the Charter. Contributors were also asked to provide information on their country of residence, educational background, age, gender and employment status, but this information was shared only on a voluntary basis (COFE, 2022, 17) and thus did not affect citizens free participation.

Clearly, the situation is different for the COFE citizens' Panels, and the three newer citizens' Panels mentioned above. These are made up of a limited number of participants, selected at random but on the basis of criteria designed to provide a faithful representation of the EU population. These include nationality, gender, age (with a deliberate and motivated choice to over-represent young people), urban/rural context, occupation, education, socio-economic background. In COFE, the panels were composed of 200 people for each of the four panels. The three newer panels were made up of 150 people.

Despite this pre-selection and the limited number of citizens participating, the panels can be considered as public spaces because they are potentially open to all European Union citizens and their selection was based on criteria aimed at representing the composition of the EU population. Thus, due to their representativeness, Panels can be said to comply with the principle of inclusiveness.

On the other hand, since participation is voluntary, the Platforms of the Commission and of the EP do not guarantee an equal representation of the components of European society: on the contrary, in prevalence these platforms are mostly accessed by educated, male, pro-European citizens, According to the data provided in the Multilingual Digital Platform final

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report of May 2022, almost half of the contributors identified themselves as men (47.3%) and 15.9% as women. Those aged 55-69 were the most active age group in terms of contributions (17.7%), followed by those aged 25-39 (16.3%) and those aged 40-54 (14.9%). People with a higher level of education were the most active (41.6%) (COFE, 2022, 19).

In the EU Platform there may also be an over-representation of certain nationalities. For example, the Commission's proposal on a directive on discontinuing seasonal changes of time received an unprecedent number of 4.6 million replies in the "Have your say" Platform. In the report on the results (European Commission, 2018) while highlighting the impressive turnout, the Commission was careful to stress that this was not a representative survey (European Commission, 2018, 11). In fact, the largest number of responses (70%) came from Germany.

Even in the case of the ECI - which requires one million signatures from at least a quarter of the member States (seven), including a minimum number of signatures from each country[6] - successful initiatives register a preponderance of signatures from citizens in one or a few member States. For example, *Fur Free Europe* was signed by 518.534 German citizens; *One of Us* by 623.947 Italian citizens.[7]

It is possible to imagine a pro-European bias also among the citizens who participate in Panels since participation is voluntary, one can imagine a self-selection process when they are enrolled (Bailly, 2023, 19). On the other hand, self-selection is a feature common to all online Platforms designed for participation.

If participation is encouraged, for example by publicising the possibility of contacting the EP or responding to the Commission's consultation (e.g. through media and campaigns), it is likely that people from different backgrounds will want to participate.

[6] The thresholds correspond to the number of the Members of the European Parliament elected in each Member State, multiplied by the total number of Members of the European Parliament.
[7] The data are available on the website of the ECI.

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It should also be borne in mind that, even where access is open, there are certain factors that can inhibit or prevent participation (Hierlemann, Roch, Butcher, Janis, Emmanouilidis, Stratulat and de Groot, 2022). One is self-restraint due to the technicalities of the legislation and the complexity of legal norms in the EU. Another reason could be the lack of publicity and lack of awareness of existing participatory tools. The digital divide is another general barrier to the use of platforms.

An issue that can be considered when discussing the open character of Platform and inclusiveness is the problem of language. The multilingual nature of the European Union can be seen as an obstacle for citizens who are unable to participate in activities such as consultations because of language barriers (for example, if the documents uploaded are only in English or a few other languages they do not speak), but it is also possible to see the other side of the coin.

Although the language policy of the EU institutions is in some cases regrettable (when translation is not available), the EP and Commission Platforms often offer the citizen the possibility to select one of the 24 official Union languages. In other terms, language can be a barrier to participation (Rose, 2008, 451) if not all documents are available in all languages but if compared to private platforms the multilingual approach of the EU (although it could be improved) is an added value and makes the space more open in terms of use and possibilities for both horizontal and vertical exchange than private Platforms (dealing with EU issues with a transnational approach), which usually do not offer alternatives to English.

The EU is a multilingual polity and shall respect its rich cultural and linguistic diversity (Article 22 of the EU Charter of fundamental rights) although "there is no general principle of EU law that confers on every citizen a right to have, in all circumstances, a version of anything that might affect his or her interests drawn up in his or her language" (European Ombudsman, 2017a). The Commission has tried to justify the lack of document translation

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for budget constraints, an explanation that was contested by the EU Ombudsman (European Ombudsman, 2011, 2017a).

If, on the one hand, citizens cannot expect all the documents of all the institutions to be translated, on the other hand, the institutions must ensure that multilingualism is respected. This is essential in the perspective of accountability, participation and for the creation of a public space where people can exchange ideas, proposals, etc., support petitions submitted by other citizens, support European citizens' initiatives. Thus, the institutions must at all events allow the interlocutor to contact the institutions in the language of his/her choice (among the 24 official EU languages) and receive an answer in the same language as provided in Article 24 of the TFEU; do their best to translate all documents uploaded on the platforms (preparatory documents such as roadmaps, petitions, etc.) at the citizen's request, the Commission should provide a translation of the relevant public consultation documents in one of the EU official languages; provide a summary of the consultation documents in all official EU languages, with automatic translation of all documents using electronic translation tools.

Some of these solutions are in fact being put into practice. First, in the Commission's and EP's platforms anyone can use one of the 24 official languages to address the institutions, (asking for information, submitting a petition, etc.). E-translation programmes are used in "have your say" and in the "petition web portal". For registered ECI, the Commission ensures the translation of the title, subject, objectives and background of the initiative (Annex II of Regulation EU 2019/788 of the European Parliament and of the Council of 17 April 2019).

Disabilities can also be an obstacle for access to all online platforms. In the case of EU Platforms, however, it shall be considered that the EU Charter of Human Rights forbids discrimination based on disability (Article 21) and recognises the right of participation in the public life (Article 26). Moreover, the EU is contracting party of the Convention on the rights of people with disabilities, which at Article 9 para. 1 obliges Contracting Parties "To

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promote access for persons with disabilities to new information and communications technologies and systems, including the Internet"[8] (European Ombudsman 2017b). Web accessibility is about ensuring that everyone, including people with disabilities, such as visual, hearing, motor or cognitive impairments, is able to use and interact with websites and applications. The EU Web accessibility action plan 2022-2025 sets out a series of actions to bring all EU websites, including documents published on these websites and online platforms, into conformity with the harmonised standards on accessibility requirements for JTI products and services and the Web Content Accessibility Guidelines (WCAG[9]). All website and web-based application of the Commission shall comply with Dir. 2016/2102[10] on accessibility of public sector bodies' websites and mobile applications. In the case of the Multilingual platform, for example, the European Disability Forum (EDF), a non-governmental organisation (NGO) that brings together representative organisations of persons with disabilities from across Europe, signalled "complaints from persons with disabilities who experienced accessibility problems". It further explained in a letter sent to the EU (EDF, 2021):

> The accessibility audit, carried out by the Swedish accessibility company Funka, showed that persons using assistive technologies such as screen readers, or those who rely on keyboard navigation because of a motor disability cannot use the website. Besides, forms necessary to input content on the platform are not properly designed, some error messages are only conveyed with colour, making it

[8] The Convention entered into force the 21 January 2011. Council decision 2010/48/EC of 26.11.2009, in OJ L 23 del 27.1.2010, p. 35.
[9] The Web Content Accessibility Guidelines (WCAG) are guidelines that define the technical specifications for making web content accessible to people with disabilities. These are drawn up by the WEB Accessibility Initiative which is part of the World Wide Web Consortium, whose main activity is precisely to define technical standards for the web (WWW).
[10] OJ L 327 del 2.12.2016, 1.

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> difficult for those with colour blindness, and some buttons do not have enough contrast to be seen by-a person with low vision.

Another aspect related to people with disabilities concerns the participation in Panels. As recalled by the above-mentioned organisation, the random selection of citizens, through telephone calls, exclude many persons with disabilities who do not have access to telephone service of live in segregated residential settings.

In summary, it can be said that the platforms of the Commission and the European Parliament, as well as the Panels, comply with the principle of openness: barriers such as language and disability, although still present, must be addressed by the EU institutions based on obligations that have their foundation in the EU Treaties and in international law binding the EU. Because of the obligations to recognise the principle of non-discrimination and equal opportunities for people with disabilities at the primary level, the EU institutions are obliged to remove these barriers; similarly, as regards language barriers, EU platforms ensure access in all official EU languages, albeit with some limitations and much room for improvement.

2.2 ETPS Activities: Information, Input, Consultation, Deliberation and Control

The activities that take place in the EU Platforms and within the Panels can be summarised as follows: request for information; input for action; participation in the first stages of the decision-making process, deliberation.

Citizens hold institutions accountable by demanding a justification of the work that the institutions have done in the citizens' name or on the citizens' behalf. The institutions are obliged to provide information on their actions and on the activities of the EU.

Information for citizens is guaranteed in the EU by the right of access to documents (Article 15 TFEU and Article 42 of the Charter of Fundamental Rights of the European Union), with some restrictions laid down in

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Regulation 1049/2001,[11] and by the possibility of direct access to the institutions. The digital platform "Ask the EP" allows citizens to submit questions on the activities of the European Parliament (general questions on the EU can be submitted by telephone or e-mail to the Europe Direct contact centre).

Although, as its name suggests, the "Ask the EP" platform is primarily designed to ask the Parliament for information on its own activities or those of the Union, it can also encourage the EP to take action, such as asking the Commission to submit a proposal to the legislator or refusing to give its assent to an international agreement and thus halting the ratification process. For example, the European Parliament was urged not to approve the conclusion of the Comprehensive Investment Agreement between the People's Republic of China and the European Union Agreement because of human rights violations in China (European Parliament, 2021).

A selection of topics and questions addressed to the European Parliament and its replies can be found on the EP Platform, accessible to all citizens. This is significant from the point of view of the creation of a TEPS: while requests for information typically create a vertical relationship between the requester and the institution, the EP Platform identifies issues (presumably on the basis of the number of requests received by the EP) that are of interest to a wider audience.

Citizens do not participate in the process of adopting EU legislation, but they can be involved in the first stages of the policy cycle, i.e. proposal and consultation. As it is well-known, the power of initiative in the EU belongs to the Commission under a quasi-monopoly regime. As mentioned above, citizens (not less than one million citizens who are nationals of a significant number of Member States) are granted – by the Treaty on European Union at its Article 11, paragraph 4 - the right to invite the Commission to submit a proposal to the EU legislators (European Citizens Initiative) (Santini, 2019;

[11] *OJ L 145, 31.5.2001, 43.*

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Damato, 2017, 39; Langlais, 2017, 495). The procedures and conditions are laid down in regulation 2019/788.[12] The ECI platform creates a virtual space where citizens can first identify an issue that they consider should be regulated by a legal act of the Union (falling within the competence of the EU and the power of initiative of the Commission). The evaluation of the ECI, in the perspective of this paper, should take into account its impact on the identification of issues of debate and interest to European citizens. In the words of AG, in the *Puppinck* case:[13]

> the added value of the ECI is present on at least four distinct levels: (i) the promotion of public debate; (ii) enhanced visibility for certain topics or concerns; (iii) privileged access to EU institutions, enabling those concerns to be tabled in a robust way; and (iv) the entitlement to a reasoned institutional response facilitating public and political scrutiny (para. 73).

The AG also argued that ECI "serves as a vehicle to bring together issues of common interest between citizens across Member States' boundaries and furthers the strengthening of the EU public space" (para. 74). In this perspective, the ECI platform creates the most interesting space, as "It gives visibility to matters of concern to citizens, which may not already be on the agenda of the institutions or even on the agenda of the political groups represented in the European Parliament". (para. 80).

The European Ombudsman took a similar view in an own-initiative inquiry into the ECI. She had emphasised how this instrument offered a platform from which a public debate could be generated in which different reasons and perspectives could be expressed, criticised or defended (European Ombudsman, 2013). In fact, the most interesting feature of the ECI for the creation of a TEPS is that it can bring out a different vision of European integration and of citizens' priorities: against the Commission's

[12] GU UE L 130 del 17.5.2019.
[13] Opinion of AG Bobek delivered on 29 July 2019, Case C-418/18, *P Puppinck and Others v European Commission*.

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model of liberalisation, and there could be an alternative model that calls for the opposite path to be followed and that enriches the political debate (Van Den Berge, Boelens, Vos, 2020, 48).

In a letter addressed to the President of the Commission the Ombudsman underlined that the ECI is a "tool to foster public debate and participation. The ECI process offers organisers a platform from which they can generate a public debate about their issue" (European Ombudsman, 2017c). In another case she argued: "Clarity about the reasons for its choices promotes constructive and open debate, thus strengthening the European public sphere and democracy at the EU level and reinforcing the importance of the debate itself," (European Ombudsman, 2013). The ECI can also contribute to strengthening the principle of information and transparency towards citizens and accountability as the Commission is required, under Regulation (EU) 2019/788, Article 15, paragraph 2, (Vogiatzis, 2017, 250) to explain how it intends to respond to the demand from European Citizens. In its report the Commission refers to the legislation in force relevant for the issue, it explains its political choices, gives an account of its position on the issue, also referring to initiatives in the pipeline, the legislation it intends to pass (or not to pass), reference (if relevant) to other past initiatives, reasons for not proposing legislation, etc. (European Commission 2023). Referring to the hearing that takes place in the Parliament's plenary on registered ECI, AG Bobeck in the cited *Puppinck* case observed "members of the committee of a successful ECI .. are given the possibility to present their initiative before the Parliament…. This opens up the possibility that their initiative will be taken up by the Parliament or some of its members" (para. 37). The hearing also contributes to the discussion and debate:

> The public hearing for initiatives in the European Parliament is an important part of ensuring inclusivity and transparency of the ECI process (….) Involving both Parliament and Council in the follow-up should enhance the process from the citizens' point of view, also

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> in terms of clarifying what they as co-legislators believe is the appropriate course of action" (European Ombudsman, 2017 c).

The space created by the ECI Platform is transnational and inclusive, and although there is no relationship between the signatories, in the Platform the interests and the requests for action are shared and could help to create a sense of identity among EU citizens.

However, one should also consider that:

> such actors that oppose an ECI are not given an official platform to make their views known to the public. Changing the ECI process to allow for more actors to vocalise their viewpoints on successfully submitted ECIs is in consonance with the aspiration of the Commission and the Ombudsman that the ECI should be an instrument for fostering public debate in addition to being an agenda setting tool (Karitzia, 2017, 177, 197).

The consultation of EU citizens is established in EU primary law. Article 11 TEU requires the Commission to "carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent". Due to the way consultations are structured, they are first a tool through which the Commission gathers information and views from stakeholders (European Commission, 2017, 69). According to the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making[14] "public and stakeholder consultation is integral to well-informed decision-making and to improving the quality of law-making" (para. 19). At the same time the consultation process also provides citizens for information on the Commission's initiatives contributing to ensuring transparency of the policy-making process and to promoting an accountability process. In fact, the Commission publishes, in the "Have your say" platform,

[14] OJ L 123, 12.5.2016, 1.

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road maps, inception impact assessment and provide all relevant information on the proposal: background, problem definition and subsidiarity analysis, legal basis, objectives and policy options, likely impact, consultation strategies.

As a tool of participation, consultations are mostly aimed at a particular target group, and selected stakeholders. For some consultations, however, the "Have your say" platform gives citizens the opportunity to provide its views on the initiative by giving comments and answering a questionnaire. All comments are available for reading but there is not the possibility to comment or endorse other citizens' comments. It should also be noted that in the case of consultation as well, there is an aspect of "self-selection bias of the respondents towards the views of those who choose to respond to the consultation against those who do not". (European Commission, 2018, 2). Furthermore, consultations should be more widely publicised in order to achieve greater visibility and enable more people to participate (Court of Auditors, 2019). The activity in the "Have your say" Platform has therefore a vertical structure. For this feature and objective its main value is – in fact – democratic participation - but it creates, in terms of interaction, a very limited form of TEPS.

Petitions serve different purposes (Vogiatzis, 2021, 82). One is a non-judicial control function where petitioners signal a failure by Member States or EU institutions to fulfil their obligations under EU law. In the latter case petitions can be seen as a tool, albeit a weak and imperfect one, of institutional accountability (Tiburcio, 2018, 4). Petitions also have an input or agenda-setting function, when a petitioner asks for new legislation to be introduced or for Parliament to make a proposal to the Commission, on the basis of the competence set out in Article 225 TFEU.

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Petitions are initiated bottom-up (as opposed to consultations which are initiated top-down) and have a vertical structure[15] in the sense that there is no discussion forum that allows public debates on the issues raised by a petition, but there is the possibility for citizens to express their support for petitions presented by other(s) citizens (by electronically co–signing), so horizontal relationships are established in this case. As keenly observed by Böhle and Riehm (2013):

> If a petitioner or as in most cases a group of petitioners make their concern public and ask for support in the form of signatures, the petition is a means to generate public attention, to initiate a debate, to influence the public opinion and to win supporters. One further aspect which is often neglected when considering petitions is the effect of active participation on the self and consciousness of the citizens.

According to the Petition Committee Report of 2021:[16] "in 2020, Parliament received 1 573 petitions, which represents an increase of 15.9 % as compared to the 1 357 petitions submitted in 2019 and an increase of 28.9 % as compared to the 1 220 petitions submitted in 2018".

In synthesis, petitions have the potential to involve citizens. In this case, various shortcomings need to be overcome, one of which is to publicise the existence of the tool and to strengthen feedback mechanisms.

The above-mentioned COFE Multilingual platform allowed all interested citizens to engage in the Conference activities. In particular, citizens, public institutions, NGO, universities, all who intended to post an idea as regards issues included in the 8 clusters of the Conference, could make proposals on the future direction of the EU project. The Multilingual Platform - with all the limitations mentioned above, and in particular those on disabilities, self-

[15] Court of Justice judgment of 9.12.2014, *Peter Schönberger v. European Parliament*, C-261/13, ECLI:EU:C:2014:2423: "It is one of the means of ensuring direct dialogue between citizens of the European Union and their representatives" (para. 17).
[16] https://www.europarl.europa.eu/doceo/document/A-9-2021-0323_EN.html

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selection, limited numerical participation - created a community of people who were able to communicate, share, comment and support or criticize ideas and proposals. The principle of multilingualism was respected as ideas could be posted in any of the 24 official languages of the Union and be read and commented on in another language thanks to an e-translation programme provided for by the Commission.

The COFE Platform has a precedent in the *Futurum*,[17] the online forum set up in the framework of the Convention on the Future of Europe (European Council, 2001) which was, however, different in composition and function. Wright (2007, 1167) discussed on the possibility of qualifying *Futurum*, as a virtual EU public sphere. He took as reference Haberman's (revised) theory of the public sphere (1996, 373) and Eriksen's three categories of public sphere: overarching general publics, transnational segmented publics and strong publics [18] (Eriksen, 2004; 2005, 345). Wright concluded that *Futurum* provided a single European space for transnational discourse on the development of a European constitution even if it did not fit into any of Erikson's models of public sphere. This is for the following reasons: it could not be qualified as general public since it was institutionally run; it did not fit in the second category of transnational segmented publics as it did not inform policymaking, not in the third (strong publics) as it was open to anyone who had the ability and desire to participate. This analysis can be of some interest when applied to the Multilingual Platform. First, the Platform was an integral part of the structure of the COFE and was connected to its other components: in this perspective it can be considered akin to Erikson's second model as it

[17] Citizens had access, via the *Futurum* platform, to information regarding the course of the debate at the Convention. The *Forum* of the Laeken Convention was a structured network that involve only civil society representatives who could contribute to the work of the conference.

[18] General public sphere is informal streams of communication' normally independent of the state; Strong publics have direct relations to the political system. (such as parliamentary debates or policy fora such as the Convention for the constitutional treaty; segmented publics, in the European context, are the policy networks (epistemic communities) populated by bureaucrats, experts and organized interests

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was connected to decision-making process (of the COFE): the ideas expressed in the Platform were functional to the working and discussions taking place in the Panels in their turn connected to the Plenary and to the final recommendations. More precisely, the ideas posted on the Platform were gathered and organized by a group of researchers who applied a *computer-assisted clustering tool* and the technique of *text mining* (Moreno and Redondo, 2016, 57; Galba, 2022). The ensuing report constituted the basis of discussion by the Panels of the COFE. What is of interest is that emphasis was placed (Appendix II of the Final Report) on deliberative and participatory events, in order to include positions and opinions that would not have found space in the part of the analysis concerning the ideas expressed in the platform. In order to provide a broader and more articulated view of the different proposals, issues raised by a limited number of participants were also included in the analysis when they presented a different perspective than the one adopted by the majority.

The Multilingual Platform is in any case an example of a public space (as defined in this paper): not only was it open and transnational, but it also provided ideas and proposals with a bottom-up approach, and it was linked to the panels and the plenary and, indirectly, to the institutions, which had to provide feedback and follow-up, transforming recommendations into proposals (EU Council, 2022; European Parliament, 2022; European Commission, 2022). On the contrary, *Futurum* provided for a point of information, allowed contributions by civil society actors (not by citizens) to the Convention; although the platform constituted a space for interactive debate (also by citizens) the online debate was not connected to the works of the Convention (Bart, 2006, 225).

The activities that took place within the COFE Panels of the conference are also worth mentioning as the deliberative method was applied and as the Panels in fact did create a space for interaction, discussion, exchange of ideas in order to make concrete proposals to be discussed by the Plenary. Their activities can be qualified as agenda setting which includes proposals for

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legislative action, based on EU conferred competences, but also proposals that would require Treaty change. In synthesis, the Platform and the Panels enabled people to interact, debate and discuss and also created a sense of belonging and common identity.

As mentioned above, a new development, in the context of the phase of the preparation of the Commission's proposal, is the setting up of panels of citizens by the Commission modelled on those of the COFE as regards participants' selection (equality being satisfied by the chance of any EU citizen to be selected), the presence of facilitators and experts. At the end of the Conference, in fact, the President of the Commission (Von der Leyen, 2022) affirmed:

> You have proven that this form of democracy works. And I believe, we should give it more room, it should become part of the way we make policy. This is why I will propose that, in the future, we give Citizens' Panels the time and resources to make recommendations before we present key legislative proposals.

This statement raises a number of questions as regards the establishment of future Panels (see also section 3). If the criterion is key proposals, the Commission needs to further clarify in which cases and at what stage of the preparation of the proposal citizens' Panels should be consulted. As in the case of consultation on Commission's proposals open to all citizens, the three Panels referred to above are required to react to a Commission's initiative and not to put forward a new issue to be regulated by the EU legislators. In other terms, Panels can be qualified as a new instrument of consultation on Commission's proposals. However, in the perspective of TEPS they are a noteworthy addition to the Commission's consultation toolkit as far as methodology is concerned. In fact, in contrast to the more traditional consultation process, Citizens' Panels adopt a deliberative approach (OECD, 2020), a process of discussion and confrontation among participants that is totally absent in the more traditional consultation process described above,

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carried out through the "Have your say" Platform. The Panels consultation process is in principle more limited in terms of participants, as the open consultation process potentially allows all citizens to express their views, but it is also more representative of the component of the EU population due to the selection process and provide a model for the establishment of further spaces for debate and deliberation.

However, it is not only the organisation of the panels that is important, but also the stage at which citizens can express and debate their views on the matter. In the case of the Food Waste Directive, the panel, composed of 147 citizens, was convened for three sessions (from December 2022 to February 2023 with the adoption of 23 recommendations to reduce food waste) after the end of the consultation process, that is at a fairly advanced stage in the preparation of the Commission's initiative (Greubel, 2022, 6). Visibility is another important feature for Panel. In fact, Panellists express their wish that greater visibility be given to the Panels (Commission, 2023b, 219).

3. Perspectives and Proposals

This paper has examined some EU tools (Platforms and Panels) established by the institutions which create transnational spaces for citizens within the EU legal order. Some of these Platforms make it possible to carry out participatory activities. What counts, in the perspective of the concept of TEPS adopted in this paper, is, above all, the possibility of interaction between all EU citizens who intend to take part in these activities, and the establishment of a sense of community, identity, sharing of values.

From the point of view of interaction, the Commission's consultation platform, which has a strong vertical dimension, hardly meets this requirement, although it is important in terms of accountability, information and, of course, participation. The Platform of e-petitions allows interaction and the ECI has the potential of creating a sense of identity and of sharing common values.

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The COFE experience has had the merit of reinvigorating the debate on participatory democracy and has been an experiment of enormous interest – but, unfortunately, of little visibility - for deliberative democracy and as an input for further citizen engagement.

The COFE has encouraged the setting up of other TEPS both directly (through recommendations adopted by the Plenary) and indirectly (through the experience of the Multilingual Platform and the four Panels). Indeed, among the recommendations of the Conference Plenary there is the proposal to create "a user-friendly digital platform where citizens can share ideas, put forward questions to the representatives of EU institutions and express their views on important EU matters and legislative proposals, in particular youth". In fact, this platform only partially mirrors the Multilingual Platform as it has less ambitious objectives in terms of participation and impact on the decision-making process. The aim of the proposal was:

> to improve the information provided to them by creating an official website summarizing how they can participate on the democratic decisions, a digital platform to share citizens' ideas, questions and views as well as a mobile application presenting EU policies in a clear language.

This proposed Platform seems to reproduce some of current tools such as the official website of the Commission ("contribute to decision-making"[19]) which contains links to the ECI, Have Your Say, The Fit for Future Platform and the COFE (Archived page). There is not link to the EP Platforms but this institution has a webpage that contains links to all EU "alternatives to petitions"[20], including the Commission's Platform and ECI.

The most interesting feature of a possible future Platform (which would generate a new TEPS) would be the creation of horizontal relations and space

[19] https://commission.europa.eu/law/contribute-law-making_en.
[20]https://www.europarl.europa.eu/petitions/en/artcl/EU+Alternatives+to+petitions/det/20220906CDT10143.

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for debate and discussions following the model of the Multilingual Platform, where ideas could be posted and discussed and commented on by other users. If this was not the case, the proposed Platform would risk duplicating the existing information tools without providing any real added value. It is to be considered that, as mentioned above, the activities of the Multilingual Platform were connected to the Panels of the Conference and their deliberative activities with a view of making proposals to the Plenary of the Conference. Therefore, from the perspective of creating strong publics (Fraser, 1990, 56; Eriksen, 2004) it would be of particular relevance to establish a connection between the (future) Platforms and the new forms of citizens' Assembly.

This is the object of another proposal that emerged from the COFE (Proposal 37, measure n. 7):

> Holding Citizens' assemblies periodically, on the basis of legally binding EU law. Participants must be selected randomly, with representativeness criteria, and participation should be incentivized. If needed, there will be support of experts so that assembly members have enough information for deliberation. If the outcomes are not taken on board by the institutions, this should be duly justified; Participation and prior involvement of citizens and civil society is an important basis for political decisions to be taken by elected representatives. The EU is founded on representative democracy: with European elections, citizens give a clear mandate to their representatives and indirectly express themselves on EU policies (footnotes omitted).

As one can easily see, the composition and deliberative method of these assemblies are clearly modelled on the COFE Panels. However, the recommended measure provides for an obligation on the institutions to give reasons if citizens' proposals are not accepted. The Panels created by the Commission do not match this recommendation as they are required – as seen

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above - to react to proposals submitted by the Commission (a top-down input) and are not competent to propose new initiatives.

Some authors, who have designed a model for institutionalised the Citizens' Assemblies observe: "The challenge is to put forward a format and a framework for a kind of participation that could consider the multiple complexities of the EU institutional system and unique transnational character of the EU policy-making process". (Abels, Alemanno, Crum, Demidov, Hierlemann, Renkamp and Trechsel, 2023, 6). They propose the introduction of permanent assemblies through an interinstitutional agreement with a wide scope of deliberation and competent for agenda-setting and scrutiny where the whole cycle is citizen-led and integrated into the existing participatory mechanisms. This is crucial because, while debating chambers are a participatory tool, the proposed assembly should be part of the democratic and representative process that is at the heart of the EU system and not in competition with it. Apart from the feasibility of the proposal (e.g. the competence to deliberate on issues outside the competence of the EU and the difficulty of reaching an agreement by the political institutions), it is interesting that this assembly could be considered as an example of a transnational European public space. The Citizens' Assemblies are therefore an interesting proposal, but only if they are given powers similar to those of the COFE Panels. Only if a link is established between the citizens' assemblies and the (new) digital platform would an added value be created. It is true that a Platform of European Citizens can contribute to the creation of a European public space, but without a structured link with the institutions, it runs the risk of not being an attractive pole.

If these panels or assemblies were also linked to existing platforms (in particular the ECI and petitions) and through these spaces to the political institutions their relevance would be enhanced. Indeed, debate in itself is not enough and needs to be linked to decision-making processes, even if only in the form of input and feedback mechanisms.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Potentialities and Margins for Improvement of the European AI Alliance, an Example of Participatory Democracy in the Field of AI at EU Level

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ABSTRACT

This contribution focuses on the dialogue with stakeholders in drafting EU acts in the field of AI, with particular reference to the so-called "European AI Alliance", which can be defined as the best example of "participatory democracy in the field of AI on European level". After understanding what the AI Alliance is and how it works, and after making some considerations on its nature, the paper focuses on its role in the context of the drafting of EU acts, such as the Ethics Guidelines for Trustworthy AI and the AI Act Proposal. In the end, it will be possible to make some conclusive remarks and to formulate some suggestions, concerning the future of the AI Alliance and the need to exploit and improve it also, and especially, after the (eventual) adoption of the AI Act and of the other legislative proposals currently under discussion.

Keywords: European AI Alliance, Ethics Guidelines for Trustworthy AI, AI Act Proposal, stakeholder consultation, participatory democracy, e-democracy, artificial intelligence

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1. Introduction: Premises, Research Questions and Methodology

The European Union is concretely interested in regulating AI since 2018, when the European Commission (EC) adopted a Communication entitled "Artificial Intelligence for Europe" (COM/2018/237 final), which clearly highlights the need to balance two conflicting interests. Indeed, on the one hand, AI technologies must be strongly *promoted*, since they can bring a wide array of economic and societal benefits across the entire spectrum of industries and social activities; moreover, it is in the EU's interest to further establish the Union's technological leadership and to ensure that Europeans can benefit from new technologies. On the other hand, however, the individuals and the society must be prevented from the risks and the negative consequences deriving from those technologies: for this reason, it is necessary to ensure an "*appropriate ethical and legal framework*" based on the Union's values and in line with the Charter of Fundamental Rights of the EU (European Commission 2018, 3). To better understand such expression, it must be specified that in this field ethics and law are perceived as inevitably complementary: ethics can help interpretating the law or can recommend behaviours that are not directly required or mandated by law (Renda, 2021, 655); in other words, the law provides the rules of the game, but does not indicate how to play well according to the rules (Floridi, 2019, 261-262).

To develop the abovementioned ethical and legal framework, according to the EC, there is the strong need of a "*cooperation with stakeholders*" (European Commission, 2018, 3): given the scale of the challenges associated with AI, the full mobilisation of a diverse set of participants, including businesses, consumer organisations, trade unions, and other representatives of civil society bodies is essential. Therefore, the Commission announced the creation of a broad multi-stakeholder platform to work on all aspects of AI: we refer to the so-called "European AI Alliance" (European Commission, 2018, 17).

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Given the above, this contribution will focus on *the dialogue with stakeholders* in drafting EU acts, both non-binding and binding, in the field of AI, with particular reference to *the role of the European AI Alliance*, which can be defined as the best example of "*participatory democracy in the field of AI on European level*" (Harasimiuk, Braun, 2021, 46). In particular, the article aims at answering two specific research questions, i.e. what the current potentialities of the abovementioned Alliance are, and how a similar instrument can be exploited and improved in the future. In order to do so, first of all, it will be necessary to examine what such platform is and how it works, also from a purely technical point of view, and to make some general considerations on its nature. Then, it will be possible to get to the heart of the paper and concentrate on the role of the Alliance in the drafting of two extremely important, although very different, EU acts concerning AI: the Ethics Guidelines for Trustworthy AI and the AI Act Proposal. Finally, thanks to the elements collected, the contribution will try to give an answer to the two research questions formulated above.

2. The Genesis of the European AI Alliance and its Material Functioning

The Alliance was launched in June 2018 and quickly attracted many adherents (2,656 participants had registered as of 4 February 2019; on the point see: Renda 2019, 44). With regard to its material functioning, it is hosted by the so-called "*Futurium*" online platform: the latter was originally developed in the framework of "Digital Futures", a foresight project initiated by the European Commission's Directorate General for Communications Networks, Content and Technology (DG CONNECT) in July 2011 and concluded in 2013. Subsequently, however, *Futurium* remained active, and turned into a space on which to experiment with new policymaking models based on scientific evidence and stakeholder participation (Accordino, 2013, 321). It combines the informal character of social networks, the simplicity of

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wikis and the methodological approach of foresights[1], with the main aim of maximally engaging stakeholders in the co-creation of the futures that they want (European Commission, 2013, 5).

The *Futurium* platform is divided in "groups"[2]: the AI Alliance is a "group" of such platform. In order to interact with such group, a two-step procedure is required. Firstly, it is essential to sign in with an "EU Login" account: as well known, the latter is the European Commission's user authentication service, which allows authorised users to access a wide range of Commission web services, using a single email address and password[3]. Secondly, it is indispensable to request membership, by filling an *ad hoc* form; the fields that must be completed are the following: "Country" (mandatory field); "Why would you like to join the European AI Alliance, and what would your contribution be to the discussion on Artificial Intelligence in Europe?" (optional field); "Do you have a twitter account? We would love to follow your updates! You can share with us your twitter handle here" (optional field); "In what capacity are you applying?", and the options are "Join the European AI Alliance in my own name" and "Join the European AI Alliance as representative of my organization"; "Which interest would you like to represent in the European AI Alliance?", and the options are "Government", "Public International Organisations", "Consumer Organisation", "Industry", "Consultancy", "Professionals association", "NGO", "Academia", "Think Tank", "Trade Union", "Financial Institution",

[1] "Foresight" is defined by the European Commission as "the discipline of exploring, anticipating and shaping the future", that "helps build and use collective intelligence in a structured and systematic way to anticipate developments and better prepare for change" (European Commission 2020 B, 3).
[2] On the point see: https://futurium.ec.europa.eu/it/groups.
[3] On the point see: https://webgate.ec.europa.eu/cas/about.html?loginRequestId=ECAS_LR-58698054-HZxImIentw1ReeQORZZp1dFCAUZpSgzodFTzK85NBtjkenqLe7tNwjuEof9eUwEk5nC8bfKJjUidUBguT2RRWF-yntOf97TTHq0GemtNMIM6i-tHEYJqgKNwxhZxjxkZnDEX6bdJsdyJcfMix835ZT5yzLEVdcjJYkzzndgIjPiZ0zd54zGV8ALUt200st9iERizu0.

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"Organisation representing churches and religious communities" (mandatory field)[4].

Once the form has been submitted, it is necessary to wait for the approval of the request, which generally does not take more than few hours. After the approval, it is possible to fully exploit the potential of the AI Alliance, which is further divided in "sections". In the section "Open Library" it is possible to find key documents and evidence on how the AI ecosystem is currently shaped in Europe and around the world; its aim is to provide a space for sharing reliable and up-to-date resources from the AI community to the AI community[5]. The section "Forum", instead, is dedicated to "your thoughts, ideas, questions and any other content that you would like to share with us"[6]. In the section "Trustworthy AI in practice", members of the AI Alliance share practices that help in building an AI ecosystem of trust in Europe and around the world[7]. In the section "Events", "you can browse the content of past AI Alliance events while in the feed below you can find a list of past and future events linking to the discussions of the AI Alliance"[8]. Finally, there is the "AI Alliance Blog", defined as a space where EU policymakers, experts and guest contributors share their thoughts, experience and work in reflection to a specific policy area of AI. Members of the AI Alliance can contribute to the blog, following a validation from the editorial team[9].

It is worth mentioning the fact that so far the Alliance has also organised several assemblies and conferences, during which extremely significant matters were debated. The "First European AI Alliance Assembly", held in Brussels on 26 June 2019, marked the one-year anniversary of the creation of the platform and was the occasion not only to discuss the perspectives of the European strategy on AI, including its impact on the economy and society,

[4] On the point see: https://futurium.ec.europa.eu/en/european-ai-alliance/request-membership-form.
[5] On the point see: https://futurium.ec.europa.eu/en/european-ai-alliance/document.
[6] On the point see: https://futurium.ec.europa.eu/en/european-ai-alliance/forum-discussion.
[7] On the point see: https://futurium.ec.europa.eu/en/european-ai-alliance/best-practices.
[8] On the point see: https://futurium.ec.europa.eu/en/european-ai-alliance/events.
[9] On the point see: https://futurium.ec.europa.eu/en/european-ai-alliance/blog.

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but also to present the most important results achieved by the Alliance that far[10]. The "Second European AI Alliance Assembly", held online on 9 October 2020, was followed by more than 1400 viewers and was particularly focused on building an ecosystem of excellence and trust in AI[11]. The "High-Level Conference on AI", held in Slovenia between 14 and 15 September 2021, featured over 80 selected high-level speakers and about 2000 participants, and was aimed at marking another important milestone to bring policymaking efforts to turn Europe into a global hub of excellence and trust in AI[12]. Moreover, the Alliance also contributed to other events, such as "European AI Excellence and Trust in the world", held between 15 and 16 March 2022, that leveraged the international stage offered by Expo Dubai to present how Europe sees the opportunities and complexities that AI may bring, as well as the initiatives undertaken by the Commission[13].

3. General Considerations on the AI Alliance as an E-Democracy Tool

As a result of what has been said so far, the European AI Alliance can be defined as a space dedicated to all legal, technical and economic implications of AI, which brings together legislators, citizens, academics, practitioners, public authorities, civil society, business, consumer organisations and other stakeholders in an open and multidisciplinary community that exchanges resources. Such resources, that can be shared in text, audio and video format, can include scientific publications, papers on specific topics, databases of AI

[10] On the point see: https://digital-strategy.ec.europa.eu/en/events/first-european-ai-alliance-assembly.
[11] On the point see: https://digital-strategy.ec.europa.eu/en/events/second-european-ai-alliance-assembly.
[12] On the point see: https://digital-strategy.ec.europa.eu/en/events/high-level-conference-on-ai-from-ambition-to-action.
[13] On the point see: https://digital-strategy.ec.europa.eu/en/events/european-ai-excellence-and-trust-world.

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incidents, recordings from webinars, interviews, websites, but also simple ideas, questions and much more[14].

It is now even clearer why at European level the Alliance can be defined as the best example, in the field of AI, of "e-democracy", or "e-participation", or even "digital democracy". Such widely applied terms describe a broad scope of practices of online engagement of the public in political decision-making and opinion forming (on the point see: Hennen, van Keulen, Korthagen, Aichholzer, Lindner and Nielsen, 2020). Thanks to information and communication technology (ICT) and computer-mediated communication (CMC), it becomes possible to enhance the participation of citizens and to practice democracy without the limits of time, space and other physical conditions (on the point see: Lindner and Aichholzer, 2020, 16; Hacker and van Dijk, 2000, 1). To be even more specific, ICT and CMC have the following positive effects on democracy: they increase the scale and speed of providing information, consequently creating more informed citizens; they lessen certain obstacles to political participation, such as apathy, shyness and disabilities; they create new ways of organising the debate, thanks to subject-specific groups for discussion; they remove distorting mediators like journalists, representatives and parties; they solve some problems of representative democracy such as territorial bases of constituencies; they allow politics to respond more directly to citizen concerns (on the point see: Lindner and Aichholzer, 2020, 18; Hacker and van Dijk, 2000, 4).

Given the above, the efforts of the European Union to promote and apply e-democracy tools appear unsurprising. As well known, the Treaty of Lisbon has put special emphasis on strengthening democratic elements in the EU. To our ends, some of the most relevant provisions of the post-Lisbon TEU are art. 10, according to which "[…] 3. Every citizen shall have the right to participate in the democratic life of the Union […]", and art. 11, that states as follows: "1. The institutions shall, by appropriate means, give citizens and

[14] On the point see: https://futurium.ec.europa.eu/en/european-ai-alliance/pages/about.

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representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent […]". In line with such provisions, the EU introduced several participatory democracy instruments, with the potential to stimulate public debate on European issues and to involve European citizens and organised civil society in policymaking at the EU level (on the point see: Lindner and Aichholzer, 2020, 24).

With even more specific reference to e-participation tools, also their importance has been highlighted by EU institutions on several occasions (on the point see: Hennen, 2020, 47). In particular, according to the 2010 European Commission Communication "The European eGovernment Action Plan 2011-2015 Harnessing ICT to promote smart, sustainable & innovative Government" (COM/2010/743 final), the new ICT tools for governance and policy modelling improve the ability of people to have their voice heard and make suggestions for policy actions in the Member States and the European Union as a whole (European Commission, 2010, 8). Moreover, the importance of digital tools to involve citizens, businesses and stakeholders in the decision-making process is emphasised by the Better Regulation Agenda as well (on the point see: Rose, 2020, 222)[15].

It is clear, therefore, that the AI Alliance cannot be read as an isolated phenomenon. On the contrary, it must be considered as one of the digital tools promoted by the European Union to enhance the participation of the public in opinion forming and decision making. As such, it presents most of the features and of the advantages that have just been described. Its peculiarity, however, relies on the fact that it deals only with one subject matter, i.e.

[15] On the point see also: https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation_en#have-your-say--share-your-views-and-ideas.

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artificial intelligence, which is characterised by a very high level of specificity.

4. The Role of the AI Alliance with Reference to the "Ethics Guidelines for Trustworthy AI"

After understanding what the AI Alliance is and how it works, and after making some general considerations on its nature, it is now possible, as anticipated, to focus on its role in the context of the drafting of EU acts, both non-binding and binding, in the field at stake.

In March 2018, the European Commission issued a call for applications for the creation of an expert group on artificial intelligence[16]. In June 2018, based on a transparent and competitive selection process from nearly 500 excellent applications received, the Commission appointed 52 experts to the new "High Level Expert Group on Artificial Intelligence", better known as "AI HLEG"[17]. Some of the members were selected among independent experts and academics, while others among representatives of vested interests (Renda 2021, 654).

The AI HLEG was immediately tasked with the definition of guidelines for the ethical development and use of artificial intelligence: an objective which is perfectly consistent with the already mentioned need to ensure an "appropriate ethical and legal framework". After the publication of a first draft of the document on 18 December 2018[18], the ultimate version of the so-called "Ethics Guidelines for Trustworthy Artificial Intelligence" was finally presented on 8 April 2019[19].

[16] On the point see: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_1381.
[17] On the point see: https://digital-strategy.ec.europa.eu/en/news/commission-appoints-expert-group-ai-and-launches-european-ai-alliance.
[18] On the point see: https://digital-strategy.ec.europa.eu/en/library/draft-ethics-guidelines-trustworthy-ai.
[19] On the point see: https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai.

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The Guidelines, which are non-legally binding, aim at setting out a framework for achieving Trustworthy AI (AI HLEG 2019, 2). Chapter I ("Foundations of Trustworthy AI") identifies and describes *four ethical principles*, that must be adhered to in order to ensure ethical and robust AI.

The first one is "Respect for human autonomy", according to which humans interacting with AI systems must be able to keep full and effective self-determination over themselves and be able to partake in the democratic process: in particular, AI systems should not unjustifiably subordinate, coerce, deceive, manipulate, condition or herd humans; instead, they should be designed to augment, complement and empower human cognitive, social and cultural skills. The second principle is "Prevention of harm", according to which AI systems should neither cause nor exacerbate harm or otherwise adversely affect human beings; they must be technically robust and it should be ensured that they are not open to malicious use. The third principle is "Fairness", which has both a substantive and a procedural dimension: the first one implies a commitment to ensuring equal and just distribution of both benefits and costs and ensuring that individuals and groups are free from unfair bias, discrimination and stigmatization; the second one entails the ability to contest and seek effective redress against decisions made by AI systems and by the humans operating them. The fourth and last ethical principle is "Explicability", according to which processes need to be transparent, the capabilities and purpose of AI systems openly communicated, and decisions – to the extent possible – explainable to those directly and indirectly affected (AI HLEG 2019, 12-13).

Chapter II of the Guidelines ("Realising Trustworthy AI"), instead, translates the four ethical principles of Chapter I into *seven key requirements* that AI systems should implement and meet throughout their entire life cycle. Such requirements are the following: (1) "human agency and oversight"; (2) "technical robustness and safety"; (3) "privacy and data governance"; (4) "transparency"; (5) "diversity, non-discrimination and fairness"; (6)

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"environmental and societal well-being" and (7) "accountability" (AI HLEG 2019, 14-24).

However, the most innovative feature of the document, which stands out compared to other existing ethical AI frameworks, is its Chapter III ("Assessing Trustworthy AI"). The latter, indeed, sets out a concrete *assessment list* to operationalise the seven requirements of Chapter II; in other words, it is a list of questions that offer AI practitioners practical guidance (on the point see: Renda 2021, 661). For example, with reference to the first requirement, i.e. "human agency and oversight", one of the questions is the following: "Is the AI system implemented in work and labour process? If so, did you consider the task allocation between the AI system and humans for meaningful interactions and appropriate human oversight and control?". With reference to the second requirement, i.e. "technical robustness and safety", one of the questions is the following: "Did you assess potential forms of attacks to which the AI system could be vulnerable?". And so on (AI HLEG 2019, 24-31).

After illustrating what the "Ethics Guidelines for Trustworthy Artificial Intelligence" are, it is now essential to understand the role of stakeholder consultation, and more specifically of the AI Alliance, in their drafting. On the point, it can be said that *the AI Alliance literally steered the work of the AI HLEG*, and this happened *before* and *after* the adoption of the Guidelines[20].

With regard to the phase that preceded the adoption of the Guidelines, it has already been mentioned the fact that a first draft of the document was presented on 18 December 2018. It must now be highlighted that, on such draft, an open consultation was launched through the European AI Alliance, in order to achieve a revised and improved version of the Guidelines[21]. During such consultation, which lasted until 1 February 2019, 506 contributions were

[20] On the point see: https://digital-strategy.ec.europa.eu/en/policies/european-ai-alliance.
[21] On the point see: https://ec.europa.eu/futurium/en/ai-alliance-consultation/guidelines.1.html.

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received through the dedicated web form and shared with the AI HLEG[22], that drafted the final document actually taking into consideration many of the suggestions received (on the point see: Barrio Andrés 2021).

Let's make some examples. The links between the different chapters of the Guidelines were made more explicit: as seen, the three Chapters logically flow one from the other. The terminology was brought in line with the terms used in Regulation (EU) 2016/679 (the well-known GDPR, "General Data Protection Regulation"). The revised Guidelines now contain a section dedicated to dealing with tensions between ethical principles. The previously existing reference to the "do good" principle was removed, as it was not found to be a principle that could be a moral imperative in each and every case (e.g. when pursuing fundamental research) and it seemed not well suited in the context of AI; however, it is now clearly stated that one of the goals of Trustworthy AI is to improve individual and collective wellbeing. References have also been included under the principle of respect for human autonomy, which includes the need for particular attention to the working environment.

The improved instrument contains a new requirement, since it also focuses on the societal and environmental impact of AI systems: this requirement addresses the need to consider the environment and other sentient beings as stakeholders, and to ensure sustainable and environmentally friendly AI systems; the need to consider the environment and other living beings was also explicitly stated under the ethical principle of prevention of harm and included in the definition of human-centric AI. The Guidelines' assessment list – operationalising the key requirements – was revised in light of the revisions made to the requirements themselves. And it would be possible to make many more examples. Ultimately, it could be stated that the extensive consultation throughout the AI Alliance induced the Expert Group to be more ambitious and to adopt in the final document a broader approach if compared to the one of the first draft (Renda, 2021, 654).

[22] On the point see: https://ec.europa.eu/futurium/en/ethics-guidelines-trustworthy-ai/stakeholder-consultation-guidelines-first-draft.html.

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Moreover, as anticipated, the AI Alliance played a crucial role also *after* the adoption of the Guidelines: with the publication of such instrument on 8 April 2019, in particular, the Alliance continued its work in order to further enhance the already described assessment list of Chapter III. Indeed, it must be highlighted that the list contained in the 2019 Guidelines was designed from the very beginning to be a "pilot version" and to be developed during a "piloting process" in close collaboration with stakeholders across the public and private sector. More specifically, the idea was to involve companies, organisations and institutions, but also all other interested stakeholders (AI HLEG, 2019, 24).

The piloting phase took place from 26 June 2019 until 1 December 2019, and during such period the interested parties shared through the AI Alliance their best practices on how to achieve trustworthy AI[23]. Thanks to the contributions received during the piloting process, where over 350 stakeholders participated, on 17 July 2020 the High-Level Expert Group on AI presented the ultimate version of the so-called "*Assessment List for Trustworthy Artificial Intelligence*", better known as ALTAI (AI HLEG, 2020). The list is also available in a web-based tool version, that can be accessed through the AI Alliance platform and that translates the principles into an accessible and dynamic checklist that guides developers and deployers of AI in implementing such principles in practice[24].

It is worth highlighting that the 2020 assessment list is much more detailed and complete if compared to the one included in Chapter III of the 2019 Guidelines. More specifically, the revision entailed a tailoring of the list to the specific use cases and the development of additional guidance on legal compliance, as well as on how to address specific risks through ad hoc procedures (Renda, 2021, 661). Consequently, all interested subjects, such as developers and deployers of AI systems, are better supported by the new

[23] On the point see: https://ec.europa.eu/futurium/en/ethics-guidelines-trustworthy-ai/pilot-assessment-list-ethics-guidelines-trustworthy-ai.html.
[24] On the point see: https://digital-strategy.ec.europa.eu/en/library/assessment-list-trustworthy-artificial-intelligence-altai-self-assessment.

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instrument, and such improvement largely happened thanks to the work of the European AI Alliance.

5. The Role of the AI Alliance with Reference to the Legislative Proposals in the Field of AI

After the presentation of the 2020 ALTAI, the AI HLEG's mandate closed. The AI Alliance, however, continued to play a significant role also with regard to the subsequent EU initiatives in the field of AI: we refer, in particular, to the proposals of legislative acts.

On 2 February 2020, the European Commission adopted the White Paper "On Artificial Intelligence – A European approach to excellence and trust" (COM/2020/65 final). In such document it is clearly stated that, in addition to the Guidelines, a binding European regulatory framework would build trust among consumers and businesses in AI, and therefore speed up the uptake of the technology (European Commission, 2020 A, 9-10). For this reason, the Commission launched a broad consultation of Member States civil society, industry and academics, of concrete proposals for a European approach to AI (European Commission, 2020 A, 25).

The abovementioned consultation actually took place between 19 February 2020 and 14 June 2020[25], and the AI Alliance played once more a crucial function: over 1215 contributions were received through the online questionnaire and communication channels of the AI Alliance. Going into detail, 42% of respondents requested the introduction of a new regulatory framework on AI, another 33% thought that the current legislation may need to be modified in order to address the gaps identified, while only 3% agreed that current legislation is fully sufficient. Concerning the scope, 43% agreed that the introduction of new compulsory requirements should only be limited to high-risk AI applications, while another 31% doubt such limitation.

[25] On the point see: https://digital-strategy.ec.europa.eu/en/library/white-paper-artificial-intelligence-public-consultation-towards-european-approach-excellence-and.

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Moreover, participants voiced doubts on the public use of remote biometric identification systems: 28% of them supported a general ban of this technology in public spaces; another 29% required a specific EU guideline or legislation before such systems may be used in publicly accessible spaces; 20% wanted to see more requirements or conditions for remote biometric identification. With regard to enforcement, a wide percentage of the respondents (i.e. 62%) supported a combination of ex-post and ex-ante market surveillance systems. Ultimately, it can be said that the large majority of the participants argued that the Commission should go further in the protection of fundamental rights *vis-à-vis* artificial intelligence (European Commission, 2020 C).

The described consultation led to the presentation by the European Commission of the 2021 AI Package, which is introduced by the EC Communication "Fostering a European approach to Artificial Intelligence" (COM/2021/205 final) and comprehends the Proposal for a Regulation of the European Parliament and of the Council "Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act)" (COM/2021/206 final).

Starting from the EC Communication, it describes the AI Package as the outcome of 3 years of intense policymaking on AI at European level, that included extensive stakeholder consultation on the Guidelines and on the ALTAI. Moreover, the Communication stresses the role of the AI Alliance, formed as a platform for stakeholders to debate the technological and societal implications of AI, culminating in a yearly AI Assembly. The result is a Proposal that combines greater safety and fundamental rights protection while supporting innovation, enabling trust without preventing innovation. The existing legislation, indeed, is deemed unable to address specific high risks deriving from certain characteristics of AI, such as the opacity of many algorithms: therefore, there is the strong need of a "risk-based European regulatory approach", i.e. a framework that regulates AI systems depending on the risks deriving from them (European Commission, 2021 A, 1-9).

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With regard to the Proposal, the "Explanatory Memorandum" recognises the role of the AI Alliance and, more in general, emphasises the importance of the whole public consultation process that took place, describing it as follows: "It targeted all interested stakeholders from the public and private sectors, including governments, local authorities, commercial and non-commercial organisations, social partners, experts, academics and citizens […] In total, 1215 contributions were received, of which 352 were from companies or business organisations/associations, 406 from individuals (92% individuals from EU), 152 on behalf of academic/research institutions, and 73 from public authorities. Civil society's voices were represented by 160 respondents (among which 9 consumers' organisations, 129 non-governmental organisations and 22 trade unions), 72 respondents contributed as 'others'. Of the 352 business and industry representatives, 222 were companies and business representatives, 41.5% of which were micro, small and medium-sized enterprises. The rest were business associations". The Explanatory Memorandum of the Proposal also remembers that there is a general agreement amongst stakeholders on a need for action, since a large majority agree that legislative gaps exist or that new legislation is needed; overregulation, however, must be avoided. With regard to the content, it is also highlighted that most of the respondents are explicitly in favour of the risk-based approach, which is considered a better option than blanket regulation of all AI systems; risks should be calculated taking into account the impact on rights and safety (European Commission, 2021 B, 7-8).

As widely suggested, the Proposal actually follows a risk-based approach (on the risk-based approach see: De Gregorio and Dunn, 2022, 473-500), that differentiates between uses of AI that create an "unacceptable risk", a "high risk" and "low or minimal risk" (on the AI Act Proposal: Veale and Borgesius, 2021, 97-112; Voss, 2021, 7-17).

AI systems whose use is considered "unacceptable" should be prohibited: among them, it is possible to mention those practices that have a significant potential to manipulate persons through subliminal techniques beyond their

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consciousness or exploit vulnerabilities of specific vulnerable groups such as children or persons with disabilities in order to materially distort their behaviour in a manner that is likely to cause them or another person psychological or physical harm; the Proposal also prohibits AI-based social scoring for general purposes done by public authorities, and even the use of "real time" remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement, unless certain limited exceptions apply (Title II, i.e. art. 5, of the Proposal). It is worth remembering that those practices, during the consultation, were judged as critical by a large percentage of the respondents: for example, as already mentioned, many participants voiced doubts on the public use of remote biometric identification systems.

The Proposal takes then into consideration AI systems that create a "high risk" to the health and safety or fundamental rights of natural persons; there are, in particular, two main categories of "high risk" AI systems: AI systems intended to be used as safety component of products that are subject to third party ex-ante conformity assessment and stand-alone AI systems with mainly fundamental rights implications (that are explicitly listed in Annex III of the Proposal). Those "high risk" AI systems should be permitted on the European market, but subject to compliance with certain mandatory requirements and an ex-ante conformity assessment (Title III, i.e. articles 6-51). It must be noticed that those requirements, which are already state-of-the-art for many diligent operators, are defined as the result of two years of preparatory work, derived from the Ethics Guidelines of the HLEG, piloted by more than 350 organisations (European Commission, 2021 B, 13): even the rules on "high risk" AI systems, therefore, can be considered *lato sensu* the outcome of the described participatory process.

Always according to the Proposal, if the risk level does not fall in the first two categories, there should be transparency obligations in certain cases (Title IV, i.e. art. 52). Finally, the Proposal encourages national competent authorities to set up "regulatory sandboxes" (Title V, articles 53-55), that

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establish a controlled environment to test innovative technologies for a limited time.

In the moment we are writing, the AI Act Proposal is still being discussed by EU institutions: in particular, the Council adopted its "General approach" on 6 December 2022, while the European Parliament adopted its position on 14 June 2023, but there has been no approval yet, since it is still necessary to negotiate a shared text. However, it must be also mentioned the fact that, in the meantime, the European Commission presented other legislative proposals in the field of AI, such as the 2021 Proposal for a Regulation "on general product safety" (COM/2021/346 final) and the 2022 Proposal for a Directive "on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive)", which are as well the result of wide consultations, starting from the one on the White Paper on AI (European Commission, 2022, 7).

6. Conclusions and Suggestions

After analysing the role of stakeholder consultation, and in particular of the European AI Alliance, in drafting EU acts on AI, it is now possible to make some concluding remarks.

Preliminary, it seems evident that in the field of AI, even more than in other fields, the dialogue between EU institutions and stakeholders clearly has two purposes.

The first aim, as already highlighted, is to *enhance the democratic legitimacy of EU decision-making processes*. With regard to AI, extremely relevant clashing interests come at stake: on the one hand, there are the needs to promote new technologies, given the economic and societal benefits that they can bring across the entire spectrum of industries and social activities, and to further establish the EU's technological leadership worldwide; on the other hand, individuals and the society must be prevented from the risks and the negative consequences deriving from those technologies. That's why

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involving all the interested parties and taking into consideration their positions and ideas is essential. This also helps to reduce the widespread perception of the 'democratic deficit of the EU' (on such topic see: Hennen, 2020; Neuhold, 2020).

However, there is also a second purpose, which in all likelihood is even prevailing in this specific field, i.e. *increasing the effectiveness of the abovementioned decision-making processes* through the exploitation of the precious competences and experiences of stakeholders such as NGOs, enterprises, academics and so on (on such topic see: Tramontana, 2013). Taking advantage of the knowledge of the specialists of the sector is always very important, but even more with regard to a complex and technical matter such as AI, which remains hardly understandable for the vast majority of the citizens.

Moreover, it is interesting to notice that the dialogue between EU institutions and stakeholders so far has been *continuous*. The consultation, indeed, did not happen just in one moment, but in several occasions and in different phases: after the presentation of the first draft of the Ethics Guidelines for Trustworthy AI, after the publication of the final version of such Guidelines, after the White Paper on AI, and so on. In other words, in the field of AI, until now, EU institutional actors felt the need to ask advice from stakeholders after every single step and before the following ones.

Given the above, it is also possible to formulate some suggestions. According to the writer, indeed, the AI Alliance should allow a deep stakeholder consultation also in the future, not only during the drafting of the AI Act, but also after its (eventual) adoption. The ideal would be to transform it into a permanent medium to institutionalise a constant dialogue on AI policy with affected stakeholders. If exploited in this way, for example, it could help to determine with increasing accuracy the AI systems that must be prohibited, since they create an unacceptable risk, and the ones that must be tightly regulated, since the risk for people's rights and freedoms is high and

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the impact of the technology might be unfavourable to individuals or society as a whole (Harasimiuk and Braun, 2021, 46).

In conclusion, it is now evident that a continuous stakeholder consultation is the only way to achieve a framework capable of addressing the new challenges deriving from the unceasing development of AI. For this reason, the AI Alliance should be constantly exploited and improved in the next years in order to allow such consultation; and this should happen also, *rectius* even more, in case of approval of the AI Act and of the other legislative proposals currently under discussion.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Could the European Court of Justice be a Decisive Player in Climate Justice?

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ABSTRACT

The article aims to assess to which extent the European Court of Justice (ECJ) is able to play an effective role in climate change justice. While some national courts are trying to respond to one of the greatest challenges of our time, which is requiring them to reinvent their role, the ECJ is maintaining a very formalistic approach that raises questions about its capacity to respond to these new challenges. The key question is whether, although the ECJ faces both procedural and substantive limitations, it has legal instruments available to overcome them as well as the legitimacy. To that end, the article analyses the limits of individual access in environmental disputes in front of ECJ and tests the justifications advanced. On the one hand, the European judge would appear to be best placed to take action on such an issue, in accordance with functionalist theories of integration: a transnational problem (climate change) must be resolved at the transnational level. Notably, in the past, when the will of Member States has been defective, the ECJ could be relied upon to advance action on a Europe-wide scale. Therefore, when it comes to climate change, its authority could be undermined if it maintains a formalistic approach to such a major societal issue. On the other hand, a less formalistic approach would require the European judge to accept, more broadly, private, and even transgenerational, claimants into its courtroom, so that it can become a new space for activist dialogue. Should, and can it be the guardian of agonistic democracy without doing judicial activism? As a result, the article suggests that by applying a climate justice lens, European judges could push the boundaries of existing law to address climate change more comprehensively, by exploring the potential of the European values, enshrined in Article 2 of TEU which could give substance to a subjective right of a clean, healthy, and sustainable environment.

Keywords: climate justice, EU Litigation, european values, right to a 'can, healthy, and sustainable environment'

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1. Introduction

The paradigm of sustainable development is over. Supposed to "transcend the tensions between the economy and ecology, the local and the global" (Fievet, 2001)[1] this economic mechanism aimed primarily at reconciling the interests of countries along the North/South axis has demonstrated its limitations in that it prioritises economic development over environmental sustainability.

Nearly forty years after the first "World Commission on Environment and Development" supported by the 1987 *Brundtland Report*,[2] resolutions, declarations, reports, conferences, binding and non-binding standards stemming from international, European, and domestic law have proliferated in an attempt to address the greatest challenge of the century. Despite some progress, this normative proliferation has not guaranteed success. We must come to terms with the observation of a steadily worsening state of the global environment, accompanied by a decline in citizens' trust in the ability of policies to address climate and environmental issues. This distrust towards policies and their relative inadequacy in the face of a now-vital emergency, however, has led to a "judicial revolution" (Huglo, 2018) on a global scale.

Concisely, the new approach could be described as such: if ecological protection cannot be adequately ensured from the top, and within political institutions, the response to the climate emergency has to be triggered from the bottom, through citizen actions and before the courts.

We are witnessing, indeed, an unprecedented surge in climate litigation,[3] brought forth at times by namely: the youth, highlighting the cost of climate

[1] Translated by the author.
[2] *Report* of the World Commission on Environment and Development (1987). *Our common future* [*Brundtland report*], (UN, New York).
[3] For an exhaustive overview of these litigations, see: Global Climate litigation Report of 2023, it highlights also: "As of December 2022, there have been 2,180 climate-related cases filed in 65 jurisdictions, including international and regional courts, tribunals, quasi-judicial bodies, or other adjudicatory bodies, such as Special Procedures at the United Nations and arbitration tribunals. This represents a steady increase from 884 cases in 2017 and 1,550 cases in 2020",

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change borne by future generations; by the elderly (Swiss Senior Association), citing the vulnerability of their group in relation to air pollution; by a mayor grappling with rising waters in their municipality;[4] mostly by individuals united in environmental defence associations; and sometimes even by trees.[5] Three main petitions have been lodged also with the European Court of Human Rights.[6]

'Climate justice' encompasses actually two meanings untimely related. First of all, climate justice calls for a holistic approach that acknowledges and addresses the social, economic, and political dimensions of climate change, striving for a more equitable and sustainable future for all. In a narrower sense, it refers also to the way civil society uses law and mobilises it before judicial institutions to the cause of climate change (Torre-Schaub, 2016).

This second facet of climate justice is particularly interesting as it could unveil a new form of direct democratic engagement, wherein certain parts of civil society attempt, through legal arguments, to shift the debate to the courts in order to achieve political changes or outcomes.

At the European Union level, such an issue implies assessing if the European Court of Justice could be a decisive player in climate justice for the purpose of individual claims stemming from civil society. In that respect, it appears necessary to establish if individual or collective societal claims can be raised with success before the European Court of Justice (ECJ), when the claimants fall outside the scope of the Aarhus Convention,[7] and if so, are EU judges able to shape legal responses to their expectations?

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[4] French Conseil d'État, C.E. (2020), *Commune de Grande-Synthe et Damien Carême*, no 427301; C.E., (2021), *Commune de Grande-Synthe*, no 428177 and Trib. Adm. de Paris (2021), *Association Oxfam France et a*., req. n 1904967, 1904968, 1904974/4-1.

[5] Trib. Bruxelles (2021), *Klimaatzaak c/ Belgique*, http://climatecasechart.com/climate-change-litigation/.

[6] *Carême v. France*, req.no 7189/21, 2022 ; *Verein KlimaSeniorinnen Schweiz v. Switzerland*, req. no 53600/20, 2021 ; *Duarte Agostinho v. Portugal* and 32 other States, req. no 39371/20, 2020(Duarte Agostinho).

[7] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in
Environmental Matters, (Aarhus, 25 June 1998, in force 30 October 2001) *UNTS* n° 2161, 447.

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It corresponds, eventually, to the first three questions a judge should resolve when a case comes before its court, namely: the standing and interest of the applicant to bring proceedings, the justiciability and enforceability of the provision of reference, and it involves, at last, the question for the judge of its own jurisdiction.

An overview of the cases law of the last two years, brought to the ECJ by individuals challenging the EU and Member States directly on climate change, highlights the actual limits of the EU judges' reasoning in relation to three questions of admissibility.

However, the approach of the ECJ, when placed in a broader context, reveals a certain potential. In this regard, the values of solidarity and dignity that are turning into hard law hold promise.

2. The Current Legal Context: The Limits of Individual Access in Environmental Disputes in Front of ECJ

The limitations of access to justice for individual petitions can be grouped into two aspects. Firstly, there are rational limitations, which are primarily procedural and textual constraints. Secondly, there are axiological limitations tied to the Court's fear of falling into judicial activism.

2.1 Rational Limitations

To date, The ECJ considers environmental protection as a mere "general objective" possibly imposing obligations on Member States and EU institutions but not conferring any rights on individuals. Consequently, in the cases where the Court had the opportunity to deal directly with individual climate claims directed against a measure of general application, the Court dismissed their actions. Two cases are particularly relevant to summarise the approach defended by the Court of Justice.

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Thereby, in the *Carvalho* case,[8] the action was first brought to the General Court by thirty-six families from different Member States together with a Swedish association representing young indigenous people. They claimed that the measures to reduce greenhouse gas emissions that had been laid down by the European legislative package were not far-reaching enough. They demanded the annulment of the legislation and the adoption of stricter measures to reduce greenhouse gas emissions by 2030.

The General Court, confirmed by the ECJ,[9] declared the action inadmissible because the claimants did not satisfy the *locus standi criteria* under its strict '*Plaumann* test'. According to this criterion, the admissibility of individual applicants, who seek the annulment of a European act, requires them to be individually affected to the same extent as if they were the addressees of the acts at issue.[10] This condition is, with rare exceptions, hardly ever met when a measure of general application is at stake, especially when it concerns a legislative act, such as in the present case.

The applicants had tried to bypass this issue by arguing that they were individually concerned due to the violation of their fundamental rights. They pointed out that an insufficient reduction in greenhouse gas emissions infringed their fundamental rights as enshrined in the Charter of the European Union: the right to life (Art. 2), the right to the integrity of the person (Article 3), the rights of the child (Art. 24), the right to property (Art. 17), the right to equal treatment (Art. 21) and the rights of the child (Art. 24).

But, under a formalist approach, the Court emphasised that

> the claim that the acts at issue infringe fundamental rights is not sufficient in itself to establish that the action brought by an individual is admissible, without running the risk of rendering the

[8] GC (2019), *Carvalho v. Parliament and Council*, case T-330/18, EU:T:2019:324.
[9] ECJ (2021), *Carvalho v. Parliament and Council*, case C-565/19 P, EU:C:2021:252.
[10] ECJ (1963), *Plaumann & Co v Commission of the European Economic Community*, case 25/62, EU:C:1963:17; such approach has been maintain even after Lisbon Treaty: See ECJ (2013) *Inuit Tapiriit Kanatami v European Parliament,* case C-583/11 P, EU:C:2013:625; [2014] 1 *C.M.L.R.* 54.

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> requirements of the fourth paragraph of Article 263 TFEU meaningless" (para. 48).

In other words, in the presence of a general EU act, like a regulation, the potential violation of their fundamental rights by a general measure could not be taken into account unless the claimants succeed in demonstrating, first of all, that they are individually affected by the act. These two issues (admissibility and substance), according to the Court of Justice, must remain distinct.

The Court concluded by noting that:

> Since, (…), the appellants merely invoked, before the General Court, an infringement of their fundamental rights, inferring individual concern from that infringement, on the ground that the effects of climate change and, accordingly, the infringement of fundamental rights are unique to and different for each individual, it cannot be held that the acts at issue affect the appellants by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguish them individually just as in the case of the person addressed"(para.49).

In this respect, it is important to bear in mind, with regard to an action for annulment, the unvarying position of the ECJ not to open its court hearing to natural persons when a measure of general application that does not entail implementing measures is at issue.[11]

The Court justifies this finding on the ground of Article 263, para. 4 TFEU stating that:

> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act

[11] For examples: ECJ (2021), *Sabo and Others* v *Parliament and Council*, case C-297/20 P, EU:C:2021:24, par. 29; ECJ (2020), *Sarantos and Others* v *Parliament and Council*, case C-84/20 P, EU:C:2020:871, par. 34.

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> addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

This procedural reason could be seen and is presented by the Court as an unsurpassable limit fixed by the treaty, but we all know that, in other contexts, the ECJ did not hesitate, through its interpretative power, to go beyond the words of the treaty.[12] Nevertheless, despite the claims formulated by individuals and even its Advocate General in favour of opening wider the action of annulment to private claimants,[13] The ECJ constantly maintains a restrictive interpretation of Article 263 TFEU,[14] even after the relative opening window introduced by the Lisbon Treaty in paragraph 4 of this provision (Bergstrom, 2014; Bouveresse, 2015).[15]

The Court's apprehension about having its courtroom congested is certainly not unrelated to its stringent positioning. Eventually, although disappointed, *Carvalho*'s ruling was not surprising, contrary to the second case.

In *Ministre de la Transition écologique and Premier ministre* case law,[16] the context was different as the claim was made in the form of an action for damages in front of the French Court. France had been condemned several times due to exceeding the limits for ambient air quality set by European legislation. In that context, the applicant considers that the deterioration of

[12] See, for topic examples, when the Court enshrined the capacity of the European Parliament to be an applicant in actions before the Court of Justice (*legitimation active*) and its capacity to be a defendant for the action of annulment (*legitimation passive*): ECJ (1986), *Parti écologiste 'Les Verts' v. Parliament*, case 294/83, EU:C:1986:166.
[13] Opinion of Advocate general Jacobs (2003), *Commission v Jégo-Quéré*, case C-263/02 P, EU:C:2003:410, "a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests' (point 60).
[14] ECJ (2002), *Unión de Pequeños Agricultores* v *Council*, case C-50/00 P, EU:C:2002:462 ; ECJ (2004), *Commission v Jégo-Quéré*, case C-263/02 P, EU:C:2004:210.
[15] ECJ (2013), *Inuit Tapiriit Kanatami and Others v Parliament and Council*, case C-583/11 P, EU:C:2013:625; ECJ (2021), *Peter Sabo e.a. v. Parliament and Council*, case C-297/20 P, EU:C:2021:24.
[16] ECJ (2022), *Ministre de la Transition écologique and Premier ministre*, case C-61/21, EU:C:2022:1015.

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the ambient air quality was the result of a breach by the French authorities of their obligations under EU law and was seeking therefore compensation arguing his health problems were directly linked to air pollution exceedances in his residential area. However, the French judge hesitated to hold France liable for loss and damage caused to the applicant as a result of breaches of EU law for which the State can be held responsible and opted to refer a preliminary question to the Court in order to determine whether the conditions for holding such liability were met.

It should be noted that, unlike the action for annulment, the action for liability is broadly accessible to natural persons. According to settled case-law, for establishing such liability, the Court held that individuals who have been harmed have a right to compensation where three conditions are met: the disposition of EU law infringed must be intended to confer rights on them; the infringement of that rule must be sufficiently serious; and there must be a direct causal link between that infringement and the loss or damage sustained by those individuals. The most challenging demonstration to provide within the framework of this widely accessible legal ground remains that of proving the existence of a fault, as a sufficiently serious breach of Union is required.

However, in the present circumstances, legitimate hopes could be held for the Court's recognition of the possibility of invoking France's liability due to its shortcomings in implementing action plans in a manner that ensures compliance with limit values and prevents persistent and systematic exceedances.[17]

Furthermore, in a judgment concerning a similar breach but attributable to Germany, while the Court had not imposed coercive detention being ordered to ensure compliance with the limit values by the relevant Länder, it nevertheless recalled

[17] See : ECJ (2019), *Commission v. France* (*Exceedance of limit values for nitrogen dioxide)*, case C-636/18, EU:C:2019:900 and ECJ, (2022), *Commission v. France*, case C-286/21, EU:C:2022:319, in which the Court refers to "persistent and systematic exceedances" (para. 45 and 70), as well as to the demonstration led by Advocate General Kokott, resulting in the conclusion of a sufficiently established violation in the submissions made in this case: Opinion (2022), case C-61/21, EU:C:2022:359, para. 106 to 125.

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> that the full effectiveness of EU law and effective protection of the rights which individuals derive from it may, where appropriate, be ensured by the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible, as that principle is inherent in the system of the treaties on which the European Union is based.[18]

This suggested at least an 'implicit' recognition, as noted by Advocate General Kokott, of the admissibility of the claim for compensation.
However, the Court of Justice ruled that the Air Quality Directive does not confer individuals harmed by air pollution rights to demand compensation when Member States breach EU air quality rules.

This is a condition that tends to be overlooked, as it is extremely rare for the Court to be picky on this point. This requirement has led to the rejection of liability in the only instances where no connection, however remote, to individual rights could be established.[19] Even the case law had, until then, demonstrated a favourable and even expansive interpretation towards the recognition of this status.[20]

Laconically, the Court nonetheless judges that, although this Directive establishes clear and precise obligations with regard to the result that Member States must achieve, "those obligations pursue (…) a general objective of protecting human health and the environment as a whole" (para. 55).

It concluded to dismiss the liability of the State on the basis of EU law:

> Thus, besides the fact that the provisions concerned of Directive 2008/50 and the directives which preceded it do not contain any

[18] ECJ (2019), *Deutsche Umwelthilfe eV v Freistaat Bayern*, Case C-752/18, EU:C:2019:1114, para. 54.
[19] ECJ (2004), *Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland*, case C-222/02, EU:C:2004:606.
[20] GC (2020), *Industrial Química del Nalón*, SA v European Commission, case T-635/18, EU:T:2020:624 where the General Court considers that it is "not necessarily exclude the possibility that the European Union may incur non-contractual liability as a result of the infringement of a rule of law which is not intended *stricto sensu* to confer rights on individuals, but rather is likely to lead to the imposition or strengthening of obligations on individuals pursuant to other rules of EU law", para. 70.

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> express conferral of rights on individuals in that respect, it cannot be inferred from the obligations laid down in those provisions, with the general objective referred to above, that individuals or categories of individuals are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to individuals. (para. 56)

According to the Court, compliance with air pollutant limit values does not lead to any explicit attribution of rights on individuals whose violation would make a Member State responsible for damages caused to them. Thus, the main and even sole argument for dismissing the compensation claim lies in the (overly) general nature of the health and environmental protection objectives.

The only determining factor seems to be the general interest objective of protecting health and the environment. In other words, the right to environmental health is not, in the Court's view, a subjective right. However, this is nothing but an assumption, given how carefully the Court avoids providing justification. If we delve more deeply into the case law, a rule grants rights to individuals in four main instances: a rule of law is intended to confer rights on individuals where the infringement concerns a provision that gives rise to rights for individuals which the national courts must protect, so that it has direct effect,[21] which creates an advantage that could be defined as a vested right,[22] which is intended to protect the interests of individuals[23] or which entails the grant of rights to individuals and the content of those rights are sufficiently identifiable.[24] While the first two hypotheses could be dismissed, the latter two, on the other hand, deserved to be, at the very least, elaborated upon. Art. 1(1) of Directive 2008/50 at stake. This article states

[21] ECJ. (1996), *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport*, cases C-46/93 and C-48/93, EU:C:1996:79, para. 54.
[22] GC. (1998), *Edouard Dubois et Fils SA v Council and Commission*, case T-113/96, EU:T:1998:11, para. 63-65.
[23] ECJ. (1978), *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and others v Council and Commission*, cases 83 and 94/76, 4, 15 and 40/77, EU:C:1978:113 para. 5.
[24] GC. (2014), *Evropaïki Dynamiki* v *Commission*, case T-297/12, EU:T:2014:888, para. 76.

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that the Directive lays down measures aimed at "defining and establishing objectives for ambient air quality designed *to avoid, prevent or reduce harmful effects on human health* and the environment as a whole".[25] It appears to us that the objective 'to prevent or reduce harmful effects on human health and the environment,' within which lies the obligation, particularly not to exceed pollutant limit values, possibly read in conjunction with Art. 3 (right to the integrity of the person), Art. 35 (health care), and Art. 37 (environmental protection) of the Charter of Fundamental Rights of the European Union (the charter), lead to the recognition of a subjective right for the benefit of victims of air pollution. In other words, it bestows an individual right to environmental health, allowing for redress when these obligations (establishing a plan/observing limit values) are distinctly violated.

This approach can be supported by the opinion of Advocate General Kokott presented in this case. Contrary to the EU judges, she had stressed that "the interest in health is highly personal and thus individual in nature and forms".[26] Recalling Article 3 of the Charter, she noted that the failure of a Member State to ensure compliance with limit values "infringes a legal interest which is much more important than the abovementioned asset-related interests. This is because everyone has the right to respect for his or her physical and mental integrity, which is laid down in Article 3 of the Charter of Fundamental Rights and is ranked in first position in relation to the other legal interests".[27] Emphasising,

> Exceedance of the limit values burdens, above all, certain groups who live or work in particularly polluted areas (…) it is incorrect to assume, (…) that the rules on ambient air quality serve exclusively to protect the general public. Although ambient air quality must be

[25] Our enphasis.
[26] Opinion (2022), case C-61/21, para. 77.
[27] *Ibidem*, para. 91.

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> protected in general, the specific problems arise in specific places and affect specific, identifiable groups of people (…).[28]

Thus, the Advocate General arrived at the conclusion that the relevant provisions recognised rights for individuals directly affected by an exceeding of limit values and urged the national judge to acknowledge, on the basis of EU law, a right to compensation for victims of environmental harm linked to degraded air quality.

Eventually, the reasoning developed by Advocate General Kokott demonstrates that procedural and textual limitations could easily be surpassed by a more constructive and progressive interpretation of the law.

Therefore, if the ECJ hesitates to follow this path, its reluctance is due to other reasons that appear in the background of these judgments. The fear of judicial activism might be one of them, but it does not withstand pragmatism and the traditionally assumed role of the ECJ as a driving force of integration.

2.2 Axiological Limitations

In a legal context, the axiological limitation faced by the Court of Justice could manifest as a concern to maintain a balance between judicial and legislative powers, to preserve the separation of powers, or to prevent an excessive intervention by the Court in sensitive political or social matters.

Critics of judicial activism have marked the Court's jurisprudential developments since its inception and the debate on this subject is far from exhausted (Scalia, 1983; Weiler, 991; Mangiameli, 1992; Alter, 2001; Adams and de Witte, 2005; Dougan, 2012; Micklitz and Taupitz, 2018). Proponents may allege that judges should strictly adhere to established legal doctrines and defer to legislative bodies when it comes to addressing complex policy issues like climate change. In that respect, ECJ could not hold governments and corporations accountable for their actions or inaction.

In that sense, in *Carvalho's* case the Court highlights that

[28] *Ibidem*, para. 100 and 101.

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> the Courts of the European Union may not, without going beyond their jurisdiction, interpret the conditions under which an individual may institute proceedings against an act of the Union in a way which has the effect of setting aside those conditions, which are expressly laid down in the FEU Treaty, even in the light of the principle of effective judicial protection. (para.69)

The same idea was developed in *Unión de Pequeños Agricultores* where it notes

> While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.[29]

However, would it really go beyond its jurisdiction by granting full access to individuals in environmental litigations? It appears to us that judicial activism would be an unfair accusation against the Court. While some plaintiffs may identify as climate activists, they do not necessarily make the Court one of their own (Eckes, 2021; Viera, 2019; Huglo, 2018). Actually, the background and the stakes make the Court's reasoning difficult to justify. It has to be recalled at first that a Court should not decline to hear a case just because its political dimensions could be more effectively addressed by another branch of government. Judges have a responsibility to interpret and apply the law in a way that reflects the evolving understanding of the problem and the need for effective solutions.

Climate change intersects with various human rights, such as the right to life, health, and a healthy environment. European judges have a crucial role in protecting fundamental rights and upholding the rule of law. In the same

[29] ECJ (2002), *Unión de Pequeños Agricultores* v *Council*, case C-50/00 P, para. 45.

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way, Climate change often exposes gaps and shortcomings in governance structures. European judges, through their interpretation and application of EU law, can fill these governance gaps by providing guidance and remedies when national governments fail to take sufficient action or violate their obligations.

This problem was directly pointed out in the *Urgenda* case law[30] when the State asserted that it is not for the courts to undertake the political considerations necessary for a decision on the reduction of greenhouse gas emissions. On this issue, the Dutch Court answered that if

> decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. (…) It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound.[31]

It pursues the reasoning by noting that

> the Netherlands is bound by the ECHR [European Convention on Human Rights] and the Dutch courts are obliged under (…) Dutch Constitution to apply its provisions in accordance with the interpretation of the ECtHR. The protection of human rights it provides is an essential component of a democratic state under the rule of law.[32]

Similarly, the EU institutions, like the Member States falling within the scope of Union law, are bound to respect fundamental rights as enshrined in the Charter and the ECHR.[33] The Court therefore has jurisdiction to ensure that they remain within these limits. Acting such, the European Court of

[30] Dutch Supreme Court (2019), *Urgenda Foundation v The State of the Netherlands*, NL:HR:2019:2008.
[31] *Ibidem* para. 8.3.2.
[32] *Ibidem* para. 8.3.3.
[33] Although the Union has not acceded to the ECHR, the rights enshrined in the latter have the status of general principles of law and are binding as such on the EU institutions.

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Justice would gain legitimacy by assuming the "role of guardian of agonistic democracy" (Grandjean, 2022). This concept highlighted in the 1930s (Honig, 1993) gained particular significance in environmental disputes (Connolly, 2002).

The latter advocates for multiple centres of power and decision-making, enabling diverse voices and perspectives to participate in the democratic process. This includes promoting the participation of marginalised and disadvantaged groups and fostering deliberative spaces where different viewpoints might be expressed. In this context, the judge as a guardian of agonistic democracy might contribute to preserving democratic values.

Moreover, the European Court is undoubtedly the best-placed institution to address such transnational issues as climate change or environmental protection, which requests to articulate the local and global dimensions that underpin these disputes. In that sense, it may be argued that addressing climate change's magnitude and urgency plea in favour of judicial creativity to fill legal gaps and promote climate justice.

3. Exploring the Potential of European Values

The idea is that by applying a climate justice lens, European judges could push the boundaries of existing law to address climate change more comprehensively. They can interpret legal principles and constitutional provisions in innovative ways to respond effectively to climate-related challenges without overreaching their powers. From this perspective, the ECJ could draw inspiration from the solutions developed by national judges, who are responsible for applying Union law. Not only do national solutions provide insights to the European judge, but their adoption, even partially, might reinforce the authority of the Court's rulings (taking into account the dynamic interaction of their system and law: Saiger, 2019; Roberts, 2011).

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3.1 National Contexts

Since 2015, European national judges have taken up climate litigations. In particular, Dutch courts (*Urgenda*[34]; in legal literature: Besselink, 2022; Maxwell, 2020; Antonopoulos, 2020; De Schutter, 2020) and German courts (*Neubauer*[35]; in legal literature: Hong, 2023; Torre-Schaub and Missonne, 2023; Humphreys, 2022; Romainville, 2022) have not hesitated to adopt innovative solutions and provide citizens with a forum for dialogue and protection of their rights. Moreover, they have initiated the transformation of environmental protection, initially perceived as a general objective, into a genuine individual right by the conjunction of the principle of duty to care. In both cases, associations of environmental protection were holding the States directly responsible for climate change.

We will focus on these two cases, particularly salient, as they took place in front of European national courts, linked as such to ECJ and because the success of these actions was a decisive step in climate litigations in Europe.

The *Urgenda* case law revolves around several key points. The Dutch Court ruled that the government has a legal duty to care in order to protect its citizens from harm caused by climate change, based on its obligations under Art. 2 (Right of life) and Art. 8 (Right to respect for private and family life) of the ECHR. It found that the Dutch government's efforts to mitigate greenhouse gas emissions were insufficient to meet its duty to prevent harm, as they were not in line with the necessary emission reduction targets. In this respect, it held that a more substantial reduction of at least 25 per cent was required to fulfil the government's duty to protect citizens' rights. One of the most interesting points of the reasoning is that the case established a precedent for positive obligations, wherein governments can be legally compelled to take action to prevent harm, rather than merely refraining from causing harm. This includes taking adequate measures to mitigate climate change.

[34] Dutch Supreme Court (2019), *Urgenda Foundation v The State of the Netherlands*, NL:HR:2019:2008.
[35] German Federal Constitutional Court (2021), *Neubauer v. Germany*, 1 BvR 2656/18, 78/20, 96/20, 288/20.

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Such findings stem from the combination established between the duty of care and human rights, emphasizing that failure to address climate change adequately could infringe upon citizens' right to life and a safe environment.

According to the Dutch Court, indeed, Art. 2 & 8 ECHR oblige the State to take measures. Relying on the ECtHR (European Court of Human Rights) case-law, the national judge holds that Art. 2 "encompasses a contracting state's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction (…) [and] was violated with regard to a state's acts or omissions in relation to a natural or environmental disaster".[36] In the same manner, it confirms that "Art. 8 ECHR encompasses the positive obligation to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment".[37] It considers therefore, that "In the case of environmental hazards that endanger an entire region, Articles 2 and 8 ECHR offer protection to the residents of that region".[38] Finally, the Dutch Court refers to Art.13 ECHR according to which national states are required to provide remedies that can effectively prevent more serious violations[39] to reassert its jurisdiction (in an over-abundant manner) or more likely to justify the substance of its ruling.

However, it is worthwhile to mention that the parties do not dispute that *Urgenda* has standing to pursue its claim because Dutch law provides for class actions brought by interest groups. Nevertheless, the *Urgenda* case remains a landmark decision, establishing the legal precedent that governments have a responsibility to take robust action to mitigate climate change and protect their citizens' rights which subtly reveals the recognition of an individual right to a safe environment.

[36] Dutch Supreme Court (2019), *Urgenda Foundation v The State of the Netherlands,* para. 5.2.2.
[37] *Ibidem* para. 5.2.3.
[38] *Ibidem* para. 5.3.1.
[39] *Ibidem* para. 5.5.

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In *Neubauer*'s judgment,[40] a group of German youth filed a legal challenge to Germany's Federal Climate Protection Act in the Federal Constitutional Court, stressing that the legislation's target of reducing greenhouse gas emissions by 55 per cent until 2030 from 1990 levels was insufficient. The complainants argued to defend their standing of interest that the German legislation violated their human rights as protected by Germany's constitution. Concerning the standing of interest, the Court held that

> Insofar as the complainants are natural persons, their constitutional complaints are admissible. This applies insofar as they claim that duties of protection arising from fundamental rights have been violated. The complainants can in some cases claim a violation of their fundamental right to life and physical integrity (…) and some of them can claim a violation of their fundamental right to property (…) because it is possible that the state, in adopting the Federal Climate Protection Act, might have taken only insufficient measures to reduce greenhouse gas emissions and to limit global warming.[41]

If the German Court notes that the challenged act "does not presently or directly affect the complainants since it merely contains an authorisation to enact ordinances"[42] and that Article 20a of the Basic Law which obliges the State to take climate action "cannot be directly relied upon to establish standing to lodge a constitutional complaint (…) [and] does not entail any subjective rights",[43] it considers nevertheless that "alongside the duties of protection arising from Art. 2(2) first sentence with regard to physical and mental well-being and from Art. 14(1) GG, a mechanism for safeguarding the ecological minimum standard could indeed acquire its own independent validity".[44] By this conjunction, it stresses that "The fundamental right to the

[40] German Federal Constitutional Court (2021), *Neubauer v. Germany*, 1 BvR 2656/18, 78/20, 96/20, 288/20.
[41] *Ibidem*, para. 90.
[42] *Ibidem*, para. 111
[43] *Ibidem*, para. 112.
[44] *Ibidem*, para. 114.

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protection of life and health (…) obliges the State to afford protection against the risks of climate change".[45]

Thereby:

> Apart from providing the individual with a defensive right against state interference, this fundamental right also encompasses the state's duty to protect and promote the legal interests of life and physical integrity and to safeguard these interests against unlawful interference by others (…). The duties of protection derived from the objective dimension of this fundamental right are, in principle, part of the subjective enjoyment of this fundamental right. *Thus, if duties of protection are violated, the fundamental right enshrined in Art. 2(2) first sentence GG is also violated*,[46] and affected individuals can oppose such a violation by lodging a constitutional complaint. (para. 145)

The German Court, in this case, strikes down parts of the Federal Climate Protection Act as incompatible with fundamental rights for failing to set sufficient provisions for emission cuts beyond 2030. Moreover, if the Court does not enshrine expressly a subjective right to future generations to live in a safe environment, it stresses however that the state's duty of protection is "also oriented towards the future (…). The duty to afford protection against risks to life and health can also establish a duty to protect future generations".[47] In this respect, it "encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence".[48] It rules: "Accordingly, the legislator may be obliged to act in a forward-looking manner by taking

[45] *Ibidem*, para. 144.
[46] Our enphasis.
[47] *Ibidem*, para. 146.
[48] *Ibidem*, para. 193.

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precautionary measures in order to manage the reduction burdens anticipated after 2030 in ways that respect fundamental rights".[49]

These approaches effectively elevated climate change from a purely environmental concern to a legal obligation tied to the well-being and rights of individuals and communities. Both rulings highlighted the role that non-state actors, such as NGOs, can play in advocating for climate action through legal means.

3.2 The Potential Mutation of Environmental Protection as a Mere Objective to a Subjective Right Through the Values of the EU

It appears to us that the solutions that need to be formulated before the ECJ to enhance individuals' access to European justice must primarily stem from the needs private prosecutors express through the concept of 'climate justice'.

Climate justice postulates the recognition of the intergenerational nature of climate change and advocates for the rights and interests of both present and future generations to be considered in decision-making processes. In other words, it emphasises the responsibility to preserve a liveable planet for future generations and ensure they have access to the same opportunities and resources as present generations.

Put differently, opening the admissibility of the action for annulment to individuals against acts of a general nature is not necessarily the anticipated response. In a certain way, it matters little whether the claims are scrutinised within the framework of an action for annulment, omission, or liability. What matters is that the legitimacy of those who feel they have been harmed by a flawed environmental policy be recognised as deserving of expression, which should be reflected, in terms of litigation, by the admissibility of their arguments before the ECJ. More precisely, while it can be accepted that the admissibility of individual actions may be denied within the scope of the action for annulment, on the other hand, such a refusal, within the framework

[49] *Ibidem*, para. 195.

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of an action for liability, amounts to endorsing a form of irresponsibility of public decision-makers in environmental matters, or at least a lack of accountability of the governing bodies to the primary stakeholders. Certainly, the effectiveness of environmental policies involves moving beyond a solely anthropocentric perspective. However, these policies cannot be pursued by entirely excluding individuals, meaning without considering them, at the very least, as potentially affected and impacted by these standards. It seems difficult to admit that environmental harm would be fully distinguishable from harm to persons (Müllerová, 2023, pointed out the necessity to examine the two branches separately).

This imperative implies that environmental standards should no longer be seen solely as goals with general obligations aimed at Member States and/or EU institutions, but rather as embodying the right of every individual to live in a healthy environment. Contentious hurdles are thus merely indicative of the significant problem arising from the lack of acknowledgement of the fundamental right to live in a healthy environment. If such a right could be enshrined by ECJ, instead of considering environmental issues as a mere general objective, then the *locus standi* of individuals becomes attainable.

The hypothesis here formulated is that the reasoning applied by ECJ with regard to the value of the rule of law could be extended to the values of dignity and/or solidarity, which support the right of present and future generations to a healthy environment.

Indeed, the Court has interpreted the values, established in Art. 2 TEU, which states that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and

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men prevail.", as reflecting the "very identity"[50] of the EU and becoming such an enforceable set of rules. In that regard, the Court adds

> (…) it must be borne in mind that Art. 2 TEU is not a mere statement of policy guidelines or intentions, but contains values which (…) are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles comprising legally binding obligations for the Member States.[51]

In consequence of this finding, the ECJ held that any specific manifestation of these values in the treaty, the Charter or secondary legislation might lead, because of their binding nature, to broader requirements for the Union institutions and its Member States that could such turning into rights for individuals.

The Court applies, in particular, this reasoning, regarding the rule of law value. Considering that 'Effective judicial protection' (established in art. 19 TEU) gives concrete expression to the value of the rule of law,[52] enabled the Court to deduce binding obligations on the Member States to provide effective legal protection to EU citizens including national judges in Poland and Romania.[53] Furthermore, once the Court can rely on a specific provision of the treaty that refers to a value of the European Union, it then becomes

[50] ECJ (2022), *Hungary v. Parliament and Council*, case C-156/21, EU:C:2022:97, para. 127 "The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties"; see also: ECJ (2022), *Poland v. Parliament and Council*, case C-157/21, EU:C:2022:98, para. 145.
[51] ECJ (2022), *Poland v. Parliament and Council*, case C-157/21, para. 264.
[52] ECJ (2018), *Associação Sindical dos Juízes Portugueses*, case C-64/16, EU:C:2018:117, para. 32.
[53] See in particular: ECJ (2019), *Commission v Republic of Poland*, case C-619/18, EU:C:2019:6 15; ECJ (2021), *Commission v Republic of Poland*, case C-791/19, EU:C:2021:596; ECJ (2022), *Poland v. Parliament and Council*, case C-157/21, EU:C:2022:98; ECJ (2021), *Euro Box Promotion and Others*, cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034.

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possible to derive from this specific provision broader obligations towards the Member States in such a manner to grant rights to individuals.

It results from the above that any norm adopted by the institutions of the Union or, within its scope, by the Member States must be interpreted in accordance with these values. Their specific embodiment in the Charter, as well as in derivative law, can lead, due to their binding nature, to broader requirements for the institutions of the Union as well as for the Member States in the implementation of Union policies and actions.

The same reasoning could apply to environmental protection, which emphasises the responsibility to preserve a liveable planet for present and future generations and ensure they have access to the same opportunities and resources as present generations. In that regard, it could be argued that the right to human dignity (Art. 1), the protection of physical integrity (Art. 3), the rights of the child (Art. 24), Health care (Art. 35) and, more broadly, the protection of the environment (Art. 37) enshrined in the Charter and others several dispositions of the treaties, give concrete expression to the value of dignity and solidarity, lay down in Art. 2 TEU. The combination of values with these specific obligations to the EU and its Member States could thus confer substance of the rights on individuals.

As some recent judgments of the Court of Justice prove, such a combination has already been done with the value of solidarity and its (concrete) manifestation as a principle in the treaty as well as in secondary legislation.

For instance, in the case of *Poland v. Commission*,[54] the principle of energy solidarity, deriving content from Art. 194 (1) (b) TFEU,[55] is interpreted as a specific expression of the value of solidarity established in Art. 2 TEU leading to binding obligations.

[54] ECJ (2021), *Germany v. Commission*, case, C-848/19 P, EU:C:2021:598.
[55] Art. 194(1)(b): "In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to (b) ensure security of energy supply in the Union".

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ECJ ruled that "(…) the spirit of solidarity between Member States, mentioned in that provision [Art. 194(1)], constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law".[56] Highlighting the several other provisions of the Treaties referring to the principle of solidarity, the Court stressed that

> the principle of solidarity underpins the entire legal system of the European Union (…) and it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In that regard, the ECJ has held, inter alia, that the principle not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States.[57]

Consequently, unlike the Member States, who invoked in defence that the principle of solidarity was merely a general and political objective, and the Commission, which argued that it could not constitute "an autonomous legal criterion that may be invoked in order to assess the legality of an act",[58] the Court considers:

> that the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of

[56] *Ibidem.* para 38.
[57] *Ibidem.* para 41.
[58] *Ibidem.* Para 36.

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> solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it.[59]

In this perspective, the protection of the environment, read in conjunction with the respect for human dignity, could thus be understood as a specific expression of the principle of solidarity. By paraphrasing the Court's reasoning, it could be argued that the principle of solidarity, closely tied to the principle of loyal cooperation, entails rights and obligations both for the European Union and for the Member States with regard to the common interest of the environmental protection. In that context, the European Union is bound by an obligation of solidarity towards the Member States and the Member States are bound by an obligation of solidarity between themselves.

Taking this a step further, the obligation of solidarity could imply intergenerational solidarity.[60]

Because of the binding nature of the values underpinning the Union's policies and actions, the principle of solidarity turned into an obligation by its combination with value would notably entail the right, for residents within the European territory representing both present and future generations, to live in conditions of dignified habitability /healthy environment. If a Member State or an EU institution were to fail to meet such a protective standard, the engagement of responsibility, either of the State before the national courts or of the EU institutions before the ECJ, should be considered admissible. The question would not be to determine whether the violated environmental norm grants rights to individuals or not, but to acknowledge that the principle of solidarity, through the specific obligations it imposes in environmental matters, ultimately grants the "right to live in a healthy environment".

[59] *Ibidem*. para. 49.
[60] In that sense Daniel Sarmiento, 2023, notes "In a context of values that are turning into hard law, it will not take long to see the value of solidarity assuming a role in binding the Member States in certain areas which affect redistribution of resources close to the individual, but also of inter-generational solidarity when it comes to matters such as environmental protection".

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Besides, the ECJ would thus echo the argumentation put forward by the German Constitutional Court, which noted in *Neubauer* that

> It is precisely because the state is dependent on international cooperation in order to effectively carry out its obligation to take climate action (…) that it must avoid creating incentives for other states to undermine this cooperation. Its own activities should serve to strengthen international confidence in the fact that climate action – particularly the pursuit of treaty-based climate targets – can be successful while safeguarding decent living conditions, including in terms of fundamental freedoms. In practice, resolving the global climate problem is thus largely dependent on the existence of mutual trust that others will also strive to achieve the targets.[61]

Such reasoning would allow for a paradigm shift from "sustainable development", in which the subjects are primarily states, to a true "right to a clean, healthy, and sustainable environment" as a human right, as recognised by the United Nations General Assembly in a resolution adopted on July 2022,[62] and as a fundamental aspect of the Union's very identity.

4. Conclusions

Access to EU courts for natural claimants is certainly more restrictive than before national courts because of the procedural obstacles they face in demonstrating their standing in European litigation. However, this is only relevant where citizens are seeking the annulment of European legislation or a declaration of the failure of these institutions to act, due to the strict conditions arising from the *Plaumann* test which applies to such actions. It is likely that the ECJ's reluctance to open its courtroom will persist in these cases. While the ECJ may hide behind the restraint it must maintain in view

[61] German Federal Constitutional Court (2021), *Neubauer v. Germany*, cit. para 202.
[62] Résolution UNGA A/76/L.75.

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of the principle of the separation of powers and the risk of developing judicial activism, its refusal to open up its access to natural claimants more widely also prevents it - and this argument should not be overlooked - from dealing with too many claims that it would not materially be able to address.

But these difficulties of access to the Court for individual claimants only arise in the context of actions for annulment or failure to act and should not be extended to other remedies, such as actions for damages where *locus standi* is easier to establish. Above all, the legitimacy of the ECJ could be called into question if, unlike the national courts of its Member States, it declines jurisdiction when transnational and essential issues for the EU, such as environmental protection, are at stake. Indeed, the Court cannot afford to refuse access to its courtroom when the responsibility of political decision-makers in environmental matters is at stake.

This imperative implies that environmental standards should no longer be seen merely as objectives with general obligations for Member States and/or EU institutions, but rather as the embodiment of every individual's right to live in a healthy environment. If the fundamental right to live in a healthy environment could be enshrined by the ECJ, rather than considering environmental issues merely as a general objective, then the standing of individuals before the Court could be recognised. In that regard, this article proposes to focus on recent developments initiated by the ECJ on the basis of the values of EU law enshrined in Article 2 TEU, which reflect the 'very identity' of the EU and turns into a set of enforceable rules conferring rights on individuals. The hypothesis put forward is that the reasoning applied by the ECJ in relation to the value of the rule of law could be transposed to the values of dignity and/or solidarity, which underpin the right of present and future generations to a healthy environment. Such reasoning implies neither a rewriting of the treaties nor judicial activism and would allow real access to individuals participating in climate justice in both senses of the term.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Litigating Climate Change Mitigation and Adaptation in Investment Dispute Resolution

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ABSTRACT

International investment agreements (IIAs) may protect in principle every kind of foreign direct investment (FDI), including "brown" and "green" FDI. This means that potentially polluting multinational enterprises may be protected by IIAs and benefit from the right to sue States for the enactment of measures adopted in furtherance of climate change action through investor-State dispute settlement (ISDS). While this is not preferable under a policy perspective, various legal techniques may provide important "entry points" through which the *lex climatica* – international climate change treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) of 9 May 1992 and the Paris Agreement of 12 December 2015, and implementing municipal laws – may be successfully integrated in the *lex mercatoria* – IIAs. Such techniques pertain to investment treaty drafting (recognition of the States' right to regulate, general exceptions, express environmental carve-outs and provisions establishing investors' commitments), procedural issues (jurisdictional requirements, admissibility filters and viability of States' counterclaims) and substantive matters (treaty interpretation and applicable laws). Notably, IIAs must be interpreted pursuant to systemic integration as required by Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) pursuant to which "any relevant rules of international law applicable in the relations between the parties" "shall be taken into account". As a result, multilateral treaties addressing climate change do constitute an hermeneutic basis against which adjudicators may asses the breaches of economic treaties under international law. In this respect, the most relevant international instrument appears to be the Paris Agreement with its 196 States membership. The domestic implementation by States of their nationally determined contributions (NDCs) required periodically under Article 4 of the Paris Agreement may provide a parameter of legality of States' climate change inaction, which would then result to be inconsistent with the applicable IIAs. The recent stipulation of multilateral commitments addressing climate change is relevant also under the lens of dispute resolution. In this respect, the "teeth" provided by IIAs and investor-State dispute settlement (ISDS) to implement the investors' rights granted by the Parties may be instrumental also to the enforcement of climate change action commitments (in the absence of an arbitration or submission agreement pursuant to Article 24 of the Paris Agreement and Article 14 of the UNFCCC). In this scenario, ISDS may be resorted to by "green" investors to request an international investment tribunal or court to sanction a possible failure by a State in the implementation of binding climate change action.

Keywords: climate change, mitigation, adaptation, international investment law, international arbitration

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1. Introduction: Climate Change and International Investment Law

The present contribution aims to analyse the relationship and interaction between States' obligations stemming from their participation to the international climate change regime (ICCR) and those arising from international investment law, especially the international investment agreements (IIAs) they are parties thereto (Schill, 2007, 469; Baetens, 2019, 107; Ben Hamida, 2021, 84; Gehring and Hepburn, 2013, 381; Tienhaara, 2019, 292). The compelling character of human-induced climate change, as incontrovertibly established by scientific evidence reported by the Intergovernmental Panel on Climate Change (IPCC), furthers its acknowledgment as first and most urgent contemporary global sustainable issue also in the economic, social and political dimension,[1] consistent with the achievement of Sustainable Development Goal No. 13 ("Take urgent action to combat climate change and its impacts").

The Paris Agreement of 12 December 2015,[2] adopted multilaterally under the aegis of the United Nations Framework Convention on Climate Change (UNFCCC)[3] and featuring 194 Parties, represents one of the most successful achievements of the international climate change regime (ICCR). Given its comprehensive scope, it provides a wide-ranging regulation of the gamut of legal aspects and processes that pertain to climate change, such as mitigation, adaptation, finance, technology, development and transfer, transparency of action, support and capacity building, loss and damage, as well as compliance. The attainment of the ambitious goals[4] envisaged in the Paris

[1] Bodanski 2021, 80: "Climate change is the mother of all global commons problems".
[2] Paris Agreement, signed at Paris on 12 December 2015, entered into force on 4 November 2016, *UNTS*, vol. 3156.
[3] United Nations Framework Convention on Climate Change, signed at New York on 9 May 1992, entered into force on 21 March 1994, *UNTS*, vol. 1771, p. 107.
[4] Paris Agreement, Art. 3: "(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development,

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Agreement demands international and national strategies and planning fostering unprecedented figures of "green" investment. Such investments deserve promotion and protection in conditions of stability and sufficient predictability from the viewpoint of foreign investors.

These prospective developments in the field of international investment law ultimately demand rethinking the traditional dichotomy between economic rights and non-economic values (e.g., environment,[5] health, labour standards), especially in the applications to be developed in the arbitral tribunals' practice. Moreover, the protection of foreign investments in the economic sectors of the "green transition" may even be reinforced upon reliance to States' international climate change law obligations, as illustrated in the following paragraphs.

The inescapable tension between States' measures aimed at countering human-induced climate change and their obligations under international investment treaties embodied the background for scholarly investigation about possible effects of "regulatory chill" by international investment law and arbitration on sound domestic climate change related actions and policies.[6] At the same time, there was conventional scepticism in the literature about the potential of the international investment regime to promote climate change action (Baetens, 2019, 107) or acknowledgement of the "invisibility" of the climate question in the context of ISDS (Grosbon, 2019, 389).

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in a manner that does not threaten food production; and (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".

[5] It is submitted that the references in IIAs to the environmental protection and concerns, although without expressly mentioning climate change, are nevertheless susceptible of being interpreted extensively as encompassing climate change action based on the application of general principles of treaty interpretation such as good faith and effectiveness (Dörr 2018, 567). Commentators have remarked, for example, that "[c]ertainly climate change is an environmental concern" (Vadi 2015, 1344) and "*plusieurs traités d'investissement ont pris en considération la dimension environnementale. Cette prise en considération permet aux Etats d'agir avec flexibilité pour gouverner le changement climatique*" (Ben Hamida, 2021, 92).

[6] For a doctrinal contrast, cf. Schill, 2009, 477 ("Investment treaties will not prevent state imposition of higher emission standards or product bans as such but restrict their unreasonable or unforeseeable introduction") and Tienhaara, 2018, 232 (outlining "three distinct varieties of regulatory chill: *internalization chill*, *threat chill*, and *cross-border chill*").

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This contribution proposes an inclusive approach about the interaction of international climate change law (*lex climatica*) and investment law (*lex mercatoria*), which should not be considered as competing norms. Notably, it will attempt to explain how the implementation of States' obligations under the Paris Agreement may be realized through resort to international investment law and ISDS. To such an extent, international investment law may provide "teeth" to the ICCR, thus contributing to the fulfilment of its ambitions. More significantly, international investment awards benefit from effective enforcement mechanisms pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 18 March 1965 (ICSID Convention or Washington Convention)[7] and also under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention).[8]

Indeed, the marked degree of ultimate enforceability of States' international commitments relating to the protection of foreign investments may be contrasted with the recognized gaps in terms of enforcement and compliance within the ICCR.[9] Most States are bound by the Paris Agreement (194) and the UNFCCC (198), on the one hand, and the ICSID Convention (166 signatories) and the New York Convention (171), on the other. To such an extent, investment awards through which climate change commitments can find implementation may be consequently recognized and enforced in almost all jurisdictions.

[7] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965, entered into force on 14 October 1966, *UNTS*, vol. 575, p. 159. In particular, under Article 53.1 "[t]he award shall be binding on the parties" and under Article 54.1 "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State".
[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on 10 June 1958, entered into force on 7 June 1959, *UNTS*, vol. 330, p. 3.
[9] UNFCC, Art. 14; Paris Agreement, Arts. 15 and 24.

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2. The Tension Between Climate Change Action and the States' International Obligations to Protect Foreign Investments

International investment law and its dispute resolution system, in which, in particular, foreign investors have direct recourse to legal redress against States, portrays a *non-mediated* representation of both private and public interests in contentious proceedings. IIAs may in principle protect *ratione materiae* every kind of foreign direct investment (FDI), including high-carbon ("brown") and low-carbon ("green").

Traditionally,[10] investors operating in the sector of fossil fuels (coal, oil and gas) have been frequent claimants in ISDS as they presented at least 192 cases against States for every kind of sovereign conduct affecting their business allegedly in breach of the substantive protections owed under IIAs and investment contracts.[11] However, also "green" arbitrations have more recently arisen amounting to 80 known cases borne out of renewable energy claims, for instance relating to solar photovoltaic energy, wind and hydroelectric power.[12] More generally, investors lodged at least 175 cases to challenge State measures adopted for the protection of the environment.[13]

Interestingly, in the context of such environmental cases, 67 per cent of the claims were directed against States with advanced economies and 95 per cent were filed by investors originating from a home State of an economically developed region.[14] The following sections will explain how the application of substantive standards of protection contained in IIAs may affect climate

[10] For an effective and concise historical reconstruction, cf. Grosbon 2019, 387.
[11] UNCTAD, *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, IIA Issues Note, No. 4, September 2022. The overwhelming majority (74 per cent) of these cases were brought against developing countries.
[12] *Ibid*. More than 90 per cent of these cases invoked the Energy Charter Treaty (ECT) as jurisdictional basis. Almost the totality (98 per cent) of such renewable energy ISDS cases were brought by investors from developed regions against developed countries (e.g., *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016).
[13] UNCTAD, *Treaty-Based Investor-State Dispute Settlement Cases and Climate Action*, IIA Issues Note, No. 4, September 2022. Among those 175 cases, 118 were concluded with the following operative outcome: 40 per cent decided in favour of the respondent State and 38 per cent in favour of the claimant investor with an award of damages.
[14] Ibid.

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change policies and, moreover, will also address the central question whether IIAs, instead of curtailing such policies, may contribute to their realization.

The international obligations of States to promote and protect foreign investments pursuant to IIAs and their implementation or failure to implement commitments stemming from the ICCR may interact in manifold respects. National laws and regulations banning or restricting high-carbon industries (for instance, phasing out coal[15]) are as a matter of principle justified either under the application of general exceptions codified in the applicable treaty or based on the general legitimate right to regulate of States (Titi, 2014).

The same would apply to measures incentivizing low-carbon businesses also pertaining to foreign investments performed in the territory of the host State. However, the fact that States operate under the umbrella of a climate change accord, for instance the Paris Agreement, or a multilateral environmental treaty does not, in and of itself, preclude the possibility of incurring international responsibility under IIAs. Notably, the measure at issue shall not be applied in discriminatory, arbitrary or unreasonable manner, which would entail the violation of the various substantive standards of treatment under IIAs, as applicable, both relative (most favoured nation and national treatment) and absolute (fair and equitable treatment and the prohibition of unlawful indirect expropriations).

This mindset is found also in Article 3.5 of the UNFCCC, pursuant to which "[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade".[16] This anti-protectionist provision borrows its language from the chapeau of Article XX of the GATT 1947, which was conserved in the GATT 1994 and also provides the model for general exceptions clauses in IIAs. Moreover, Article 3.5 of the UNFCCC

[15] See, for instance, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022 (claim eventually dismissed for lack of jurisdiction of the tribunal). See also the earlier case *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I)*, ICSID Case No. ARB/09/6, Award, 11 March 2011 (award embodying the parties' settlement agreement).
[16] UNFCCC, Art. 3.5.

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posits a general parameter of legality of State measures adopted in furtherance of climate change commitments that affect foreign businesses.

3. The Substantive Scrutiny of State Acts and Omissions Relating to Climate Change Actions Under the Lens of International Investment Law

State measures consisting in prohibitions, bans or, less drastically, restrictions affecting a carbon intensive economic sector are in principle lawful under IIAs (Titi, 2018, 323). In January 2021, the German company RWE AG and its Dutch subsidiary RWE Eemshaven Holding II BV lodged a request for arbitration at ICSID against the Netherlands for its ban of coal-fired power generation by 2030 implemented through the Law on the Prohibition of Using Coal in the Electricity Production (*Wet verbod op kolen bij elektriciteitsproductie*, *Staatsblad* 2019, No. 493), which entered into force on 20 December 2019.[17] The Dutch government adopted this decision to meet its commitments under the Paris Agreement.

However, the claimants have invoked the responsibility of the Netherlands under the Energy Charter Treaty (ECT), including for breach of FET and the prohibition of unlawful indirect expropriation, since practically no compensation was offered by the State, and emphasized that the coal ban targeted a sector in which only foreign investors were operating. A similar claim against the same ban was filed in April 2021 by the German energy company Uniper. However, in this case the investor subsequently agreed in July 2022 to withdraw its request for arbitration as a condition of the deal reached with the German government for its bailout.[18]

[17] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4.

[18] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22. This act by the German government appears to be in line with the position adopted by the European Commission and Member States with regard to intra-EU investment arbitration, especially in light of various judgments of the Court of Justice of the European Union (*Achmea*, *Komstroy*, *PL Holdings*, *Micula*). See

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The legality of an environmental mining ban applied by Colombia formed the object of an arbitration brought by the Canadian corporation Eco Oro. Colombia adopted relevant regulation to protect the high mountain ecosystem of Santurbán Páramo, an environmental conservation zone which fell to cover in part the concession area, a gold and silver deposit, in which the investor operated for decades. The arbitral tribunal, while acknowledging that "neither environmental protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner",[19] found by majority – Professor Philippe Sands dissenting – that the ban violated the minimum standard of treatment of aliens, including FET,[20] pursuant to Article 805 of the Canada-Colombia FTA (2008), notwithstanding the applicability of its general exceptions clause in Article 2201(3).[21] This conclusion appears questionable in so far as it subverts the cardinal tenet upon which a sovereign measure justified by a general environmental exception (or by legitimate right to regulate) and applied evenly and non-discriminatorily by a State shall not

"Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union", in particular at point 4: "Member States which control undertakings that have brought investment arbitration cases against another Member State will take steps under their national laws governing such undertakings, in compliance with Union law, so that those undertakings withdraw pending investment arbitration cases".

[19] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 828.

[20] A controversial finding of breach of the minimum standard of treatment, including FET, under Article 1105 of the NAFTA was decided by majority in the *Clayton/Bilcon* case in relation to the environmental assessment decision by Canadian authorities to reject a project to develop and operate a quarry and a marine terminal in Nova Scotia significantly based on "community core values". See *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, paras. 588-604 and 733-741 *Contra*, Id., Dissenting Opinion of Professor Donald McRae, 10 March 2015, especially para. 44 et seq.

[21] This provision applied specifically to the investment chapter of the relevant FTA and preserved the adoption of "measures necessary: a. To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health; b. To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or c. For the conservation of living or non-living exhaustible natural resources". See Canada-Colombia FTA (2008), Art. 2201(3)(a)-(c) and Annex 811(2)(b).

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give rise to a violation of the applicable IIA, including in relation to compensation.[22]

The same conclusion remains applicable to climate change action undertaken by States through domestic legislation. This is confirmed by other arbitral decisions that pondered in a more appropriate manner the competing societal objectives at issue. For instance, in *Chemtura v. Canada*, the tribunal considered that the ban adopted by the Canadian Pest Management Regulatory Agency (PMRA) with regard to the use of toxic agro-chemical lindane on the basis of its health and environmental effects was subject to the provisions of Aarhus Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants (LRTAP Convention)[23] and therefore necessary under the international treaty obligations assumed by the State.[24] Eventually, the tribunal did not find any breach of NAFTA and consequently did not award any damages to the claimant[25].

Also, State measures that provide incentives to "green" investment, for instance in the sector of renewable energies, are in principle legitimate under international investment law (Ben Hamida, 2021, 90). However, such support schemes should not engender a breach of contingent non-discrimination standards under IIAs, namely the obligations of most-favoured-nation (MFN) treatment vis-à-vis investors of third countries and, especially, the national treatment vis-à-vis domestic undertakings.

[22] For the tribunal's reasoning, cf. *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, paras. 826-837. See also *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 477.
[23] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, done at Aarhus on 24 June 1998, *UNTS*, vol. 2230, p. 79.
[24] *Chemtura Corporation v. Government of Canada*, UNCITRAL (formerly *Crompton Corporation v. Government of Canada*), Ad Hoc NAFTA Arbitration under UNCITRAL Rules, Award, 2 August 2010, para. 266.
[25] See also *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, especially Part IV, Chapter D, para. 7 (claim dismissed on the merits in relation to the Californian ban on the use or sale in California of the gasoline additive MTBE).

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In *Nykomb v. Latvia*, a Swedish investor successfully complained about the refusal by Latvia to honour a promise of incentivization, namely a double-tariff, for low-carbon electricity production on the basis of which its investment was made. The tribunal ascertained discriminatory treatment by the State under Article 10(1) of the ECT, since the administrator of the incentive schemes continued to support low-carbon installations operated by domestic investors, while refusing this benefit to foreign investors operating in comparable conditions.[26] This case law entails that national incentive schemes applying *de iure* to and benefitting both foreign as well as domestic investors would not trigger international responsibility of the State under investment treaties.

Hitherto, it has been analysed how positive measures by States imposing bans or restrictions on "brown" investments or providing incentives in favour of "green" investments may withstand the ISDS scrutiny, but for a finding of discriminatory, selective or protectionist application. The necessary achievement of the objectives that are consubstantial to the fight against climate change may provide a sound and viable justification to such measures under both general international law and international investment law. The remaining paragraphs of this section will instead investigate to what extent the inaction of States in implementing climate change measures required under the umbrella of the ICCR may be sanctioned under IIAs for breach of non-contingent standards of treatment, in particular FET.[27] Notably, the

[26] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para. 4.3.2.

[27] Concerning the substantive standard of the prohibition of unlawful expropriation measures, especially indirect, the adoption and even-handed implementation by States of climate change legislations and regulations would constitute a legitimate exercise of their police powers, especially if necessitated by multilateral commitments, and would not result in a violation of IIAs. See, for example, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 272-307, especially 304 (taking into consideration the World Health Organization Framework Convention on Tobacco Control). Moreover, as observed above (see *supra* section 2 of this Chapter) the measures at issue would not be sanctioned as unlawful under the relevant IIA, if the latter contains an express carve-out clause. See CETA, Annex 8-A (*Expropriation*). Instead, it would be markedly speculative to submit that the State's failure to adopt specific climate change action on which the investor legitimately

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analysis focuses on the relevance of climate change mitigation and adaptation measures to which a State committed through the issuance of its nationally determined contributions (NDCs). While the previous analysis assumed a dimension of confrontation between international investment law and climate change law, this scenario posits a relation of reciprocal benefit between the two. In particular, the economic protection of a "green" business investing in the territory of the host State in reliance of the latter's unilateral NDC and in line with the objective to fully realize the climate "ambition cycle" of the Paris Agreement would be placed in alignment rather than opposition.

Pursuant to Article 3 of the Paris Agreement, "[a]s nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of" the Paris Agreement itself.[28] Moreover, it is stated that "[t]he efforts of all Parties will represent a progression over time".[29] Pursuant to Article 4, each Party "shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions".

Each State Party shall communicate every five years its NDCs and every successive edition thereof shall "represent a progression" and "reflect" the "highest possible ambition" of the issuing State.[30] These obligations bind all Contracting Parties of the Paris Agreement, having regard to the "common but differentiated responsibilities and respective capabilities, in the light of

relied may embody an expropriatory act, notably for lack of the requirement of substantial deprivation of the value of the investment.

[28] Paris Agreement, Art. 3.

[29] *Ibid*.

[30] Id., Arts. 4(3) and 4(9). Rajamani and Guérin (2017, 78) observe that "[s]uffice it to say here that these expectations in relation to progression are of tremendous significance, as they are designed to ensure that, notwithstanding the national determined nature of contributions from parties, the regime as a whole is moving towards ever more ambitious and rigorous actions from parties. This ensures that there is a 'direction of travel' for the regime, as it were." Also, Bodansky, Brunnée and Rajamani (2017, 234) acknowledge that: "The standards of progression and highest possible ambition are arguably objective rather than self-judging".

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different national circumstances" (CBDRRC-NC). This means that, but for a certain degree of flexibility and modularity, the States' commitments that are instrumental to the realization of the goals of the Paris Agreement – first and foremost its temperature goal, the net zero target and the financial pledge – must not be overturned and, moreover, must be progressively strengthened in the course of the "ambition cycle", namely the combination of the expectation of progression (Article 3), the global stocktake (Article 14) and the binding obligation of each Party to present an NDC every five years (Article 4).

Under the Paris Agreement, a Party's substantive commitment pursuant to its NDC embodies an obligation of conduct rather than result (Mayer, 2018, 256-262; Bodanski, 2016, 146; Voigt, 2021, 1016, who characterizes NDC commitments under the Paris Agreement as a "treaty-based expression of due diligence"), which entails that the State is not bound to actually achieve its self-imposed targets, whereas it must proffer its best efforts to this goal within a bottom-up regime (Rajamani, 2016, 500, 511). Instead, the Parties' procedural obligation to prepare, communicate every five years and maintain successive "progressive" NDCs is strictly binding, including the duty to provide mandatory informational requirements to track progress in their implementation and achievement.[31]

It is hereunder investigated whether substantive obligations under IIAs – especially non-contingent standards of treatment – may be applied so as to reinforce qualitatively the binding scope of NDC related obligations under the Paris Agreement in terms of operationalization of prescriptions and enforceability of contents. This analysis chiefly revolves around the protection of the legitimate expectations of foreign investors relying on a State's NDC for or in the making of its investment.[32]

[31] Cf. Paris Agreement, Art. 13(7)(b).
[32] For an effective FET analysis, see *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360.

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4. The State's Failure to Implement its Nationally Determined Contributions as a Breach of the Fair and Equitable Treatment

The *Antaris v. Czech Republic* tribunal[33] provided an effective FET analysis by isolating its cardinal principles. With regard to the investor's legitimate expectations, it found that "[a] claim based on legitimate expectation must proceed from an identification of the origin of the expectation alleged, so that its scope can be formulated with precision" (para. 360(2)). It also added that "[a] specific representation may make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectation, but is not indispensable to establish a claim based on legitimate expectation which is advanced under the FET standard" (para. 360(5)). The representation may be explicit or implicit (para. 360(3)). Furthermore, consistent arbitral case law and literature establish that the investor's reliance on a legitimate expectation should be crystallized at the time of the investment decision or in the post-establishment phase at the time of the determination whether to channel additional economic resources into an ongoing project or operation (Schreuer and Kriebaum, 2009, 265).[34]

To borrow the language of the *Total v. Argentina* tribunal,[35] NDCs may embody a State's "previous publicly stated position, whether that be in the form of a formal decision or in the form of representation" (para. 129). The substantiation of such a position may depend on the particularization of the content of the individual NDC, which may vary based on the discretion of the communicating Party (for Bodanski, Brunnée and Rajamani, 2017, 202, the

[33] *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360.
[34] Cf. also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 190; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 219; *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 287: "where investments are made through several steps, spread over a period of time, legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment".
[35] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.

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notion of NDCs "by privileging sovereign autonomy, respecting national circumstances, and permitting self-differentiation, significantly reduced the sovereignty costs of a legally binding instrument": the more specific and clear the declaration to the addressees, the more compelling the case that the foreign investor in question was entitled to rely on it in good faith on the basis of a legitimate expectation. NDCs are not addressed by States only to single investors, but to the generality of stakeholders, *in primis* to the other Parties of the Paris Agreement (Mayer, 2018, 273).

However, the general character of the source of the legitimate expectation does not fatally prevent a successful FET claim. Tribunals have found that general regulatory frameworks and legislation may also give rise to legitimate expectations especially if drafted with sufficient specificity and targeted at foreign investors in order to attract their commitments of resources in the host State.[36] To this extent, domestic laws and regulations on climate change, including those envisaged in NDCs,[37] that provide a defined legal framework for future "green" investment operations – for example, including the provision of support schemes and incentives – may create legitimate expectations based on specific commitments reliable by foreign investors.

NDCs can be considered among the variety of host States' unilateral acts or statements (or assurances, representations or declarations) that may represent a source of obligations with regard to the protection of foreign investments (Reisman and Arsanjani, 2004, 328-343). However, their degree of normativity depends on the clarity and specificity of their contents, which embodies the result of a State's commitment to climate change mitigation and adaptation. This approach is supported by Guiding Principle 7 of the "Guiding

[36] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 133; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 260 (referring to specific "legislative" undertakings); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 371.

[37] E.g., "Nationally determined contributions under the Paris Agreement. Synthesis report by the secretariat", 26 October 2016, FCCC/PA/CMA/2022/4, para. 104.

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Principles applicable to unilateral declarations of States capable of creating legal obligations" adopted by the International Law Commission in 2006:

> A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligation, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.[38]

The context and the circumstances in which the NDCs have been communicated by States comprise the applicable international instruments under the aegis of the ICCR, first and foremost the Paris Agreement. In particular, although the mitigation (and adaptation) targets stated in NDCs are not binding as to their result, the "ambition cycle" established by the Paris Agreement generates a reasonable expectation of progression in climate change action, which prevents the self-committing Party to reverse or repeal abruptly its representations and bind the same to take appropriate steps for the attainment of such goals, decisively in view of the presentation of its successive NDC (Rajamani and Bodanski, 2019, 1026).

This force of logic is even more mandatory in relation to countries characterized by an industrialized developed economy having reached the peak of emissions consistent with the CBDRRC-NC caveat. As a consequence, at determined conditions a foreign investor may rely on the State's specific unilateral statements formulated in NDCs and to accrue legitimate expectations that the latter would implement its climate change

[38] International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, Guiding Principle No. 7. The incorporation of the relevance of the context and the circumstances in which the unilateral declaration was formulated is consistent with the case law of the International Court of Justice. See *Case Concerning Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment of 22 December 1986, I.C.J. Reports 1986, 554, at 574, para. 40 and *Case Concerning Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, *I.C.J. Reports 1974*, at 256, para. 34.

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policy and action in effectually incremental direction. Against this background, the investments performed in furtherance of such expectations may fall under the normative scope of IIAs and their substantive protections.

To such an extent, climate change multilateral agreements would constitute "any relevant rules of international law applicable in the relations between the parties" pursuant to Article 31(3)(c) of the VCLT and, therefore, may be systemically integrated in the BIT or IIA that is applicable in an investor-State dispute. The fact that a State is party to the Paris Agreement or other ICCR instrument does not "transform" the substantive standards under the IIAs to which it is also a Party (it is self-explanatory that "IIAs… are not environmental treaties", Boute, 2012, 662). However, the *Allard v. Barbados* tribunal pertinently acknowledged in relation to the Convention on Biological Diversity (CBD)[39] and the Ramsar Convention[40] that "consideration of a host State's international obligations may well be relevant in the application of the standard to particular circumstances".[41]

This entails that ISDS adjudicators may well interpret the applicable IIA, including its external context, and substantiate the reach of the FET obligations contained therein having regard to the relevant climate change obligations binding on the Contracting Parties and the entire variety of aggregate consequences descending therefrom, including reasonable reliance by investors on the practicability of commitments formulated by States in their NDCs. This legal construct appears to be consonant with the consideration of general principles of law recognized by the community of nations such as good faith, estoppel and *venire contra factum proprium* (Bowett, 1957, 176), especially in case host State's organs and

[39] Convention on Biological Diversity (CBD), signed at Rio de Janeiro on 5 June 1992, entered into force on 29 December 1993, *UNTS*, vol. 1760, p. 79.
[40] Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971, entered into force on 21 December 1975, *UNTS*, vol. 996, p. 245.
[41] *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016, para. 244 (in the context of FPS analysis). In this case, the investor had unsuccessfully argued that the host state's approval of an environmental management plan (EMP) constituted a representation that it would act in a specific way.

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instrumentality willingly induced and attracted foreign "green" businesses by signalling a favourable investment climate. This conclusion would be even more viable if the applicable IIA required the Contracting States to implement the commitments stated in their NDCs.[42]

Finally, since NDCs, as mentioned above, may lack specificity, a foreign investor and the organs (or parastatal entities or State-owned enterprises (SOEs)) of the host State may always incorporate in contractual arrangements a reference to climate change commitments articulated in NDCs or other obligations stemming from the Paris Agreements or other ICCR instruments. In this scenario, the breach of such privy commitments can be scrutinized under IIAs with regard to FET[43] and, if applicable, especially umbrella clauses, i.e. treaty provisions prescribing the observance of contractual commitments entered by States or SOEs with investors (Crawford, 2008, 251). Accordingly, the competent tribunal would be empowered to adjudicate both treaty and contract claims (the latter being governed by the proper law of contract, which usually is the domestic law of the host State) thus rendering enhanced justice to the vindication of climate change related commitments.

This stands as an effective option for States and private businesses furthering the transition to the "green" economy, taking into account that the Paris Agreement's "ambition cycle" is yielding increased target setting activity through Parties' successive NDCs, but the gap between actual implementation and optimal levels of mitigation, adaptation and finance remains considerable (Maljean-Dubois, Ruiz Fabri, and Schill, 2022, 738: "Existing pledges, however, are far from sufficient and remain inconsistent with the temperature target set in the Paris Agreement").

[42] EU-China Comprehensive Agreement on Investment (CAI), Agreement in Principle (2020), Section IV, Sub-Section 2, Art. 6(a). Article 6(a) of the CAI requires each Contracting Party to "effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions".

[43] See *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, Decision on Jurisdiction, 12 February 2010, para. 148 (referring inter alia to the "baseline expectation of contractual compliance").

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5. Concluding Remarks

Consistently with their progressive understanding of climate change as most urgent and pressing global challenge of the present era, States, especially in the developed world, and investors increasingly consider climate change norms as elements of international public policy, on one side, and a source of business opportunities rather than a negative economic externality, on the other side. In this context, unilateral domestic measures (Bilder, 1981, 51) adopted by "pioneer" States in furtherance of climate mitigation, adaptation and finance would be legitimate pursuant to international law, notably under IIAs, if not applied arbitrarily, unpredictably, discriminatorily and as a way to foster protectionism. Moreover, the imperatives of climate change related action, especially as ordered under the Paris Agreement, require massive sustainable investment, including FDI. In the corresponding perspective of "green" investment, climate change action and the protection of economic rights would then stand in synergy, rather than dichotomy.

With regard to investment treaty drafting (recognition of the States' right to regulate, general exceptions, express environmental carve-outs and provisions establishing investors' commitments), procedural issues (jurisdictional requirements, admissibility filters and viability of States' counterclaims) and substantive matters (treaty interpretation and applicable laws), various "entry points" are available for a successful integration of the *lex climatica* – international climate change rules and implementing municipal laws – in the *lex mercatoria* – IIAs. In the framework of ISDS, it has been shown that adjudicators may determine the legality of domestic measures implementing climate change action and, significantly at given conditions, sanction States' omissions in the observance of determined obligations under the ICCR, in particular specific voluntary targets communicated in their NDCs. Having regard to the prong of effectiveness, international investment law and arbitration may importantly give to the ICCR those "teeth" that are lacking under both the Paris Agreement and the

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UNFCCC, thus tempering their admitted compliance and enforcement gaps. Indeed, the prescriptions relating to climate change that are established in investment awards may be successfully recognized and enforced under the ICSID Convention and the New York Convention in accordance with the requirements set forth therein.

From the perspective of deepened and broadened international investment law, the relevance and consideration of climate change related action and concerns, notably under the framework of the Paris Agreement, may function as paradigmatic catalyst of a more sophisticated internalization of non-economic values in the legal dimension of foreign investment. For instance, this forthcoming development would be demonstrated by a conclusive defeat of the sole effects doctrine[44] with regard to the ascertainment of States' breaches of IIAs, notably as to expropriatory acts.

The evolution of international investment law in response to the test of climate change will also depend on the attitude and posture of ISDS adjudicators, in terms of their possible inclusive approach or, conversely, self-restraint, with regard to the application and taking into consideration of norms and legal standards that are "external" (Kurtz 2020, 200) to the applicable commercial treaty. This reflection opens a reference to the question of the requirements and competences of ISDS adjudicators, which inter alia is the object of discussions within the current possible reform of ISDS, especially at UNCITRAL. Certainly, a "demonstrated expertise in public international law"[45] by arbitrators appears to be fundamental for the purposes of appropriate integration of international climate change law in the international protection of foreign investments. This may enhance as a consequence a more adequate balancing in international economic adjudication between economic and non-economic values and concerns, such

[44] E.g., *Compañia del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No. ARB 96/1, Award, 17 February 2000, para. 72.
[45] E.g., CETA (2016), Art. 8.27(4).

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as the environmental protection, to the benefit of the populations that are concerned in a democratic-striving perspective (de Búrca, 2007-2008, 221).

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

The Proposed EU Directive on SLAPPs: A (First) Tool for Preserving, Strengthening and Advancing Democracy

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ABSTRACT

The proposed EU Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("anti-SLAPPs Directive") is the European Union response to fight strategic lawsuits against public participation ("SLAPPs"). The latter are proceedings where the lawsuit legal instrument is misused to silence activists regarding information activities carried out by them in relation to facts of public interest and, finally, to achieve a chilling effect on the entire society. As a result, SLAPPs represent an obstacle to freedom of expression, participation, activism, and ultimately to democracy. Indeed, democracy is the foundation the EU is based on and can only thrive in a climate where freedom of expression is upheld, in line with the European Convention on Human Rights, including its positive obligations under Article 10, and the Charter of Fundamental Rights of the European Union, highlighting the horizontal (and questionable direct effect) dimension of its Article 11. And for a healthy and prosperous democracy, people need to be able to actively participate in public debate without undue interference and to have access to reliable information. Therefore, the proposed anti-SLAPPs Directive aims to safeguard SLAPPs targets and, in so doing, strengthen democracy. The anti-SLAPPs Directive is tested practically to SLAPPs cases which have interested Daphne Caruana Galizia, a blog editor in Malta whose activism led to her being killed in 2017, as well as tested to other SLAPPs affected story lives. A broader comparative/multidisciplinary look at other human rights protection systems and anti-SLAPPs legislations in the world is offered. At the end, from the overall analysis carried out, it emerges that the anti-SLAPPs Directive has a significant potential for the objectives it aims to achieve, but that is not enough: Member States should consider also to address SLAPPs in domestic cases and to decriminalise defamation.

Keywords: SLAPPs, anti-SLAPPs Directive, democracy, freedom of expression, public participation, Daphne Caruana Galizia

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1. The Issue at Stake: The Proposed EU Directive to Flight SLAPPs

Democracy is the foundation the European Union ("EU") is based on and can only thrive in a climate where freedom of expression is upheld, in line with the European Convention on Human Rights ("ECHR")[1] and the Charter of Fundamental Rights of the European Union ("Charter").[2] For a healthy and prosperous democracy, people need to be able to actively participate in public debate without undue interference. In order to ensure meaningful participation, people need to have access to reliable information, enabling them to form their own ideas in a public space where different opinions can be freely expressed. Activists, then, play a fundamental role in facilitating public debate and in communicating information, opinions and ideas.

An obstacle to freedom of expression, participation, activism, and ultimately to democracy, is today represented by strategic lawsuits against public participation ("SLAPPs"). The latter are legal proceedings, initiated by powerful individuals, lobby groups, corporations and State organs, and against journalists, academics or activists, regarding information activities carried out by them in relation to facts of public interest. Their goal is to suppress, intimidate, and silence critics by forcing them to pay for legal defence and face negative consequences, psychological and not, until they drop their criticism or opposition. SLAPPs, unlike regular proceedings, are not filed with the intention of exercising the right to access to justice and winning the legal actions or receiving redress. Instead, they are started in order to scare the defendants and deplete their resources. Moreover, the ultimate purpose, by quieting the defendants and discouraging them from continuing their work, is to achieve a chilling effect on the entire society.

In light of the above, the Council of Europe has begun in the last years to deal with SLAPPs problem. And the work done by the Council of Europe has

[1] European Convention on Human Rights, Rome, Nov. 4, 1950.
[2] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

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been carried forward by the European Commission for the starting point of its proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("anti-SLAPPs Directive").[3] This anti-SLAPPs Directive intends to safeguard SLAPP targets and prevent the issue from spreading further in the EU. By adopting a unified EU understanding on what constitutes a SLAPP and by introducing procedural safeguards, the anti-SLAPPs Directive aims to equip courts with effective tools to deal with SLAPPs and targets with the means to defend themselves.

As a result, the purpose of this work is to analyse the anti-SLAPPs Directive.

The working hypothesis is to carry out this analysis based on a case study represented by Daphne Caruana Galizia. She was editor of one of the most popular blogs in Malta, engaged in numerous investigations and active against corruption. Her story, then, is relevant to this end since her life was continually destroyed by this type of legal proceedings brought to silence her. The originality of this method of analysis lies in submitting this anti-SLAPPs Directive to an effectiveness test, that is to relate the anti-SLAPPs Directive, imagined it as approved and implemented in the EU Member States, to these litigation cases which involved Daphne Caruana Galizia, but not only, to assess if and what could have changed. This analysis will reveal that the anti-SLAPPs Directive is a useful, even if challenging, instrument to protect persons who engage in public participation from manifestly unfounded or abusive court proceedings; however, in order to achieve this aim, it cannot be the only tool.

The following sections are organised as follows: in paragraph 2 an overall picture on SLAPPs is provided; in paragraph 3 an overview of the freedom of expression under the ECHR and the Charter is offered; in paragraph 4 the

[3] Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), COM/2022/177 final.

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proposed Directive on SLAPPs is framed and critically addressed; in paragraph 5 the proposed Directive is related to Daphne Caruana Galizia and other relevant cases; in paragraph 6 a comparative/multidisciplinary reading about the protection of freedom of expression in others human rights protection systems and about other anti-SLAPPs legislations in the world is exposed; finally, the conclusions are presented.

2. SLAPPs

The expression SLAPPs was coined in the United States ("US") about thirty years ago by George Pring and Penelope Canan (Canan and Pring, 1988, 506; Pring and Canan, 1996, 8) to indicate an abusive or meritless lawsuit filed against someone for exercising their political rights or freedom of expression in relation to matters of public interest (Freeman, 2018, 26; Sheldrick, 2014, 1; Brown and Goldowitz, 2010, 3; Donson, 2010, 83; Shapiro, 2010, 14). Indeed, it refers to legal proceedings initiated against journalists, academics or activists regarding information activities carried out by them in relation to facts of public interest, such as corruptive practices, violations of human rights or environmental offences (Ravo et al., 2020, 3). These are actions, typically brought in civil proceedings but not only, by which the claimant complains mainly about the defamatory nature of the journalistic writings. The request, in the civil arena, is to be compensated for the damage suffered (Requejo Isidro, 2021). The cause of action, then, can be various: they are often grounded as claims based on defamation, but they may also relate to breaches of other rules such as data protection or privacy rules, combined with a request for damages.

The claimant is often an important person on the political or economic global scene, or a large company, investing lots of resources in this initiative. As a result, the "strategic" nature of this proceeding lies in the fact that the claimant, by invoking the defendant's liability, the journalist one, actually aims to make him withdraw from these public interest activities and to

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dissuade him and other journalists from carrying out similar ones (Hess, 2022, 23). Consequently, claimant makes use of a legitimate instrument to achieve a different purpose, other than the one to which the tool itself is preordained to by the legal order: in the final analysis, it is proposed to silence a voice deemed uncomfortable because influencing the public debate (Bárd et al., 2020, 4; Bayer et al., 2021, 22).

SLAPPs are by definition legally unfounded and dubious actions. Indeed, claimant does not really expect to get the defendant convicted or sanctioned. The practical purpose of this initiative is achieved at the very moment in which the defendant is brought into a proceeding: due to the distress and costs that participation involves (courts fees and lawyers costs) and the inevitable risk of its outcome, just when filed this proceeding is capable of producing a dissuasive effect, or chilling effect.

SLAPPs, which were first identified as a growing issue in the US in the 1980s, have now become a danger to freedom of expression and information in other countries, including the EU ones. Although the true scope of this phenomenon within the EU is unknown, a 2022 report[4] by the Article 19 organisation found an increase in SLAPP litigation cases in 11 European States (Belgium, Bulgaria, Ireland, France, Croatia, Hungary, Italy, Malta, Poland, Slovenia, and the United Kingdom), involving journalists, NGOs, and activists, and it was highlighted that none of the countries studied had special domestic anti-SLAPP laws. Similarly, from 2010 to 2021, the Coalition Against SLAPPs in Europe was able to identify 570 SLAPP cases

[4] Media Freedom Rapid Response (2022). SLAPPs against journalists across Europe, in *Article 19*, https://www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf.

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filed in over 30 European States;[5] and in 2022 another 240 cases were collected.[6]

In the end, initiatives of this kind are capable of compromising the effective exercise of the freedom of democratic participation.[7]

3. Freedom of Expression

SLAPPs today represent an obstacle to freedom of expression, also to participation, activism, and ultimately to democracy.

Article 2 of the Treaty on EU ("TEU")[8] states that the Union is founded on the (interdependent) values of respect for, *inter alia*, democracy, the rule of law and human rights (Carrera et al., 2013, 1). And among the latter, the right to freedom of expression is the cornerstone indissociable from democracy (Gerards, 2023, 81),[9] as it protects the pluralism, tolerance and broadmindedness without which democratic societies cannot flourish (Bhagwat and Weinstein, 2021, 82; Price and Krug, 2007, 94; Stotzky, 2001, 255; Bullinger, 1985, 88).[10]

[5] Bonello Ghio R., and Nasreddin D. (2022). Shutting out criticism: How SLAPPs threaten European democracy, The Coalition Against SLAPPs in Europe, in *The-Case*, https://www.the-case.eu/wp-content/uploads/2023/04/CASEreportSLAPPsEurope.pdf; Zuluaga N., and Dobson C. (2021). SLAPPed but not silenced. Defending Human Rights In The Face Of Legal Risks, in *Business and Human Rights Resource Centre*, https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v51.pdf.

[6] The Daphne Caruana Galizia Foundation on behalf of the Coalition Against SLAPPs in Europe (2023). SLAPPs: A Threat to Democracy Continues to Grow. A 2023 Report Update, in *The-Case*, https://www.the-case.eu/wp-content/uploads/2023/08/20230703-CASE-UPDATE-REPORT-2023-1.pdf.

[7] Crego M.D., and Del Monte M. (2022). Strategic lawsuits against public participation (SLAPPs), in *European Parliament*, https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733668/EPRS_BRI(2022)733668_EN.pdf.

[8] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.

[9] Goodwin v. The United Kingdom, 2002-VI Eur. Ct. H.R. ¶ 39 (1996); Jersild v. Denmark, A298 Eur. Ct. H.R. ¶ 31 (1994).

[10] Handyside v. The United Kingdom, 24 Eur. Ct. H.R. (ser. A) ¶ 49 (1976); Müller v. Switzerland, 133 Eur. Ct. H.R. (ser. A) ¶ 33 (1988); Vogt v. Germany, 323 Eur. Ct. H.R. (ser. A) ¶ 52 (1995); Appleby v. United Kingdom, 2003-VI Eur. Ct. H.R. ¶ 24 (2003).

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In this framework, the role played by press as public watchdog is considered essential in democratic societies, thus justifying a higher level of the freedom of expression protection.[11] Non-governmental organisations ("NGOs"), researchers and even bloggers or popular users in social media have been granted comparable protection, on the condition that they also play a meaningful societal watchdog function (Zagrebelsky, 2022, 371; Voorhoof, 2016, 101; Schudson, 2013, 159; Oosterveld and Oostveen, 2013, 146; Traimer, 2012, 1; Fenton, 2010, 153; Jakubowicz, 2009, 9).[12]

Both the ECHR and the Charter, in their respective, guarantee freedom of expression. Let us focus on them.

3.1 Article 10 of the ECHR

Article 10(1) ECHR protects the freedom of expression, comprising the freedom to hold opinions and to receive and impart information and ideas without interference by States (Di Stasi, 2022, 27-28; Grabenwarter, 2014, 252; Mowbray, 2007, 623; Thorgeirsdóttir, 2005, 25; Ridola, 2001, 337). All forms of expression are included, through any medium: this means also via TV and radio interviews, as well as internet (Bychawska-Siniarska, 2017, 11; Rainey et al., 2014, 435).[13] However, as stated expressly in the wording of Article 10(2) and by the European Court of Human Rights ("ECtHR"), free expression, particularly through the media, is a strong tool, carrying special duties and responsibilities (Oetheimer and Cardone, 2012, 397). While it is critical to protect the right to freedom of expression because of its ability to promote democracy, uncover abuses, and advance political, artistic, scientific, and commercial development, it is also critical to recognise that free expression can be used to violate individual privacy and safety (McGonagle and Andreotti, 2016, 15; Smeth, 2010, 187; Barendt, 2009,

[11] Axel Springer AG v. Germany, 2012 Eur. Ct. H.R. ¶ 79 (2012); Pedersen and Baadsgaard v. Denmark, 2004-XI Eur. Ct. H.R. ¶ 71 (2004); Bladet Tromsø and Stensaas v. Norway, 1999-III Eur. Ct. H.R. ¶¶ 59 and 62 (1999).
[12] Magyar Helsinki Bizottság v. Hungary, 2016 Eur. Ct. H.R. ¶ 109 (2016).
[13] Ahmet Yildirim v. Turkey, 2012 Eur. Ct. H.R. ¶ 54 (2012).

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52).[14] Substantive and procedural rules, as dealt with in the case law of the ECtHR (Spatti, 2020, 363),[15] attempt to find a reasonable balance between these opposing interests (Barendt, 2007): for instance, the rules on limitation periods in libel actions that shall be respected by who wants to seek protection for an alleged reputational harm;[16] or the rules on the criteria and procedure for determining the amount of compensation,[17] that should not result in an unreasonably high compensation, in order to avoid an imbalance[18] between the two sides at stake (Franzina, 2021, 808).

In addition to the State's essentially negative duty to refrain from interfering with Convention guarantees (Teitgen, 1993, 3), States are required to take measures to defend these freedoms (Stoyanova, 2023, 7; Pisillo Mazzeschi, 2020, 63; Lavrysen, 2013, 162; Xenos, 2012, 57; Dickinson, 2010, 203; Mowbray, 2005, 78; Bestagno, 2003, 29; Spielmann, 1998, 134; Dijk, 1998, 17; Sudre, 1995, 364; Malinverni, 1995, 125). Such positive obligations under Article 10 arise when private individuals obstruct the enjoyment of the rights protected (McGonagle, 2016, 9; Franchi and Viarengo, 2016, 257; Schabas, 2015, 453; Mowbray, 2004, 192).[19] States are

[14] These rights merit, in principle, equal respect: see Hachette Filipacchi Associés (Ici Paris) v. France, 2009 Eur. Ct. H.R. ¶ 41 (2009); Mosley v. The United Kingdom, 2011 Eur. Ct. H.R. ¶ 58, 111 (2011); Von Hannover v. Germany (n. 2), 2012 Eur. Ct. H.R. ¶ 106 (2012); Haldimann and others v. Switzerland, 2015 Eur. Ct. H.R. ¶ 54 (2015); Couderc and Hachette Filipacchi Associés v. France, 2015 Eur. Ct. H.R. ¶ 91 (2015); Rubio Dosamantes v. Spain, 2017 Eur. Ct. H.R. ¶ 30 (2017); Gra Stiftung Gegen Rassismus und Antisemitismus v. Switzerland, 2018 Eur. Ct. H.R. ¶ 55 (2018).

[15] The balancing activity between the right to information and the right to privacy must be founded on an assessment of a number of factors: the ability of the news, or image, to contribute to a public debate; the notoriety of the person involved and the subject of the news; the subject's previous behaviour; the methods by which the information was obtained and its veracity; the content, form, and impact of the publication; and the gravity of the sanctions imposed.

[16] Times Newspapers Ltd (nos. 1 and 2) v. The United Kingdom, 2009 Eur. Ct. H.R. ¶ 45-46 (2009).

[17] Independent News and Media and Independent Newspapers Ireland Limited v. Ireland, 2005-V Eur. Ct. H.R. ¶ 119-124 (2005).

[18] MGN Limited v. The United Kingdom, 2011 Eur. Ct. H.R. ¶ 201 (2011).

[19] Palomo Sánchez and others v. Spain, 2011 Eur. Ct. H.R. ¶ 58-62 (2011); Verein Gegen Tierfabriken Schweiz (Vgt) v. Switzerland (No. 2), 2009 Eur. Ct. H.R. ¶ 78-82 and 91 (2009); Khurshid Mustafa and Tarzibachi v. Sweden, Eur. Ct. H.R. ¶ 31-32 (2008); VgT Verein Gegen Tierfabriken V. Switzerland, 2001-VI Eur. Ct. H.R. ¶ 45 (2001); Guerra and Others v. Italy, 1998-I Eur. Ct. H.R. ¶ 52 (1998). *Contra*, in the past, Gaskin v. The United Kingdom, A160 Eur. Ct. H.R. ¶ 52 (1989).

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required to put in place an effective system to protect authors and journalists (Zagrebelsky, 2022, 382; Parmar, 2016, 33), as well as to create an environment that encourages all persons involved to participate in public debate without fear of repercussions for expressing and holding opinions that are contrary to both the views of the State authorities and private parties.[20]

This is clearly referred to by the ECtHR in the *Özgür Gündem* case,[21] when stating that genuine, effective exercise of this freedom does not rely just on the State's obligation not to intervene, but may necessitate positive measures of protection, even in the realm of relations between individuals. And when it is known that a journalist faces a real risk to his life arising out of exercise of his freedom of expression, a positive obligation to take steps to protect him may arise. When establishing whether or not a positive obligation exists, a fair balance must be established between the general interests of the society and the interests of the individual, a quest for which is intrinsic throughout the Convention. The extent of this obligation will invariably vary due to the variety of conditions that exist in Contracting States, the challenges inherent in regulating modern societies, and the choices that must be taken in terms of priorities and resources. Finally, such an obligation must also not be understood in such a way that it imposes an impossible or disproportionate burden on the authorities (Reid, 2015, 654).[22]

3.2 Article 11 of the Charter

The Charter dedicates to freedom of expression and information the Article 11, as interpreted by the Court of Justice of the European Union ("CJEU"),[23]

[20] Dink v. Turkey, 2010 Eur. Ct. H.R. ¶ 137 (2010).
[21] Özgür Gündem v. Turkey, 2000-III Eur. Ct. H.R. ¶ 43-46 (2000); *mutatis mutandis*, X and Y v. the Netherlands, 91 Eur. Ct. H.R. (ser. A) ¶ 23 (1985).
[22] Rees v. the United Kingdom, 106 Eur. Ct. H.R. (ser. A) ¶ 37 (1986); Osman v. the United Kingdom, 1998-VIII Eur. Ct. H.R. ¶ 116 (1998).
[23] C-163/10, Criminal proceedings against Aldo Patriciello, EU:C:2011:543, ¶ 31; C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, EU:C:2014:238, ¶ 28; C-203/15 and C-698/15, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others, EU:C:2016:970, ¶ 93, 101; C-516/17, Spiegel Online GmbH v Volker Beck, EU:C:2019:625, ¶ 45; C-511/18, C-512/18 and C-

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which is both traditional and innovative. It is traditional in that it assumes the approach taken by prior international conventions on the issue of extending protection to the various components of the freedom in question; indeed, it includes freedom of opinion and freedom of information, the latter both on the "active" side (freedom to communicate information) and on the "passive" side (freedom to receive information) (Piroddi, 2014, 1693). However, it is innovative in that, for the first time in a supranational legal instrument dedicated to fundamental rights, it makes an explicit reference to the freedom and pluralism of the media (Strozzi, 2017, 217).

What is noteworthy about this Article is its horizontal dimension (Gallo, 2018, 333; Walkila, 2016, 261; Leczykiewicz, 2013, 479).[24] Without going into the details on the discussed topic of the direct horizontal effect of the rights granted under the Charter (Nascimbene, 2021, 81; Lazzerini, 2022, 173; Vial, 2020, 377; Pollicino, 2018, 263; Dittert, 2014, 177; Platon, 2014, 33),[25] the attitude of whether this fundamental right should be applicable solely against the State or whether it can also have application between private actors is to be stressed out. The choice is normally conceptualized in terms of whether the rights-based Charter should only have a vertical application as between individual and State, or whether it can also have a horizontal dimension between private parties (Frantziou, 2019, 82). With

520/18, La Quadrature du Net and Others v Premier ministre and Others, EU:C:2020:791, ¶ 113.

[24] C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, EU:C:2014:317.

[25] C-144/04, Werner Mangold v Rüdiger Helm, EU:C:2005:709, ¶ 75-78; C-555/07, Seda Kücükdeveci v Swedex GmbH & Co. KG, EU:C:2010:21, ¶ 20-27, 43, 50-51, 56; C-447/09, Reinhard Prigge and Others v Deutsche Lufthansa AG, EU:C:2011:573, ¶ 63, 76; C-176/12, Association de médiation sociale v Union locale des syndicats CGT and Others, EU:C:2014:2, ¶ 42-51; C-441/14, Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen, EU:C:2016:278, ¶ 22-37; C-569/16 and C-570/16, Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn, EU:C:2018:871, ¶ 62; C-619/16, Sebastian W. Kreuziger v Land Berlin, EU:C:2018:872, ¶ 29; C-684/16, Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu, EU:C:2018:874, ¶ 49-57; C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V., EU:C:2018:257, ¶ 49, 55; C-193/17, Cresco Investigation GmbH v Markus Achatzi, EU:C:2019:43, ¶ 76; C-55/18, Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE, EU:C:2019:402, ¶ 38, 60, 65.

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respect to the effect of Article 11 of the Charter on a counterparty who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the EU with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility (Lazzerini 2018, 126).[26] Indeed, the fact that certain provisions of EU primary law are addressed principally to the Member States does not preclude their (direct) application to relations between individuals.[27] Next, the CJEU has, in particular, held on a case by case basis that the provisions laid down under the Charter could be sufficient in themselves to confer on individuals a right which they may rely on as such in a dispute with another individual,[28] without, therefore, Article 51(1) of the Charter preventing it. And it could not be otherwise: it is essential that the interpretation of the scope of these rules is aimed at achieving the useful effect of their provisions (Ruggeri, 2018, 317); if not, the genuine and effective exercise for instance of the freedom of expression would be deeply undermined.

4. The Anti-SLAPPs Directive

At the European level, the necessity to respond to the sort of dissuasive practises caused by SLAPPs has primarily resulted in a number of positions expressed by the Council of Europe's Committee of Ministers[29] and

[26] Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn (n 25), ¶ 87.
[27] Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. (n 25) ¶ 77.
[28] *Ibidem* ¶ 76.
[29] See, in particular, the Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression, in *Council of Europe*,

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Parliamentary Assembly[30]. Their aim is to call on States to ensure, *inter alia*, that their defamation laws are in line with European and international standards, that prison sentences for press offences are only used in exceptional circumstances, and that they take the necessary steps to prevent the malicious use of the law and legal process to intimidate and silence journalists. And another relevant regional organisation active in protecting the freedom is the Organisation for Security and Co-operation in Europe (OSCE). It has a special focus on freedom of the media and internet freedom, based on the consideration of the right to disseminate and to receive information as a basic human right.[31]

Then, to face (and fight) rising concerns about the incidence of SLAPP lawsuits within the EU, the European Commission declared its intention to launch an initiative against abusive litigation targeting journalists and rights

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805ca6ce, and the Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, in *Council of Europe*, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14.

[30] See, *inter alia*, the Resolution 1577 (2007) and the Recommendation 1814 (2007), Towards decriminalisation of defamation, in *Council of Europe*, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en, and https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en; the Recommendation 2111 (2017) and Resolution 2179 (2017), Political influence over independent media and journalists, in *Council of Europe*, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23990&lang=en and http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23989&lang=en; the Resolution 2212 (2018), The protection of editorial integrity, in *Council of Europe*, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24734&lang=en; the Resolution 2213 (2018), The status of journalists in Europe, in *Council of Europe*, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24735&lang=en; the Resolution 2317 (2020), Threats to media freedom and journalists' security in Europe, in *Council of Europe*, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28508&lang=en; the Motion for a resolution, Countering SLAPPs: an imperative for the democratic society, in *Council of Europe*, https://pace.coe.int/en/files/29597/html?__cf_chl_tk=PirvLHUm.ji0lhu6AxVQNdp9aDQYpB381FoubyMa2pI-1644511326-0-gaNycGzNCVE.

[31] See, in particular, Amsterdam Recommendations on Freedom of the Media and the Internet (2003), https://www.osce.org/files/f/documents/4/a/41903.pdf; the Representative on Freedom of the Media at https://www.osce.org/representative-on-freedom-of-media, whose activities include efforts to ensure the safety of journalists, and related Joint Declarations on freedom of expression.

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defenders in its 2021 work programme,[32] under the priority "A New Push for European Democracy". This objective was reaffirmed in the European democracy action plan,[33] which revealed numerous upcoming ideas to create a more robust EU democracy, including two crucial actions to combat SLAPPs: a) forming an expert committee comprised of legal practitioners, journalists, academics, and civil society members to collect expertise; and b) launching an endeavour to defend journalists and civil society from SLAPPs. Despite being expected in late 2021, the European Commission initiative to protect journalists and civil society from SLAPPs was presented on 27 April 2022 in the form of a proposal for a Directive, i.e. the anti-SLAPPs Directive.

The anti-SLAPPs Directive is based on Article 81(2)(f) of the Treaty on the Functioning of the European Union ("TFEU"),[34] which serves as the legal basis for cross-border judicial cooperation in civil matters. The proposal was accompanied by a staff working document,[35] which stated that the proposal aimed to provide domestic tribunals and courts with the necessary tools to deal with SLAPPs having a cross-border dimension, as well as to protect journalists, activists, and human rights defenders, and anyone acting as a public watchdog in general. The initiative also intends to gather data on SLAPPs in a more systematic manner, improve SLAPP awareness among experts, and assist victims. The anti-SLAPPs Directive consists of six

[32] European Commission, Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2021. A Union of Vitality in a World of Fragility, in *European Commission*, eurlex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb-9a54-01aa75ed71a1.0001.02/DOC_2&format=PDF.

[33] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy action plan, COM/2020/790 final.

[34] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

[35] Commission Staff Working Document analytical supporting document accompanying a Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") and a Commission Recommendation on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), SWD/2022/117 final.

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chapters: the first on general provisions; the second on common rules on procedural safeguards; the third on early dismissal of manifestly unfounded court proceedings; the fourth on remedies against abusive court proceedings; the fifth on protection against third-country judgements; the sixth on final provisions (Requejo Isidro, 2022).

Because the anti-SLAPPs Directive is only applicable to cross-border civil SLAPPs, it was accompanied with a non-binding recommendation[36] outlining suggestion for Member States to adopt adequate steps to handle with purely domestic SLAPPs based on Article 292 TFEU. Despite being limited to domestic SLAPP cases, the recommendation has a greater scope of application *ratione materiae* than the proposed anti-SLAPPs Directive. It not only urges Member States to align their civil procedural legislation with the proposed EU standards for domestic SLAPPs, but it also includes proposals on criminal law, data protection, and deontological rules guiding the behaviour of legal practitioners. In this trend, the recommendation calls on Member States to abolish prison sentences for defamation, preferring administrative or civil law to deal with defamation cases, to strike a fair balance between data protection rules and the protection of freedom of expression and information, and to ensure that deontological rules for legal professionals discourage SLAPPs. Furthermore, Member States under the recommendation are called to support SLAPP training for legal professionals, to ensure that SLAPP targets have access to individual and independent support, and to collect and report data on the number of SLAPPs initiated in their jurisdiction on a yearly basis beginning by the end of 2023. Member States are required to report on the recommendation's implementation to the European Commission by the same time, and it is for the European Commission to review the recommendation's impact no later than 5 years after its adoption and decide on the next steps.

[36] Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation') C/2022/2428, OJ L 138, 17.5.2022, p. 30–44.

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5. The Anti-SLAPPs Directive to the Test of Daphne Caruana Galizia and Other Cases

Rather than conducting an article-by-article theoretical analysis of the anti-SLAPPs Directive, a more practical one is preferred. And the prime case study is represented by Daphne Caruana Galizia.[37]

She was editor of one of the most popular blogs in Malta,[38] engaged in numerous investigations and active against corruption. Her voice had attracted so much attention in the public debate that it disturbed politics and businessmen. On 16 October 2017, Daphne Caruana Galizia was murdered by an explosive device planted under her car seat outside her home in Malta. Her story has relevance as to SLAPPs because her life was continually destroyed by legal proceedings brought all over in the courts of the world to silence her. Just upon her death, over 47 pending cases resulted.

Via the online portal of the Daphne Caruana Galizia Foundation,[39] relevant SLAPPs cases involving the journalist are addressed in order to submit the anti-SLAPPs Directive to an effectiveness test: imagined it as approved and implemented in the EU Member States, this analysis aims at assessing, starting from these Daphne Caruana Galizia litigation cases, if and what could have changed.

The analysis will be dealt with referring to chapters of the anti-SLAPPs Directive.

5.1 General Provisions

Chapter one of the anti-SLAPPs Directive contains rules on the subject matter and the scope of the instrument, some definitions and a provision about when

[37] Daphne Caruana Galizia is one of the long series of activists interested by SLAPPs. For a reconstructive database, see at https://www.business-humanrights.org/en/from-us/slapps-database/.
[38] Daphne Caruana Galizia blog is available at https://daphnecaruanagalizia.com/.
[39] The website of the Daphne Caruana Galizia foundation is available at https://www.daphne.foundation/en/.

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a matter is considered to have cross-border implication for the purposes of the anti-SLAPPs Directive.

So, let us consider a case in Daphne Caruana Galizia activities which can be useful to deal with the latter aspects. And the case is represented by the claims carried out by Edgar Bonnici Cachia.[40] He has been a politician, a Former Labour candidate in the 1981 general elections in Malta. Daphne Caruana Galizia, via her blog site daphnecaruanagalizia.com, had begun to interest in him and his dark past life mainly in three notes, which resulted in three posts. They were about his criminal record: in the past, indeed, he was convicted for defrauding an old lady under his care; he had been jailed in Egypt in the 1980s for his part in a plot to murder the Libyan Prime Minister of the time, Abd al-Hamid al-Bakush, parallel to the Mu'ammar Gheddafi leading Lybia; finally, he was condemned for unpaid bills. To clean up his public image, he filed a complaint to the Maltese Police for these three libels cases requesting a criminal sanction for Daphne Caruana Galizia, being at that time libel a criminal offence under Maltese Press Act.

These three cases seem to fall within the definitions under the anti-SLAPPs Directive. Indeed, first and foremost, "public participation" in Daphne's activism is at stake, which includes any statement or activity, such as blog posts, made or carried out by her in the exercise of the right to free expression and information on a matter of public interest, as well as any preparatory, supporting, or assisting action directly related thereto. Then, the information reported by Daphne's also are a "matter of public interest", since they affect the public to such an extent that the public may legitimately take an interest in it, in areas such as the Edgar Bonnici Cachia activities under public consideration by judicial body; they would have be relevant also in cases of

[40] These three claims resulted in judgement of the Court of Magistrates (Criminal Judicature), *Il-Pulizija vs Caruana Galizia Daphne Anne*, 1/15, 16 November 2016, MT:LBL:2016:103516; judgement of the Court of Magistrates (Criminal Judicature), *Il-Pulizija vs Caruana Galizia Daphne Anne*, 2/15, 16 November 2016, MT:LBL:2016:103517; judgement of the Court of Magistrates (Criminal Judicature), *Il-Pulizija vs Caruana Galizia Daphne Anne*, 4/15, 16 November 2016, MT:LBL:2016:103518. These judgements are available at Sign In - eCourts.gov.mt.

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consideration and review by other State function or if related to public health, safety, the environment, climate or enjoyment of fundamental rights, or if concerned allegations of corruption, fraud or criminality or, finally, if activities aimed to fight disinformation. Lastly, the lawsuits filed appear to be "abusive court proceedings against public participation" in so far as they are completely or partially unfounded, being this information relating to Edgar Bonnici Cachia derived from his criminal record, and have the primary goal of preventing, restricting, or penalising public involvement. And indications of such a purpose can be the disproportionate, excessive or unreasonable nature of the claim, such as the criminal one; the existence of multiple proceedings, exactly three, initiated by him in relation to similar matters; intimidation, harassment or threats on the part of the claimant.

However, in these three libel cases it is possible to deduct that the anti-SLAPPs Directive would have no impact. Indeed, the anti-SLAPPs Directive shall apply only to civil or commercial matters, whatever the nature of the court or tribunal, not in criminal issues. As a result, the problem arises to the extent that proceedings relating to defamation can be both civil and criminal in nature. They are governed differently from the substantive point of view by the civil or criminal legislation of the considered Member State. The anti-SLAPPs Directive does not cover all of them, but only those with a civil nature. And not even all the civilian ones but only those having cross-border implications: so, according to the anti-SLAPPs Directive, if at least one of the party is domiciled in another Member State other than that of the court seized; or, failing this, if the act of public participation relates to a matter of public interest against which court proceedings are initiated is relevant to more than one Member State, or if the claimant or associated entities have initiated concurrent or previous court proceedings against the same or associated defendants in another Member State. However, this is due to a competence issue: the EU legislator can intervene, under Article 81 TFUE as legal basis on judicial cooperation in civil matters, only in situations having cross-border elements, not in those domestic that are purely internal one. It derives that

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these exclusions, both the criminal cases and the civil domestic ones, are a relevant obstacle for the anti-SLAPPs Directive to achieve, at the end, its final objectives.

It is paradoxically, then, that the anti-SLAPPs Directive, named the "Daphne's law" because inspired by her story, would not have protected her. However, there are other cases falling within the aforementioned cross-border meaning where the anti-SLAPPs Directive could have played a role. With reference to the case in which both parties are not domiciled in the same Member State as the court seized, an example is represented by *T&F Trade and Finance v Kyrgyzstani news website 24.kg*.[41] A civil lawsuit was brought against Kyrgyzstani news website 24.kg in relation to an article discussing the breakdown of a business partnership in Kyrgyzstan. One of the companies named in the article, T&F Trade and Finance, argued that 24.kg's claims that they were 'pseudo investors' were defamatory, but instead of pursuing legal action in Kyrgyzstan, in the wake of a "libel tourism" practice, a civil law suit was filed in Austria, where T&F Trade and Finance is registered. Or again, in the event of both parties domiciled in the same Member State as the court seized, the cross-border implication of the act of public participation concerning a matter of public interest relevant to more than one Member State occurs, for instance, in claims against climate change and human rights activists. The anti-SLAPPs Directive could play a role in this context too and there are many cases to refer to:[42] German coal giant RWE tried suing for 50,000 Euros Ende Gelände, a 24-year-old climate activist for saying coal mines have to be stopped to address the climate crisis; or in Portugal Eucalyptus pulp producer Celtejo who sued activist Arlindo Marquês over accusations that the company pollutes the Tagus River, claiming for 250.000 Euros for compensation; or again in Spain the industrial meat producer Coren

[41] Judgement of Handelsgericht Wien [Commercial Court, Vienna], *T&F Trade and Finance v Kyrgyzstani news website 24.kg*, 25 March 2019.
[42] For an overview map and cases details, Greenpeace (2020), Sued Into Silence. How the rich and powerful use legal tactics to shut critics up, https://www.greenpeace.org/static/planet4-eu-unit-stateless/2020/07/20200722-SLAPPs-Sued-into-Silence.pdf.

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sued activist Manual García demanding 1 million Euros in damages for saying the company's poor livestock waste management was polluting As Conchas reservoir. Or again, in the event of domicile in the same Member State as the court seized, the cross-border implication in the strategy of filing concurrent court proceedings against the same or associated defendants in another Member State is no less relevant. This occurs on the one hand by initiating separate claims against the journalist and against the newspapers where he published or against the activist and the related NGO; on the other hand, by multiplying the number of claims grounding them on different causes of action. A relevant example, in this sense, is the massive use of claims by Kingdom of Morocco, who filed multiple civil defamation lawsuits before French, German, and Spanish courts against NGOs, newspapers, radio broadcasters and individual journalists and reporters after they published investigative work alleging that the Moroccan administration used Pegasus spyware to spy on the mobile phones of politicians, journalists and activists.[43]

To get a clearer idea on the subject matter and scope issue, a 2021 comparative study (Bayer, 2021), funded by the European Commission, examined the legal environment of SLAPPs throughout the EU and its Member States, revealing a patchwork picture at the national level. On the one hand, indeed, according to the study, all but six Member States criminalise defamation, and the sanction can be imprisonment in all but one of those. Criminal defamation is said to be more regularly utilised to safeguard one's reputation in ten Member States than civil defamation. And eight Member States continue to impose harsher penalties for public dissemination, notably for the press. On the other, anti-SLAPP legislation is not (so) developed at EU level. The situation at domestic level is similar. According to the staff working document accompanying the anti-SLAPPs Directive, none of the EU Member States have specific safeguards against SLAPPs, and only three of them (Ireland, Lithuania and Malta) were

[43] For a brief reference, see The Case (2022), The European Slapp Contest 2022, in *The Case*, https://www.the-case.eu/latest/the-european-slapp-contest-2022/.

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considering (and were about to) the introduction of specific measures to address SLAPPs.

Despite these two important gaps in order the freedom of expression to achieve a full protection, in relation to the criminal relevance it is to be noted that the real "challenge" is played in the civil field, not in the criminal one. In the latter, the public prosecutor indeed guarantees and restores that missing balance between parties. While in relation to domestic cases, falling outside the anti-SLAPPs Directive, it is to be highlighted that Member States are recommended to deal also with them in a way comparable as to the cross-border ones. SLAPP cases in which the defendant is domiciled in a State other than that of the court seized are a relatively small part of the total amount of SLAPP cases documented in Europe (11% of the total documented[44] from 2010 to 2021, according to the Coalition against SLAPPs in Europe); although, cases dealt with under the anti-SLAPPs Directive, due to the complexities arising out of the cross-border element, are the ones with the major capacity to harm the victim of these abusive proceedings.

Needless to say, the three criminal proceedings under consideration in this paragraph ended up with three judgements in favour of Daphne Caruana Galizia.

5.2 Common Rules on Procedural Safeguards and Remedies Against Abusive Court Proceedings

Chapter two of the anti-SLAPPs Directive contains horizontal provisions on the application for procedural safeguards, its content and other procedural features; while chapter four contains rules on award of costs, compensation of damages and penalties.

Let us consider another case in Daphne Caruana Galizia's activism that might be suited in having a beneficial thanks to the anti-SLAPPs Directive on the latter components. Four lawsuits have been filed against the blogger

[44] Bonello Ghio R., and Nasreddin D. (see note 26).

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before the Civil Maltese Courts by two politicians: the deputy leader of the Labour Party and Minister of the Economy, Christian Cardona, and his EU presidency policy officer, Joseph Gerada.[45] They claim libel damages because of the posts that were published on her website. Those articles reported that both men had been in a brothel, a place for having sex by payment, in Velbert, Germany, just a week before while they were on an official business journey representing the government of Malta as guests of the German government. What is interesting about these cases is that the desire for revenge of these two men was very high. So, they put pressure on her on the economic side. They request the court to order the exceptional measure of precautionary warrants on Daphne's assets. In civil procedure, a precautionary warrant is a sum of money which, upon request of one party and order of the court, must be set aside and becomes not available until a new order or the final judgement; its objective is to anticipate the final judgment on the merits, just for a certain period of time, and, once defined, to ensure that it will be possible to enforce it. As a result, Daphne bank accounts were frozen for 47.460 Euros. This measure paralyzed her life, causing her family lots of problem. And it is precisely the nature of SLAPP that has revealed in these cases. Indeed, these two men reached their objective, that is to silence public participation. Caruana Galizia, family in this case, stopped from presenting the evidence of these two men entering and being in that brothel in Germany. And this proceeding lasted just for the time period of interest by the abusive litigants: these two men, then, satisfied and therefore no longer interested in, simply withdrew their libel requests before court or, anyway, they remained inactive.

The impact of the anti-SLAPPs Directive is very relevant on the economic and support side to these cases, imaging they fall within its scope of application.

[45] These proceedings (Christian Cardona v. Caruana Galizia Daphne Anne and Joseph Gerada v. Caruana Galizia Daphne Anne) before the Maltese courts are registered as no. 29/2017, 30/2017, 31/2017, 32/2017; the precautionary warrants proceedings are registered as no. 34/2017, 35/2017, 36/2017, 37/2017. However, they seem not accessible at Sign In - eCourts.gov.mt.

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It provides for two main tools during the proceeding. The first consists in providing court seized with the option of allowing that NGOs safeguarding or promoting the rights of persons engaging in public participation may take part in proceedings, either in support of the defendant or to provide information. And Daphne, considering this possibility, would certainly have benefited. The second is that the court is empowered to require the claimant to provide security for procedural costs, or for both procedural costs and damages, if the court considers such security appropriate in light of the presence of elements indicating abusive court proceedings and the likelihood of success in the main proceedings is low. And even with this instrument, claimants in these proceedings against Daphne would have had to provide for sums of money during the litigation, thus involving a beginning reflection in deciding carefully whether to file them.

Additionally, the anti-SLAPPs Directive also includes a set of crucial instruments after the conclusion of the proceeding. In relation to award of costs, a claimant who has started a SLAPPs case may be required to cover all the costs of the proceedings, including the defendant's entire legal representation costs. The two politicians, therefore, perhaps would have made different assessments whether to file or not the lawsuit and, in the case of filing, they would have had to indemnify Daphne from all the costs. And the provision on compensation for damages also helps in the dissuasive purpose on the claimant side, by providing that the person who has suffered harm as a result of an abusive court proceedings against public participation shall be able to claim and to obtain full compensation for that harm. And if that weren't enough, the rule on the penalties matter also comes to the rescue, which provides that the author of this abusive litigation will incur in effective, proportionate and dissuasive penalties because of the filing of this proceeding. Finally, subsequent amendments to the claims or the pleadings made by the claimant in the main proceedings, including the discontinuation of proceedings, would not do to circumvent all this legal framework.

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From this overview on chapters two and four, as referred to the cases considered, it is evident that the anti-SLAPPs Directive would certainly provide an effective and efficient corrective in countering this type of abusive proceedings. The economic aspect, and related assistance and support, is, indeed, a critical component for the success of these lawsuits. Indeed, even if in only twenty Member States the losing party pays the legal cost of civil proceedings, this normally takes the form of a refund and may be obtained years after the final ruling on the merits.[46] Furthermore, legal aid is provided in twenty Member States for civil defamation claims, but many SLAPP targets cannot benefit from this type of assistance, given the restrictive and narrow scope of the conditionality criteria that apply.[47] Therefore, the anti-SLAPPs Directive, taking all this in account, precisely addresses this point.

5.3 Early Dismissal of Manifestly Unfounded Court Proceedings

Chapter three of the anti-SLAPPs Directive contains provisions on requirements and procedural safeguards to grant an early dismissal in court proceedings that are manifestly unfounded.

Let us consider another case in Daphne Caruana Galizia's work that might be interested of an improvement via the anti-SLAPPs Directive on the time element. Mark Gaffarena has filed a libel lawsuit against Daphne Caruana Galizia following an article on her blog.[48] In this post, Daphne Caruana Galizia insinuated he was trafficking drugs in partnership with Antoine Azzopardi, who runs in Malta his restaurant located in a problematic area because without public authorization. Corruption with public officials is involved too. Because of the defamatory nature of these statements, Mark Gaffarena claimed for damages before the Maltese Courts. The proceeding

[46] Bayer J., Bárd P., Vosyliute L., and Luk N.C. (2021). Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study - EU-CITZEN: Academic Network on European Citizenship Rights, in *European Commission*, https://commission.europa.eu/system/files/2022-04/slapp_comparative_study_0.pdf., 59.
[47] *Ibidem.*
[48] This lawsuit resulted in the judgement of the Court of Magistrates (Civil Judicature), *Mark Gaffarena vs Daphne Caruana Galizia*, 174/15, 20 February 2017, MT:CIV:2017:104975.

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started on 17 June 2015 and was closed by the judgement on 20 February 2017 with a final decision in favour of Daphne Caruana Galizia, since the proceeding filed by Mark Gaffarena has been considered unfounded. Nevertheless, Daphne Caruana Galizia had to wait about two years with this proceeding pending, before the declaration of the groundless by the court.

The impact of the anti-SLAPPs Directive is also relevant on the time factor to such cases, where they fall within its scope of application.

It provides that early dismissal is granted where the claim presented against the defendant is manifestly unfounded, in whole or in part; Member States may impose time restrictions on exercising the right to file an application for early dismissal that are appropriate and do not render such exercise impossible or too burdensome. If the defendant applies for early dismissal, the main proceedings are stayed until a final decision on that application is taken. As a result, an application for early dismissal is treated in an accelerated procedure, taking into account the circumstances of the case and the right to an effective remedy and the right to a fair trial; to guarantee maximum expediency in the accelerated procedure, Member States may specify time restrictions for hearings or for the court to take a decision, as well as procedures for interim measures. Where a defendant has applied for early dismissal, it shall be for the claimant to prove that the claim is not manifestly unfounded; however, it does not imply a restriction on access to justice, given that the claimant bears the burden of proof regarding that claim and only needs to meet the much lower threshold of demonstrating that the claim is not manifestly unfounded to avoid an early dismissal. Finally, a decision refusing or granting early dismissal shall be ensured to an appeal.

All these possibilities regarding the time issue certainly affect SLAPPs cases, such as the one major under analysis. Daphne Caruana Galizia had to wait around two years for the final decision on the merits. With these rules, on the other hand, it would have taken limited time, in cases of groundlessness like these, to obtain an early dismissal, in an accelerated procedure and with the burden of proof upon the claimant. And if in this proceeding she had to

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wait a few years, there were other SLAPPs cases that affected her where the waiting years have been enormously higher.[49] And waiting a pending proceeding is dangerous: because it causes anxiety for the defendant, it involves spending lots of money, it silences the journalist voices and, ultimately, it undermines public participation and democracy.

5.4 Protection Against Third-Country Judgements

Chapter five of the anti-SLAPPs Directive contains remedies to protect the defendant against abusive court proceedings brought in third countries' courts.

Let us consider a different case in Daphne Caruana Galizia's life that might be relevant to this issue. Pilatus Bank, and its majority shareholder Ali Sadr, sued Daphne Caruana Galizia in the US, precisely before the Arizona courts (Borg-Barthet et al. 2021, 35).[50] The lawsuit arose from the statements made by the defendant, Daphne Caruana Galizia, about the claimants on her blog, which they regarded untrue and defamatory: the statements are related to circumstances that essentially occurred in Malta and were presented by the journalist as relevant to the island's political life, such as the fact that the bank's staff had received orders from its top management to hide certain information to Maltese enforcement authorities on money laundering. The decision to file the lawsuit in Arizona, i.e. in a forum wholly unconnected to the subjective or objective elements of the dispute, may be part of the claimants dissuasive strategy. Pilatus and his shareholder justified the jurisdiction of the Arizona courts by relying on the choice-of-court agreement contained in the general terms and conditions of the hosting services company

[49] Let us consider, for instance, the case before the Civil Court, First Hall, Malta, *Vella Dr Mario Et Noe vs Caruana Galizia Daphne*, no. 1934 / 1999 / 1, which has been registered in 1999 and is pending still today; after continuous referrals, a final judgement is awaited. But there are lots of other examples as well: the case before the Court of Magistrates (Civil Judicature), Malta, *Mizzi Dr Konrad et vs Caruana Galizia Daphne*, no. 365 / 2014, pending since 2014, or the case before the Court of Magistrates (Civil Judicature), Malta, *Gambin Lindsey vs Caruana Galizia Daphne*, no. 366 / 2014, pending since 2014.

[50] Superior Court of Arizona, County of Maricopa, or Maricopa County Superior Courts, *Pilatus Bank PLC and Ali Sadr v. Daphne Caruana Galizia*, 23 October 2017, no. […]7457.

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(GoDaddy.com LLC) - based in Phoenix, to be precise – used by the journalist (like thousands of other bloggers around the world) to run her blog. Leaving aside this groundless legal reasoning on jurisdiction, by choosing Arizona as where to litigate, the claimants wanted to attract Daphne Caruana Galizia to a forum in which she would probably have struggled to defend herself, due to the geographical distance, to the high costs of legal assistance and to the difficulty of giving an account of the complex political and economic events to a court completely alien to the Maltese environment. A forum, furthermore, where the defendant would have been exposed to more serious consequences than she might have faced if a comparable proceeding had been started elsewhere. And, finally, a forum where claimants sought the Arizona courts, *inter alia*, that the journalist to be ordered to pay a sum for punitive damages.

The impact of the anti-SLAPPs Directive is also relevant in this protection needed against third-country judgements.

It requires Member States to ensure that the recognition and enforcement of a third-country judgment in court proceedings arising from public engagement by a person domiciled in a Member State is refused as manifestly contrary to public policy if those claims would have been deemed clearly unfounded or abusive if brought before the courts of the Member State where recognition or enforcement is sought and those courts would have applied their own law (Kohler, 2022, 817). This would undoubtedly provide protection to the activist victim of this litigation such as Daphne Caruana Galizia: imagining the proceeding in the third country going on, and ultimately a possible decision ordering to pay for damages, the latter would not be recognised and enforced in the Member State where that person is domiciled, such as Malta, i.e. where her assets may be located that creditors would like to foreclose.

In addition, Member States are required to provide for an additional remedy against a third-country judgement. Where abusive court proceedings against public participation have been brought against a person domiciled in a Member State in a court of a third country, that person can claim for the

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damages and the costs incurred in connection with the litigation before the court of the third country, irrespective of the domicile of the claimant in the proceedings in the third country (Kohler 2022, 818). This tool creates a new special ground of jurisdiction in order to ensure that targets of abusive litigation who are domiciled in the EU have an efficient remedy available in the Member States against abusive court proceedings brought in a third country court. This remedy has a significant impact as well: being able to claim for both compensation and costs for these abusive third country proceedings directly 'at home' facilitates the victim. Daphne Caruana Galizia might simply resort to the Maltese court, rather than filing a new and additional lawsuit in a third country. And the benefits are numerous: economically; then, in terms of direct managerial profile of the dispute; ultimately, also in relation to the legal expertise about the claim.

6. A Broader Look at Other Human Rights Protection Systems and Anti-SLAPPs Legislations in the World

The ECHR system on the human rights protection, such as for the right to the freedom of expression, is not the only one; in parallel, other human rights protection systems come to the attention. Likewise, the anti-SLAPPs Directive is not the legislation that first tries to discipline this issue in the world, since there are other previous and parallel ones.

As a result, to better evaluate the protection of the freedom of expression in cases of SLAPP within the European territory, a look at other human rights protection systems is appropriate; equally, then, a framework on other anti-SLAPPs legislation in the world can be helpful to be addressed.

6.1 Freedom of Expression (and SLAPPs) in Other Human Rights Protection Systems

The institutional reality of internationally recognized human rights is today organized in a "universal system", managed by the United Nations ("UN"),

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and in "regional systems", operating in the functional sphere of regional organizations such as the Council of Europe, the Organization of American States, the African Union and the League of Arab States (Zanghì and Panella, 2019, 145; Pisillo Mazzeschi, 2021, 179).

Within the universal system, the right to freedom of expression is protected under Article 19 of the Universal Declaration of Human Rights ("UDHR") (Brown, 2021, 81; Hannikainen and Myntti, 1993, 275)[51] and under Article 19 of the International Covenant on Civil and Political Rights ("ICCPR") (O'Flaherty, 2012, 636; Joseph and Castan, 2013, 18.22-7), [52] as monitored by the Human Rights Committee ("HRC").[53] These rights can be subjected only to restrictions which are prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others (Ciampi, 2017, 2). Resolution 24/5 of the Human Rights Council[54] stresses that "(…) respect for the[se] rights to freedom (…), in relation to civil society, contributes to addressing and resolving challenges and issues that are important to society, such as the environment, sustainable development, crime prevention, human trafficking, empowering women, social justice, consumer protection and the realization of all human rights". It also reminds States of "their obligation to respect and fully protect the rights of all individuals (…), and to take all necessary measures to ensure that any restrictions on the free exercise of the[se] rights to freedom (…) are in accordance with their obligations under international human rights law". The imperative of the obligations to respect and protect these rights is underscored

[51] Universal Declaration of Human Rights, Paris, Dec. 10, 1948.
[52] International Covenant on Civil and Political Rights, New York, Dec. 16, 1966.
[53] Faurisson v. France, U.N. Doc. CCPR/C/58/D/550/1993(1996) HRC (1996), ¶ C.8; Gauthier v. Canada
U.N. Doc. CCPR/C/65/D/633/1995 HRC (1999); Mohamed Rabbae v. The Netherlands, U.N. Doc. CCPR/C/117/D/2124/2011 HRC (2016), ¶ 10.4; Claudia Andrea Marchant Reyes and Others v. Chile, U.N. Doc. CCPR/C/121/D/2627/2015 HRC (2017), ¶ 7.4.
[54] Human Rights Council, Resolution 24/5. *The rights to freedom of peaceful assembly and of association*, UN Doc. A/HRC/RES/24/5, 8 October 2013, https://documents-dds-ny.un.org/doc/UNDOC/LTD/G13/171/79/PDF/G1317179.pdf?OpenElement.

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by the "destruction of rights" provisions contained, *inter alia*, in Articles 30 of the UDHR and 5 of the ICCPR. In this framework, it is fundamental to recall the States' positive obligation to facilitate the exercise of the right to freedom of expression which includes, among others, the duty to establish and maintain an enabling environment for civil society to operate freely.[55] To this end, the Committee on Economic, Social and Cultural Rights has developed the States' obligation to protect individuals under their jurisdiction from interference by third parties in its General comment No. 24 (2017),[56] where it states that "the obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights. States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners". And precisely on the issue of SLAPPs, it specifies that "the introduction by corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation's reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies". This statement is based on the previous work set out by the Special Rapporteur on the situation of human rights defenders, where noted that "the consolidation of more sophisticated forms of silencing their voices

[55] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/20/27, 21 May 2012, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.

[56] Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odka6DUwG3Y.

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and impeding their work, including the application of legal and administrative provisions or the misuse of the judicial system to criminalize and stigmatise their activities. These patterns not only endanger the physical integrity and undermine the work of human rights defenders, but also impose a climate of fear and send an intimidating message to society at large".[57] This States' duty is also recalled in a 2015 report by the former Special Rapporteur on the rights to freedom of peaceful assembly and association;[58] it insists on the duty of States to enact robust national laws that specify the rights and responsibilities of all, to establish independent and effective enforcement, oversight, and adjudicatory mechanisms, to ensure effective remedies for violations of rights, and to promote awareness of, and access to, relevant policies and practises related to natural resource exploitation. In the same line, according to a joint report of 2016, "business entities commonly seek injunctions and other civil remedies against assembly organizers and participants on the basis, for example, of anti-harassment, trespass or defamation laws, sometimes referred to as strategic lawsuits against public participation. States have an obligation to ensure due process and to protect people from civil actions that lack merit".[59] Finally, in its Guidance on National Action Plans on Business and Human Rights, the Working Group on Business and Human Rights advised for States to establish anti-SLAPPs laws to guarantee that human rights defenders are not exposed to legal responsibility for their activities.[60]

[57] Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/HRC/25/55, 23 December 2013, ¶ 59, https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx.

[58] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/29/25, 28 April 2015, ¶ 14, http://ap.ohchr.org/documents/alldocs.aspx?doc_id=24900.

[59] Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66, 4 February 2016, ¶ 84, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/13/PDF/G1601813.pdf?OpenElement.

[60] Guidance on National Action Plans on Business and Human Rights, United Nations Working Group on Business and Human Rights, December 2014, UNGP 25, p. 37, https://www.ohchr.org/Documents/Issues/Business/UNWG_ NAPGuidance.pdf.

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Coming now to the regional human rights protection systems, one of them is represented by the African one (Centre for Human Rights 2021, 1). Under the aegis of the Organisation of African Unity, the concerned right to information and freedom of expression is dealt with in Article 9 of the African Charter on Human and Peoples' Rights ("ACHPR")[61] (Evans and Murray 2008, 219),[62] as interpreted by the African Court on Human and Peoples' Rights ("ACtHPR").[63] On the same line, under the aegis of the Council of the League of Arab States, Articles 30 and 32 of the Arab Charter on Human Rights ("ACHR")[64] protects the freedom of expression (Zerroughui, 2011, 7; Rishmawi, 2005, 361).[65]

However, in relation to freedom of expression, and specifically SLAPPs, the inter-American regional system has gone farther. Within the framework of the Organization of American States, the American Convention on Human

[61] African Charter on Human and Peoples' Rights (Banjul Charter), Nairobi, 27 June 1981.
[62] On the relevance of the topic, see High Court of South Africa (Western Cape Division, Cape Town), Mineral Sands Resources (Pty) Ltd et al. v. Christine Reddell et al., 9 February 2021, Case No 7595/2017. See also African Commission on Human and Peoples' Rights, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR /Res.62(XXXII)02, 23 October 2002, https://www.refworld.org/pdfid/51949e234.pdf; African Commission on Human and Peoples' Rights, Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, Comm. No. 05/93, 128/94, 130/94 and 152/96, 1998, ¶ 54, https://www.globalhealthrights.org/wp-content/uploads/2014/07/Media-Rights-Agenda-v.-Nigeria.pdf; African Commission on Human and Peoples' Rights, The Law Offices of Ghazi Suleiman / Sudan, No. 228/99, 2003, ¶ 49-50 , http://hrlibrary.umn.edu/africa/comcases/Comm228-99.pdf. See, also, in this framework, the Special Rapporteur on Freedom of Expression and Access to Information, whose works are available at https://achpr.au.int/en/mechanisms/special-rapporteur-freedom-expression-and-access-information.
[63] XYZ v. Republic of Benin, Afr. Ct. H P.R., App. No. 010/2020, ¶ 112 (Nov. 27, 2020); Alex Thomas v. United Republic of Tanzania, Afr. Ct. H P.R., App. No. 005/2013, ¶ 154 (Nov. 20, 2015); Ingabire Victoire Umuhoza v. The Republic of Rwanda, Afr. Ct. H P.R., App. No. 003/2014, ¶ 132 (Nov. 24, 2017); Lohé Issa Konaté v. Burkina Faso, Afr. Ct. H P.R., App. No. 004/2013, ¶ 145 (Dec. 5, 2014).
[64] Arab Charter on Human Rights, May 22, 2004.
[65] In this framework, see the Declaration on Media Freedom in the Arab World, 3 May 2016, https://www.ifj.org/fileadmin/user_upload/Arab-Declaration.Explanatory-Memo-EN.pdf; Cairo Declaration on Human Rights in Islam, 5 August 1990, https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2017/05/cairo-Declaration-on-Human-Rights.pdf; UNESCO, General Conference - Twenty-ninth Session, Paris, 1997, Implementation Of 150 Ex/Decision 3.1, Part III, concerning The Sana'a Declaration, https://unesdoc.unesco.org/ark:/48223/pf0000109085.

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Rights ("ACHR")[66] (Medina Quiroga and David Contreras, 2022, 5) dedicates Article 13 to freedom of thought and expression (Hennebel, 2007, 559). If the content of the latter is based on the lines already analysed, what is noteworthy is the interpretation that the Inter-American Court of Human Rights ("IACtHR") has made of it.[67] In the *Emilio Palacio Urrutia* case,[68] the IACtHR determined that the State of Ecuador infringed Emilio Palacio Urrutia and other people's right to freedom of expression, as protected under Article 13 of the ACHR. The IACtHR argued that the criminal convictions and civil sanctions imposed on the aforementioned individuals for the publication of the article 'NO a las mentiras', which criticised President Rafael Correa, were disproportionate and could have a chilling effect on the free exchange of ideas, opinions, and information. The IACtHR further determined that article was a kind of protected expression worthy of exceptional protection since it was an opinion piece regarding a public figure and an issue of public interest. In doing so, it further stated that the use of criminal defamation cases by public officials to silence criticism on subjects of public concern is a danger to free expression. For the first time, it noted that these forms of proceedings, known as SLAPPs, are an abusive use of judicial mechanisms that require regulation and control by States in order to ensure the effective exercise of freedom of expression. It emphasised the importance of reflecting on the need for (and importance of) anti-SLAPP measures as a means of avoiding strategic demands whose purpose is to censor critical opinion, as well as the need to continue strengthening the ACHR's robust protection of freedom of expression by fostering the protection of opinion speech and freedom of expression on matters of public

[66] American Convention on Human Rights (Pact of San José), San José, Nov. 22, 1969.
[67] "La Última Tentación de Cristo" v. Chile, Inter-Am. Ct. H.R., (ser. C) No. 73, ¶ 61-68 (Feb. 5, 2001); Lagos del Campo v. Peru, Inter-Am. Ct. H.R., (ser. N/A) No. N/A, ¶ 117 (Aug. 31, 2017); Herrera-Ulloa v. Costa Rica, Inter-Am. Ct. H.R., (ser. C) No. 107, ¶ 113 (Jul. 2, 2004); Bedoya Lima v. Colombia, Inter-Am. Ct. H.R., (ser. C) No. 431, ¶ 107 (Aug. 26, 2021); Mémoli v. Argentina, Inter-Am. Ct. H.R., (ser. C) No. 265, ¶ 123 (Aug. 22, 2013); Álvarez Ramos v. Venezuela, Inter-Am. Ct. H.R., (ser. C) No. 380, ¶ 100 (Aug. 30, 2019).
[68] Emilio Palacio Urrutia et al. v. Ecuador, Inter-Am. Ct. H.R., (ser. C) No. 446 (Nov. 24, 2021).

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interest. As a result, this ruling reflects the IACtHR's first articulated approach in case law to conceptualising the obligation of States to defend freedom of speech through anti-SLAPPs measures or laws. In this way, it opens the door for the creation of procedural mechanisms that prevent lawsuits from silencing or disproportionately affecting those who are sued, especially journalists or the media. Therefore, even if Article 13 ACHR does not expressly provide for this obligation, it is essential that the interpretations of the scope of the ACHR is aimed at achieving the useful effect of its provisions.

After this overview on freedom of expression, and SLAPPs, in universal and regional human rights protection systems, the possibility arises as to their harmonisation of jurisprudence; furthermore, the extent to which the UN human rights treaty monitoring bodies and regional human rights courts and commissions have cited one another's jurisprudence/practice has been identified to this end in recent scholarship (Cheeseman 2016, 595). This harmonisation process would make it possible to benefit worldwide from the prevailing wisdom at the expense of fragmentation; it would ensure that universality which is at the core promise of human rights; it would avoid divergences, which only serve to undermine the protection; lastly, it would spread best reasoned jurisprudence. And precisely on the topic of SLAPPs it is even more appropriate: indeed, there are no reasons that justify a divergent treatment at different latitudes of the globe, since SLAPPs represent a generalized problem not coloured (and affected) by local particularisms.

6.2 Anti-SLAPPs Legislations in the World

The anti-SLAPPs Directive is not one of the first legislation that deal with the SLAPPs issue. Since this phenomenon was originally detected in the US, it is appropriate to have a look overseas.

An excellent comparative reference is represented by a new published report which evaluates and assesses the effectiveness of anti-SLAPP legislations in 37 jurisdictions of the world that provide for legal protection

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against these abusive proceedings (Brander and Turk, 2023, 7).[69] The Centre for Free Expression, which oversaw the completion of this research, assessed and ranked every anti-SLAPP law considered based on a standard set of criteria. The strongest anti-SLAPP laws share several common features:

-a wide scope of application: effective anti-SLAPP rules apply extensively to any case involving expression on a public interest issue. The weakest legislations, on the other hand, are limited in scope, applicable exclusively to a single matter or to statements made before certain government authorities.

-staying proceedings: when a request to dismiss the case is filed, all proceedings between the parties, including discovery, are stayed. Without such a safeguard, discovery and other proceedings might drag on, possibly incurring significant expenses on the defendant before the SLAPP is dismissed.

-*onus probandi*: the defendant has a limited obligation to demonstrate that the litigation is a matter of public interest under effective anti-SLAPP laws. The burden then shifts on the plaintiff to demonstrate that the case has substantial merit, and that the defendant has no reasonable defence.

-expedited hearing: effective anti-SLAPP legislations require courts to schedule an anti-SLAPP motion hearing within a reasonable period following filing.

-provision for costs: effective anti-SLAPP rules require courts to fully reimburse prevailing defendants for the expenses of the motion while shielding the defendant from costs if the motion is refused.

-right to an immediate appeal: effective anti-SLAPP legislations allow a defendant to appeal a denial of an anti-SLAPP motion as of right and on an expedited basis.

[69] For additional references on anti-SLAPPs legislations, see https://www.rcfp.org/.

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Based on the examination of the latter elements, Ontario[70] and British Columbia[71] result having the strongest anti-SLAPP rules in the world, with each province's law receiving a score of 75 out of a potential total of 79 points; their legislation combines a broad scope with effective processes for achieving an expedient decision on a SLAPP proceeding, as well as reasonable defendant safeguards. The anti-SLAPP laws of New York,[72] Texas[73] and California[74] are towards the top of the rankings; these measures, too, combine broad applicability with all of the necessary procedural features

[70] Protection of Public Participation Act, 2015, S.O. 2015, c. 23 - Bill 52, introducing sections 137.1 to 137.5 to Ontario's Courts of Justice Act ("CJA"). On its application side, see 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 (CanLII), [2020] 2 SCR 587, https://canlii.ca/t/j9kjz, retrieved on 2023-07-05; Park Lawn Corporation v. Kahu Capital Partners Ltd., 2023 ONCA 129 (CanLII), https://canlii.ca/t/jvtb0, retrieved on 2023-07-05.

[71] Protection of Public Participation Act, S.B.C. 2019, c. 3 (PPPA). On its application side, see Mawhinney v. Stewart, 2023 BCSC 419.

[72] New York Consolidated Laws, Civil Rights Law - §§ 70-a, 76-a, and New York Civil Practice Law and Rules §§ 3211(g), 3212(h). On its application side, see Palin v. N.Y. Times Co., 510 F. Supp. 3d 21, 27 (S.D.N.Y. 2020); NOVAGOLD Res., Inc. v. J Cap. Rsch. USA LLC, No. 20-CV-2875 (LDH) (PK), 2022 WL 900604 (E.D.N.Y. Mar. 28, 2022); Kesner v. Buhl, No. 20-CV-3454 (PAE), 2022 WL 718840 (S.D.N.Y. Mar. 10, 2022); Shahidullah v. Shankar, No. 20-CV-3602 (DLB), 2022 WL 286935 (D. Md. Jan. 31, 2022); Lindberg v. Dow Jones & Co., Inc., No. 20-CV-8231 (LAK), 2021 WL 3605621 (S.D.N.Y. Aug. 11, 2021); Ctr. for Med. Progress v. Planned Parenthood Fed'n of Am., 551 F. Supp. 3d 320, 333 (S.D.N.Y. 2021); Sweigert v. Goodman, No. 18-CV-8653 (VEC) (SDA), 2021 WL 1578097 (S.D.N.Y. Apr. 22, 2021); Goldman v. Reddington, No. 18-CV-3662 (RPK) (ARL), 2021 WL 4755293 (E.D.N.Y. Apr. 21, 2021); Coleman v. Grand, 523 F. Supp. 3d 244, 257–58 (E.D.N.Y. 2021); Great Wall Med. P.C. v. Levine, 163 N.Y.S.3d 783 (Sup. Ct. N.Y. Cnty. 2022). For other cases, see https://www.rcfp.org/anti-slapp-guide/new-york/. Cases are accessible at https://casetext.com.

[73] Texas Citizens Participation Act, introducing Texas Civil Practice and Remedies Code §§ 27.001, 27.002-9. On its application side, see U.S. Lending Grp. v. Winstead PC, 2021 WL 1047208 (Tex. App.-Tyler Mar. 18, 2021), as for the Court of Appeals, and U.S. Lending Grp. v. Winstead PC, No. 21-0437 (Tex. May. 19, 2023), as for the Supreme Court of Texas; Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC, 591 S.W.3d 127, 133-34 (Tex. 2019); S&S Emergency Training Sols., Inc. v. Elliott, 564 S.W.3d 843, 847 (Tex. 2018) (quoting In re Lipsky, 460 S.W.3d 579, 590 (Tex. 2015)); Landry's, Inc. v. Animal Legal Def. Fund, 631 S.W.3d 40, 45-46 (Tex. 2021). Cases are accessible at https://casetext.com.

[74] California Code of Civil Procedure - §§ 425.16, 425.17 and 425.18. on the application side, see Hill v. Heslep et al., Case No. 20STCV48797 (Apr. 7, 2021, L.A. Cnty. Super. Ct.); Muddy Waters, LLC v. Superior Court, 62 Cal. App. 5th 905 (2021); Verceles v. Los Angeles Unified School District, 63 Cal. App. 5th 776 (2021); Appel v. Wolf, 839 F. App'x 78 (9th Cir. 2020); Dyer v. Childress, 55 Cal. Rptr. 3d 544 (Cal. Ct. App. 2007); Rivero v. Am. Fed'n of State, Cty., & Mun. Emps., 130 Cal. Rptr. 2d 81, 89–90 (Cal. Ct. App. 2003); Braun v. Chronicle Publ'g Co., 61 Cal. Rptr. 2d 58 (Cal. Ct. App. 1997). For other cases, see https://www.casp.net/california-anti-slapp-first-amendment-law-resources/caselaw/california-supreme-court/. Cases are accessible at https://casetext.com.

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of effective anti-SLAPP legislation. Pennsylvania,[75] Virginia[76] and Australia[77] have the weakest legislations; these laws pertain to a specific subject matter, lack crucial procedural aspects, or remove certain causes of action from their scope (just for instance, Australia's anti-SLAPP legislation excludes defamation lawsuits from its scope, thus reducing its efficacy).

And because this phenomenon has received so much attention in the US, it has also been disciplined at the federal level.[78] Indeed, the existing patchwork of State-based anti-SLAPPs laws, which some but not all US States have, provides troubling openings for aggressive plaintiffs to forum shop, for example, calculating where to sue with the fewest anti-SLAPP constraints. This sort of behaviour undermines the aim of State legislation and creates scenarios in which plaintiffs can litigate on their own terms, no matter how unfair. As a result, a federal anti-SLAPP act closes the gap that allows retaliatory litigants to bring State-based claims in areas with less safeguards or federal claims in federal court.

Some other anti-SLAPPs legislations, which are outside the referred report, remain around the world.

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[75] 27 Pennsylvania Consolidated Statutes §§ 7707, 8301 – 8305. Pennsylvania has a narrow anti-SLAPP law that applies only to individuals petitioning the government about environmental issues. On its application side, see Penllyn Greene Assocs., L.P. v. Clouser, 890 A.2d 424, 433–34 (Pa. Commw. Ct. 2005).

[76] Virginia Code Annotated § 8.01-223.2(A) (amendments of 2020). Virginia's (unofficially recognized) anti-SLAPP law creates immunity from civil liability for individuals facing claims of SLAPPs type. However, it fails to identify any special procedures allowing a defendant to invoke these protections at an early stage of the proceedings; it does not provide protection for statements made with knowledge of, or reckless disregard for, whether they are false; and it does not address whether a trial court's decision on an anti-SLAPP motion is immediately appealable. See, on the weakness, the alleged widespread speculation in Depp v. Heard, No. CL-2019-2911 (Va. Cir. Ct. Jul. 25, 2019). Its impact is slowly changing thanks to selective amendments made in 2023.

[77] Protection of Public Participation Act 2008, Bill 138. There are several major exclusions from the scope of Australia's law; notably, it does not apply to causes of action for defamation. The law does not shift the burden to the plaintiff to defeat an anti-SLAPP motion, proceedings are not stayed on filing of the motion, and a court may award costs to either prevailing party. In relation to SLAPP cases, see Gunns v Burling & Ors, [2004] VSC 9575; or cases over the Hindmarsh Island bridge in South Australia and over development on Hinchinbrook Island in Queensland. Collections of cases are available at https://www.sourcewatch.org/index.php/SLAPP%27s_in_Australia.

[78] H.R.8864 - SLAPP Protection Act of 2022 117th Congress (2021-2022). It provides a procedure to dismiss, punish, and deter SLAPPs.

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In the United Kingdom, for instance, a policy paper has been adopted with the goal of intervening in this area.[79] But even in Southeast Asia this problem has been approached in various ways: starting from Indonesia, where protection is offered both in civil and criminal matters to environmental activists;[80] then passing to the Philippines, where, once again in environmental matters, an explicit anti-SLAPP protections enables courts to dismiss SLAPPs in a summary hearing before advancing to a full trial;[81] ending then in Thailand, where a reference to the protection of defenders' rights to freedom of expression against SLAPPs has been made, allowing the court to dismiss any criminal case at the filing stage of the lawsuit if the court determines that the cause of action stems from ill intention to harass to take advantage over a person to gain any unlawful benefits or to achieve any corrupt underlying objectives.[82] Finally, there are many States where protection against SLAPPs is offered using common rules, and not via rules special for these proceedings which have not yet been adopted.[83]

7. Conclusions

Following this thorough examination, a final overall assessment of the anti-SLAPPs Directive is provided.

[79] The policy paper is available at https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-strategic-lawsuits-against-public-participation-slapps.
[80] See Law No. 32/2009 on Environmental Protection and Management, and Law No. 18/2013 on the prevention and eradication of Forest Destruction, both available at https://www.ecolex.org.
[81] The Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, available at https://www.lawphil.net.
[82] Section 161/1 of the Criminal Procedure Code. References available at https://www.ohchr.org/sites/default/files/Documents/Issues/Reprisals/GoodPractices/THAILAND.pdf.
[83] See, for instance, the Indian case. Order 7 Rule 11 of the Civil Procedure Code deals with the dismissal of the claim in case it fails to disclose any cause of action, or Section 250 Criminal Procedure Code allows the court to order the complainant to pay monetary compensation to the accused in case the accused persons are acquitted. They are both available at https://www.indiacode.nic.in.

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The anti-SLAPPs Directive is interesting since it represents the EU's attempt to respond to the need to strengthen democracy and, to close the circle, to protect fundamental human rights, from which this contribution started. On the one hand, the horizontal (and questionable direct effect) dimension of the fundamental right under Article 11 of the Charter is stressed in order to ensure its effectiveness, resulting in a dual dimension: the vertical one (authority v. freedom) and the relevant horizontal one (relations between private individuals). On the other, Article 10 of the ECHR, which creates a series of obligations for States, both negative and positive. Among the positive ones, the anti-SLAPPs Directive tool, which is peculiar in that it combines two elements: on one side, placing the State as a legislator on the level of relations between private individuals, it guarantees freedom of expression, as provided for by international and EU law, in its horizontal dimension (person v. person, rather than the traditional vertical dimension State v. person); on the other side, by protecting that right, the benefit is not only for the single individual involved, but for the entire society, thus for the functioning of democracy.

The anti-SLAPP Directive appears to be well tailored to deal with a specific issue, which is a reverse situation with respect to the traditional civil litigation. Usually, the claimant is the person entitled to legal protection in the legal order, who is obliged to file a lawsuit before the court because he or she is unable to seek justice on his or her own and cannot secure spontaneous fulfilment of obligations from the defendant. Instead, in SLAPPs cases, the emphasis appears to shift: it is no longer the claimant who has to be protected, but the defendant.

The fundamental challenge, though, is that this strategic litigation looks to be like many others; only later will it be clear if it is truly founded or not. Meanwhile, it realises its chilling influence from the beginning (even in the pre-trial phase). And, as a result, the regulatory area of action can only be limited: in the case it is excessively restricted, it prevents and impedes access to justice even for individuals claiming damages against journalists and

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activists who truly defame people. Thus, the relevance of the guarantees established by Article 6 ECHR on the right to a fair trial in civil matters, which includes, among other things, the right to access to justice, to be concreted and effective, independence and impartiality, reasonable time, and so on. It is about balancing the rights derived from the fair trial for both sides (claimant and defendant) without favouring one over the other. Even though the needle of the balance on procedural rules can slightly move in light of the reverse litigation type dealt with in this contribution.

The anti-SLAPPs Directive seems to be well-designed for functioning and achieving its objectives: the scope of application is wide; a staying procedure is addressed; the *onus probandi* is reallocated; hearings shall be expedited; rules on costs are provided; and the right to an appeal is guaranteed. If it is still a proposal at the moment, the aim is that the work in the legislative process does not undermine, but rather improve, its effectiveness (Franzina, 2023; Pasqua, 2023); and, in any event, because SLAPPs are a global problem, it is also hoped that their discipline will occur globally. However, although the anti-SLAPPs Directive is a first step in combating this dark litigation side, it cannot work alone. To truly eradicate SLAPPs cases, it has to be accompanied by two other fundamental tools: the protection should be provided by Member States also in domestic actions, not only in the cross-border ones; defamation should only be a civil matter, not a criminal one, hence Member States should also be urged to review their national legislations in order to decriminalise defamation.

Quoting freely David Sassoli, we are immersed in epochal transformations which, in order to be governed, need new ideas and the courage to be able to combine great wisdom and maximum audacity. Since SLAPPs are a constant threat and a negative reality that undermine ultimately democracy in Europe (and elsewhere), anti-SLAPPs legislation is required. If procedure is the backbone of (substantive) law, this *ad hoc* legislation replies to this peculiar situation in which the procedure becomes substance and the proceduralisation

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becomes effective substantive protection. Therefore, for States time to (en)act has come.

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CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

The Palgrave Handbook of the Public Servant

HELEN SULLIVAN, HELEN DICKINSON, AND HAYLEY HENDERSON (EDS.), CHAM: PALGRAVE MACMILLAN, 2021, XXIV + 1737 PP., ISBN 978-3-030-29979-8

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ABSTRACT

In an increasingly globalised world, the essential roles and functions that public servants perform are constantly evolving at various levels across different geographical and cultural contexts. This Handbook intends to foster an up-to-date understanding of the evolution of the public servant in different traditions and waves of reform. In particular, it navigates through the emerging actors and new terrains that public servants operate and translate public value into practice. This Handbook contributes to a closer understanding of identities, motivations, values, roles, skills, and positions. It also serves to chart the future courses of development for the public servant with practice-informed and evidence-based research with synthesised insights from practitioners and scholars.

Keywords: public service, value and motivation, government, globalisation, evidence-based policy making, co-production

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"The best way to find yourself
is to lose yourself in the service of others."
Mahatma Gandhi

1. Introduction

Covid-19 has hugely impacted the way public services are delivered. It also left an indelible imprint on the perceptions of public servants in a technology-facilitated future. In the imminent future, governance is increasingly defined by global concerns, local considerations, and cross-national collaborations between the Global North and South, supported by social and technological innovations. This intensified trend requires public servants to learn and adapt to constantly evolving role responsibilities and navigate a plethora of boundary dilemmas with clarity.

However, a review of existing literature on public service and public servants reveals an individualistic case-by-case approach to local-first governance issues. The relational and communicative aspects of public services through the collaborative intermediary of public servants in social and technological innovations remain under-explored. In particular, sustainability literacy, fluidity of role boundaries, and cultural fluency in the technology-accelerated multicultural governance context need to be further discovered.

With a primary readership in the public service sector in mind, *The Palgrave Handbook of Public Servant* broadens our understanding of public duties and officialdom through thematic explorations of key concepts and issues that are central to governance decision-making, policy-making, and value- and impact-generating.

2. Key-concepts, Themes and the Structure

In this Handbook, the public servant is defined as follows:

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> [The public servants] are those working at all levels of government, in policy service organisations, professionals including diplomats and armed forces personnel, as well as those who work across the public/private divide, and those whose identities blurred the political/administrative boundary (p.1714).

These include policymakers, commissioners, service deliverers, and regulators. The public servant serves the public interest and value and works primarily in the public sector. The public sector is characterised by four elements: (1) state-owned, (2) under direct political authority, (3) operating in non-market environments, and (4) serving the public interest by producing non-market impacts.

Anchored in the public sector, this Handbook comprises thirteen parts, each addressing a specific topic of interest to the public servant. These topics are further clustered into thematic discussions: (1) a global perspective of public servants, (2) philosophical foundations and traditions, (3) values and motivations, (4) trajectories of reform, (5) elite public servants as policymakers and as regulators, (6) implementation of policies, (7) public servants in the wild, (8) public servants in technological innovations, (9) integrity and ethics, (10) representation, and (11) education.

Topics include (1) the composition of the public servant from socio-demographic and human resources perspectives across different geographic, cultural, and institutional contexts in Asia, Europe, Latin America, and North America; (2) Confucian traditions on human relationships and Western philosophical perspectives on public administration; (3) common values and motivations for a career in the public service over time, across space, and under different governance systems; (4) waves of reform and the shifting roles, identities, values, and functions of public servants; (5) community-led co-production; (6) non-state actors in public policy; (7) collaborative and decentralised administration; (8) street-level and frontline public servants in regional and local governments; (9) e-governance, data security and privacy;

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and (10) skills, abilities, traits, capabilities, and competencies of public servants in the era of volatility, uncertainty, complexity, and ambiguity.

3. Evaluation, Reflections and Take-home Messages

The public sector has been challenged on multiple fronts. Even before the pandemic, there has been a consistent call for austerity in public administration. This tendency is further manifested in the public service sector through cuts in budgets and costs. As a result, the public sector is increasingly stretched by limited resources and personnel that challenge the ability to optimise the use of tools and techniques in response to public emergencies. In the context of Europe, in order to face the pandemic and its economic impact, governments resorted to an unprecedented increase in public spending, both in the public sector and in terms of economic aids, compensations and subsidies for private citizens and enterprises. National Plans of Recovery and Resiliency are of course the main example.

Overall, this comprehensive Handbook on public servants provides a holistic overview of current trends and issues in global governance, with a particular focus on emerging themes, such as multiculturalism, localism, ethics and public integrity, and social and technological innovation. Its contributions to the existing literature are manifested in theoretical, methodological, and practical dimensions.

Theoretically, the discussions in this Handbook centre around four key notions: identity, authority, capability, and agency. Notably, the identity the public servant possesses is marked by its multiplicity and is increasingly challenged by globalisation and neoliberal government reforms. A signatory move towards collaboration and co-production has been evident in the existing literature on public administration. Scholarly attention has been thus directed towards the organisational culture and the institutional structure in support of the fluidity of the public servant identity in community-led co-production.

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It is also important to point out that claims to authority seem to be rooted in expertise, position, and connections. These encompass organisational position, political influence, and credentials and capabilities. However, contributors to this Handbook elicit multiple tensions arising from negotiated authority and accountability issues in the practice of local governance and public-private partnership. These tensions require public servants to take proactive actions to learn and develop new skills. In many chapters, learning and knowledge management aspects of the public service work have been elaborated, highlighting the importance of boundary-spanning in the interface of digital and social innovation marked by big data and algorithmic applications.

Methodologically, this Handbook engages a practice-informed, evidence-based approach to address definitional and theoretical ambiguity. Contributors to this Handbook engage a context-, culture-, and case-specific approach to explore and interpret empirical data. In particular, the voices of people with culturally and linguistically diverse backgrounds have been debated in the representation of collective bargaining on wages and job protection. In the future of public service, public servants are expected to be fair, just, and competent in fulfilling their public duties for a wide variety of people from diverse socio-economic, ethnic, cultural, linguistic, and educational backgrounds.

Practically, this Handbook illuminates the pragmatic understanding of public servants in a globalised world and leaves the readers with some practical knowledge. The knowledge can be useful for public servants to work across boundaries and strategically manage the relational and communicative challenges in cross-institutional and inter-cultural contexts. Many contributors highlight the importance of developing cultural awareness in translating institutional values into practices for multicultural citizens. With the increasing globalisation and migration, the promise of linguistic equity and social incorporation for migrants in host societies has caught scholarly attention in the intersection of law, sociology, and applied linguistics (Piller

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1967; Yi 2023). The ability of the public servant to translate culture has become an essential soft skill in the future of public administration.

However, as stated in the opening remark, this Handbook privileges perspectives by contributors based in the Global North and enrich the debate based on institutions in the Global South, especially in our case from Africa, and the Middle East, for a pathway to publication for diverse voices to be heard. More cross-national and culture- and context-specific case studies can add to the strength of future volumes.

In summary, trust is of vital importance in the public sector. To be trustworthy and dependable, public servants face many role boundary dilemmas between the private and public self and between an amateur and a professional. A career in public service is by no means easy, which can be best illustrated by heavy responsibility and emotional labour, particularly in the constantly evolving globalised world marked by technological and social innovations. This Handbook updates our understanding of the public servant in a globalised world characterised by interconnectedness and unpredictability. With its strengths and limits being discussed, this comprehensive Handbook can be a valuable reference for public servants, policymakers, regulators, public managers, and scholars in governance and policy studies and beyond.

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