What's new in human rights doctoral research

A collection of critical literature reviews Vol. V

edited by

Pietro de Perini, Paolo De Stefani

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Introduction

Pietro de Perini, Paolo De Stefani

This volume collects seven critical literature reviews by Ph.D students enrolled in human rights programmes at the University of Padova and in partner universities, namely at the University of London (School of Advanced Studies) and at the University of Zagreb (Department of Law).

Since its launch in 2017, this edited series has aimed to allow early career doctoral students to putting themselves to the test of academic publishing while bringing some fresh contribution to broader human rights scholarship. This goal is pursued through the provision of an updated review of the existing literature on the core topics underlying and framing their research questions. As it was in the four past editions, the result is a very heterogenous book - thematically and disciplinary-wise -, which quite accurately represents the increasingly complex, diverse and dynamic scope of what can be nowadays termed "human rights studies". The chapters of this book, departing from a variety of legal, sociological, philosophical and policy analysis approaches, and often considering the benefit of interdisciplinarity, address core human rights issues from the management of migration and inclusion policies to climate change implications; from the changing role of religion in society to the treatment of minorities; from the expansion of universal jurisdiction in criminal prosecution, to developments and comparability of transitional justice approaches.

These literature reviews are made available open access and, together with those published in the previous four editions of this series, they form a notable and multi-faceted amount of human rights knowledge which intends to benefit both the group of young scholars growing around the mentioned Ph.D programmes, and the broader international human rights studies community who can refer to these chapters in order to get updated state-of-the-arts on a wide range of significant research topics.

The first chapter, by Giorgia Alessandrini, bridges the literature from social justice and migration studies to review the diverse determinants for the education outcomes of children of immigrants in Europe. Focusing on the inequality of opportunities concept, the chapter points to family background and the country's institutional setup as crucial determinants of disadvantageous conditions faced by those belonging to this group. In the second chapter, Matilde Rocca reviews the disputed legal status and obligations of non-State actors (private companies, NGOs, criminal networks) under international law and international human rights law focusing on the context of maritime migration, namely on the central Mediterranean Sea route. Rocca concludes her state-of-the-art review stressing the need for a more systematic adoption of a human rights-based approach to research on this matter also with a view to promote a culture of accountability and justice and to counteract impunity for the abuses suffered by migrants. The third chapter, by Indira Boutier, reflects on discriminatory policies, legislations and practices in India towards minority groups, focusing in particular on the human rights violations and abuses suffered by Kashmir Pandits, who are considered and ethnic and religious minority in the Country but are also part of a majority Hindu religious group. Through her critical review of the extant literature on Pandits, Boutier provides a broader frame to analyse Indian institutions' policies and practices and understand how these increase both discrimination *vis-à-vis* this group and their invisibility. Carlotta Rossato is the author of the fourth chapter, which focuses on the issue of universal jurisdiction as a legal tool to combat impunity in case of international crimes. Rossato diachronically pieces together the development of this legal principle. Her review also considers recent debates including the relationship between the States' use of universal jurisdiction and the International Criminal Court, and some major criticisms that scholars have addressed to the principle, such as those concerning the risk of disruption for international relations and local conflict resolution, and its colonialist biases. In the fifth chapter, Carlos Arturo Gutiérrez-Rodríguez reviews the debates on transitional justice using the Colombian peace agreement as a case study. Based on large extent of scholarly articles and policy documents, the chapter makes the case for a promising comparison between the process taking place in Colombia, with the ones of Nepal and the Balkans. This comparison, the author argues, would shed light on the way transitional justice has evolved from its emergence as a concept, to a manner of understanding transitions in a way that satisfies the international obligations of States in terms of truth, justice, reparation and guarantees of no repetition. The literature review by Moncef Chaibi is the sixth chapter

of this book. Chaibi addresses the debate on the changing role of religion in society. He shows that individual religious experience has mutated over time bringing new issues and challenges for social scientists to explore, especially in the fields of Law, Sociology and Political Science, calling for new interdisciplinary approaches in the domain. The re-configuration of the religious experience (spritualisation, *à-la-carte* religiosity, religious *mosaïque*) calls for a renovation of the traditional dialectics concerning the individual freedom of religion and belief and the relationship between the State and religious pluralism. The trajectory described in the chapter ends with a set of questions that only interdisciplinary research can appropriately address. In the seventh and last chapter of the book, Leon Žganec-Brajša adopts an international law perspective to illustrate some crucial issues connected to climate change. The review looks at the consequences of sea level rise on Small Island States, focusing on the intersection among human rights, statehood and international responsibility concerns. The predicament of such States and of their populations is illustrated in terms of implication for the continuity of States, human and peoples' rights of forcefully relocated inhabitants, and international responsibility of developed States as big polluters. The analysis stems from the demonstrated anthropogenic character of climate change phenomena. References to scholarly literature are integrated with a comprehensive survey of expert reports and IPCC documents.

Inequality of Opportunity for Migrants' Children in Europe: A Focus on Second Generations

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Abstract: The central purpose of this literature review concerns the educational outcomes of second-generation immigrants. The performances of immigrants' children reveal interesting information about the efficacy of European immigration and integration policies as well as about the role of their family backgrounds. I firstly briefly review the most relevant theories of social justice through the lenses of equality and inequality of opportunity. Then I will identify the common ground between those theories and migration studies. The major findings lead to family background and country's institutional setup as crucial determinants of disadvantageous conditions faced by immigrants' children.

Keywords: equal opportunities, *immigration*, *second generations*, *intergenerational mobility*, *education*.

Introduction

This literature review concerns the inequality of opportunity faced by the children of immigrants in Europe. The topic intersects the field of social justice, which is analysed through the concepts of equality and inequality of opportunity, and the field of migration studies, with a particular interest in second-generation immigrants. This work will reveal the connections between these two fields of study by showing their points of convergence and evolution in time. Moreover, it will try to integrate the economic and sociological analyses of the transmission mechanism of the patterns of inequality from first to second generations.

The paper is divided into four Sections.

Section 2 starts defining inequality through the theories of social justice developed in the second half of the XX century. In Section 3, the attention is shifted to the specific category of immigrants' children, as the most interesting subjects on which to test the effectiveness of European long-term integration policies. Traces of inequality can be detected in both the immigrants' backgrounds and the institutional environment. The former will be analysed in Section 4, which covers the intergenerational transmission of the socioeconomic situation by family characteristics such as ethnicity. The latter, examined in Section 5, comprises ethnic environment, policies, laws and rights, educational systems. The review will end with some concluding remarks, which highlight weak spots in the selected literature, and suggest future developments.

2. Defining (In)Equality of Opportunity

The definition of what can be thought of as equality of opportunity is the result of several reasonings developed over many decades since the middle of the last century.

The general topic of 'social justice' has interested, of course, many scholars across different disciplines and times. The modern political-philosophy approach dates back to the theory of justice of Rawls (1958), followed by the luck egalitarianism of Dworkin (1981) and Arneson (1989). Other well-known philosophical contributions are the definition of 'opportunity' by Cohen (1989) and the enlightening discourse of Scheffler (2003) about the positive and negative sides of inequality as a condition.

Scholars more inclined to empirical analysis, like economists and social scientists seek operational definitions of 'social justice'. The economist Sen (1979) contributes to this topic by providing his own classification of equality and by further developing Rawls' theory on basic capability equality. A different and more recent approach is that of Roemer (1998), who mainly focuses on income, and who introduces some statistical criteria for distinguishing between 'fair' and 'unfair' inequality in income distribution and finds them in the concept of 'equality of opportunity'. Economic achievements by children when they become adults should not depend on circumstances that are beyond their control. His discourse revolves around the ethical goal of 'level the playing field' by appropriate social policies, and has been further developed in a series of articles (Arneson, 1989; Cohen, 1989; Scheffler, 2003; Roemer, 2004; Roemer and Trannoy, 2016).

In parallel with this literature, the same idea of level the playing field has been developed by a host of studies in another direction, focusing on a comparison between the outcomes of two successive generations of the same family, leading to a measure of 'intergenerational mobility' (Peragine, 2004; Roemer, 2004; Corak, 2013). A very interesting topic that has been only partially investigated is the comparative strengths and weaknesses of the 'inequality of opportunity' and the 'intergenerational mobility' approaches (Roemer, 2012).

2.1. Theories of Justice

Rawls has given rise to a theory of equality known as the 'Rawlsian equality' (see for example Sen, 1979). In his view, justice and fairness are two distinguished concepts. More specifically, he uses a fairness framework to explain and achieve justice, which can be reached only when fairness is mutually accepted.

In Rawls (1958), a first attempt to explain justice is done through an experiment in which decision-makers are unaware of their physical, social, and biological qualities, therefore protected from inequality thanks to a 'veil of ignorance' (Rawls 1958). On the other hand, the decision-makers are perfectly rational and aware of the economic laws. According to Rawls (1958), these two are the conditions to make neutral decisions about distributive justice, which is the socially just allocation of resources (or primary goods) among individuals.

Subsequent scholars develop as well as criticise Rawls's theory of justice. The critics complain about the rational limitations imposed on decision-makers in the experiment. For example Roemer and Trannoy (2016) argue that the subjects of the thought experiment should be aware of their life plans, and of the resource distribution within society as they are of the laws of economics.

An influential development of Rawls's theory is put forward by Dworkin (1981), who believes that resources at people's disposal include wealth and material assets, as well as people's characteristics, and circumstances in which they live. Dworkin (1981) assumes the achievement of an equal distribution of resources, and therefore justice, when souls representing actual people would participate in an 'insurance market' behind the veil of ignorance. Here, they would be assigned with an equal amount of currency to buy an insurance against bad luck in the original process of allocation of souls to their actual persons.

The system theorized by Dworkin is called in Anderson (1999) the 'luck egalitarianism' and it is reviewed by subsequent scholars such as Scheffler (2003). Dworkin (1981) also introduces the theory of social justice for children, who are at the starting point in their path into life and who should be therefore equally competing.

In Arneson (1989), the distribution of resources should be done in an equal way to everyone to achieve equality. This also includes the consideration of disabilities, if any, in the equal allocation of resources. In addition, Arneson (1989) makes an important turn in the literature about justice and equality: the fundamental step to reach an equal welfare is not to equalize resources but opportunities.

2.2. Inequality of Opportunity and of Outcome

The concept of inequality is often used in an exclusively negative connotation, which is a limited perspective. Inequality can indicate a natural propensity of societies, which does not necessarily lead to negative conditions (Scheffler, 2003). According to him, inequality can be just or unjust, according to the voluntariness of choices made by people.

The discourse about inequality urges a deepening into when it is considered unfair and when it is the result of different preferences and aspirations, for which people should be considered accountable. Many scholars focus on the inequality of outcome (in terms of income, employment, occupation, ...), trying to investigate the factors leading to such a situation, and concluding that this type of inequality is unjust when it starts from unequal opportunities. Cohen (1989) defines an opportunity as the possibility to access advantage, and Arneson (1989) adds that opportunities can be considered chances only when there is a certain desire.

2.3. Circumstances and Efforts

One key contribution to the theories of justice in economic outcomes is developed by Roemer (1998). He identifies two basic understandings of the equal opportunity concept. The first one is focused on the 'level the playing field' idea, which means ensuring equal achievements for people who put equal efforts no matter what their circumstances are. The second one relies on the non-discrimination principle. This implies that, in each society, people competing for a position should not be judged based on non-relevant characteristics for that position, such as sex or ethnicity. Roemer concentrates on the first understanding of equal opportunity. In the framework of the 'level the playing field' approach, Roemer (2004) bases

his theory of equality of opportunity on five concepts: *objective*, such as income; *circumstances*, that are characteristics for which individuals are not responsible, such as parents' income; *type*, which is a set of individuals sharing the same circumstances; *efforts*, that are characteristics for which individuals are responsible; *instruments*, such as policies, to achieve the desired objective. Roemer (2012) believes that the use we make of our circumstances is our responsibility.

2.4. Principle of Responsibility

A certain difficulty arises in identifying when the individual can be held responsible for a disadvantaged or advantaged position.

Peragine (2004) theorises the *principle of responsibility* as when the achievement of different outcomes derives from the individual's personal responsibility. Therefore, according to Peragine, unequal outcomes deriving from people's responsible choices would not need compensation. However, Arneson (1989) believes that individuals are not fully responsible for their preferences because the environment and biological characters of the individual would influence their choices. A clear example is represented by religion. Religious preferences within a family will undoubtfully influence future generations. According to Arneson, preferences are rational when: decision-maker has complete information, is in a 'calm mood', thinks clear, and makes no errors in her reasoning. These conditions cannot be met by children, whose beliefs, preferences, and personality traits are strongly influenced by those of their parents.

2.5. Roemer's Model for Equal Opportunity

Dworkin mentions disability as a possible obstacle in the equal allocation of resources. Roemer (1998) recognizes that individuals can differ in effectiveness and efficiency. For example, disabled children who have access to school resources may not be able to reach them on their own.

By using the same example of education, Roemer considers *ability* as the tendency to transform resources into educational achievement. The same term is used in Corak (2013) to refer to an inherited characteristic such as a genetic character.

The baseline model developed by Roemer categorizes the population into types, who share the same circumstances, and influence the desired outcome.

It is possible to apply Roemer's baseline model to group children in types according to their abilities. The theory suggested considers an equal-op-

portunity policy when the average educational achievement among types is equalized. This means compensating the differences due to belonging to different types or circumstances.

2.6. Types of Equality and the Compensation Principle

The final implicit aim of the analysed literature is to provide some theoretical grounds to achieve equality among people with similar preferences and efforts despite their unequal circumstances. Sen (1979) identifies four types of equality: utilitarian equality, equality of total utility, Rawlsian equality, explained in Rawls (1958), and basic capability equality. According to Sen (1979), the latter would be a natural development of the Rawlsian theory.

The concept of basic capability is explained as 'a person being able to do certain basic things' and it also presents some limitations, such as the dependence on culture when this concept needs to be applied in practice.

The same concept can be better understood in Roemer and Trannoy (2016)'s distinction between the functioning and the capability at people's disposal in front of the available primary goods. A very clear example is that of the rich hunger strike man and the poor starving man. They both have the same functioning, but their capabilities are different. The strike man would have the capability to exit from the situation of hunger while the poor man does not have the resources to do so. The capability is, for Sen (1979), the set of functioning available to a person, such as 'being healthy, literate, able to move around, and so on' (Roemer, 2012).

Peragine (2004) resumes one important principle from Roemer's model: the *principle of compensation*, when society has the moral duty to compensate individuals that have obtained different outcomes because of inequitable circumstances.

2.7. The Role of Circumstances in the Intergenerational Mobility

The above-mentioned framework is essential to investigate the transmission of inequality across generations. As Roemer argues, 'The earth's resources are scarce: is it not fairest to share them so as to produce equal outcomes across generations?' (Roemer, 2012). To assess the influence of family background, Roemer (2004) develops a tool: the intergenerational transition matrix, further discussed in Section 4.2. The objective set by the author is a child's future income in relation to her parents', and this relationship is influenced by four circumstances: social connection provision (C1), beliefs and skills formation (C2), ability transmitted by genetics

(C3), preferences and aspirations' formation (C4). The extreme case would imply the elimination of all four channels to reach equal opportunities for all children.

3. Inequality of Opportunity and Second-generation Immigrants

According to Peragine (2004), inequality of opportunity can be investigated and measured in two main ways, ex ante and ex post. In the 'ex ante' approach we describe the different opportunity sets of individuals belonging to different types and ascribe inequality of outcomes to those differences, while in the 'ex post' approach (which in principle is more rigorous but more difficult to implement statistically) we try to split down the observed inequalities in the two components of 'effort' and 'circumstances', as we have seen in the previous Section.

The literature on the children of immigrants reveals the existence of inequalities and in the main they are ascribed to different opportunity sets, according to the ex-ante approach. Being born from a native or an immigrated family should not prevent children's equal access to opportunities. However, it seems that the migratory background somehow impacts the performance of future generations by putting them in a disadvantaged position.

Beyer (1980) and Widgren (1986), recalled by Bolzman et al. (2017), are the first scholars to investigate, as a general topic, the successful or failed integration of second-generation immigrants in Europe. Other authors prefer to focus on single European countries, after noticing heterogeneity across nations in inequalities between children of immigrants and natives. Some examples of empirical studies are cited in Chimienti et al. (2021). The variety of second generations' performances according to the country in which they are settled suggests that the institutional framework plays a role in the integration process of immigrants (Crul and Vermeulen, 2003).

In addition, other factors contribute in preventing the formation of a levelled playing field. For example, Lüdemann and Schwerdt (2013) concentrate on teachers' recommendations at school as playing a role in creating a disadvantage. The same scholars also condemn social inequalities as being the cause of this unfavourable position. Moreover, Schnepf (2007) sees these generations as affected by a double disadvantage. Given the strong relationship between education and a person's future economic situation (Reiter et al., 2020), this disadvantage would be carried over in the labour market (Liebig and Widmaier, 2010).

The intergenerational transmission of disadvantage is a worldwide phenomenon (Andrews and Leigh, 2009). In America, an early scrutiny of the relationship between inequalities and second-generation immigrants is Portes and Zhou (1993)'s theory of segmented assimilation and its practical application to the immigrant population living in America (Zhou, 1997). Some attempts to test the theory of Portes and Zhou (1993) with real data has also been attempted in Europe, by authors in Crul and Vermeulen (2003). Subsequent literature explores factors such as ethnicity (Heath et al., 2008) and human capital investments, including education (Dustmann and Glitz, 2011), as possible determinants of inequalities of opportunity for the children of immigrants.

3.1. Educational Inequality of Second-generation Immigrants

After the second world war, studies on second generations started to interest academics working in the migration field. Gunther Beyer, one of the founders of the European Association for Population Studies[1], is among the first scholars to introduce this topic. He raises the issue in the 1980's European Demographic Information Bulletin (Beyer, 1980). Bolzman et al. (2017) cite Widgren (1986) as an early scholarly interest in second generations' performances. In his paper, after noticing inequalities between immigrants' and natives' children, he develops some suggestions for policymakers to improve the situation of this generations in Europe.

More recent authors focus on specific European countries and analyse second generations' performances through empirical data. Some examples are cited in Chimienti et al. (2021): Clauss and Nauck (2009) for Germany, Crul and Heering (2008) for the Netherlands, Crawley (2009) for the United Kingdom, Gomensoro (2014) for Switzerland. The latter is a particularly interesting country for two main reasons: because of the large share of foreign-born population, and because it registers the biggest impact of parents' background over their children's educational outcomes (Bauer and Riphahn, 2007). We shall turn to this case in Section 4.5.

In Italy, Bertolini et al. (2015) analyse the influence of several factors (such as the type of school path chosen) in the non-compulsory secondary school enrolment rates for both first and second-generation immigrants. Lüdemann and Schwerdt (2013) discovered significant educational gaps between second-generation immigrants and their native counterparts in Germany, and they blame social inequalities as the cause. Schnepf (2007)

[1] The EAPS (European Association for Population Studies) is a Dutch non-profit organisation focused on studies on populations (https://www.eaps.nl/).

finds high educational achievement's disadvantage for immigrants in the Continental Europe.

Schnepf (2002) also introduces the concept of double disadvantage for second generation immigrants, which is further analysed in Lüdemann and Schwerdt (2013). The latter consider the first disadvantage as determined by different 'standardized achievement tests and cognitive ability', and the second one as not explainable by the previously mentioned characteristics. Lüdemann and Schwerdt (2013) deepen the concept of double disadvantage by adding two contributions. Firstly, by measuring students' achievement and cognitive ability immediately before the selection into secondary school tracks. Secondly, by considering the 'relevant measure' of the second disadvantage as the different recommendations by teachers based on cognitive skills only.

This idea of accumulated disadvantage is applicable in the consideration of education as a precondition for future labour market integration of second generations (Schnepf, 2007). The first comparative overview of immigrants' children outcomes in the labour market is carried out by Liebig and Widmaier (2010), who find that in most OECD countries, immigrants' children enjoy 'much less favourable conditions' than their native counterparts.

3.2. Portes' Theory of Segmented Assimilation Applied

In America, one of the first scholars to publish on second generations is Alejandro Portes, with his theory of segmented assimilation: different immigrant groups assimilate into different segments of society. The options proposed by Portes and Zhou (1993) are three, and they differ in the degree and type of assimilation, for example the 'classical variant' sees the children of immigrants as positively integrated into the new society. On the contrary, another type occurs when second generations suffer a downward assimilation in low strata of the society. The sociologist Zhou (1997) tries to apply the theory of segmented assimilation to second generation immigrants in America. She highlights a practical ambiguity of the assimilation theory: children of immigrants experience a 'pull' process from the host country culture and a 'push' process from their parents' culture. In addition, she criticises the American society of her time for having caused damage to the immigrants' children by providing unequal resources to immigrant parents, therefore creating a situation of unequal opportunities (Zhou, 1997).

In Europe, the theme has interested the following scholars: Seifert (1992), Crul (1994), Tribalat (1995), Veenman (1996) and Lesthaeghe (1997), cited in Crul and Vermeulen (2003). The latter further try to apply the Portes' theory to second generations in Europe but find scarce application when dealing with practical data. Furthermore, the last input provided by Crul and Vermeulen (2003) is that the second generations' poor or failed integration is linked to the opportunities provided by national institutions. Chimienti et al. (2019) call the Crul and Vermeulen (2003)'s perspective as the 'institutional approach'.

4. The Role of Family Background

Hammarstedt and Palme (2012) assume that the family background of immigrants affects the children's outcomes more than that of natives. Bowles and Gintis (2002) refer to this process as the 'inheritance inequality'.

This hypothesis is tested by several other scholars who investigate the role that family background plays in education and labour market performances of second-generation immigrants. Some authors demonstrate more interest in the educational sphere of mobility as being the basis for a future career, such as Wößmann (2004). On the same direction, Huang (2013) identifies the two most engaging channels of educational intergenerational transmission: 'nature' and 'nurture', which indicate the genetic and the economic acquisition of parental background. In addition to these two sources of transmission, Gang and Zimmermann (2000) believe that immigrants would be affected by an 'immigrant shock' experienced during migration. Bauer and Riphahn (2007) demonstrate that the children of immigrants in Switzerland truly experience downward mobility.

4.1. Inequality Inheritance in Education

In a survey reported in Andrews and Leigh (2009), adults from various European countries, United States, and Japan expressed their acceptance of economic success as fair, only if opportunities are equal. However, as illustrated in Schnepf (2007) and recalled in the paper of Reiter et al. (2020), one crucial determinant of a person's economic situation is education: there is a strong connection between parental as well as childhood education and economic status (Schneebaum et al., 2016; Altzinger and Schnetzer, 2013; Causa and Johansson, 2010; Franzini and Raitano, 2009 in Reiter et al., 2020). All these authors assume that inequality may be transmitted from one generation to the following through the process of

inheritance of inequality, theorised by Bowles and Gintis (2002) in terms of economic status. Bowles and Gintis (2002) are aware of the difficulty in finding a solution to this inheritance process through a mere agreement on how to redistribute resources and avoid economic inequality. They also express their concern about where to draw the line between who is poor and who is rich. They agree with the overall opinion which accepts inequalities only when the playing field is levelled, and hypothesise that, when there is intergenerational persistence of economic success, we should rather look at the 'parent-offspring similarities in traits influencing wealth accumulation, such as orientation toward the future, sense of personal efficacy, work ethic, schooling attainment and risk taking' (Bowles and Gintis, 2002, p. 18).

4.2. How to Measure Intergenerational Mobility?

The relationship between parents and children's achievements found in Reiter et al. (2020) and in many other studies, is called intergenerational mobility. It measures possible divergences from parents to their children in terms of outcomes of various nature such as educational attainments, or earnings. There is high mobility when the influence of parents on their children is low, in this way allowing the offspring to move from the path set forth by the family to their own trajectory. Inversely, when the children tend to obtain the same outcomes as their parents, mobility is considered low. One way through which scholars try to measure intergenerational mobility is the transition matrix tool. This tool helps the literature on intergenerational mobility to understand whether the transmission of a certain characteristic to children can help to explain their outcomes.

The studies on second generations of immigrants use this tool to analyse the educational, as well as the economic situation of children with respect to their parents. The objective is equal opportunities for children despite their background. There are different views on how to achieve equality of opportunities. The 'implicit social goal' explained by Roemer (2004) would be a transition matrix where the rows are homogeneous. This would indicate that children can occupy a different position than that of their parents' and it would therefore mean that there is intergenerational mobility. The existence of mobility consequently indicates the effectiveness of children's efforts and abilities. Nevertheless, a distribution of children's incomes which is completely independent from parents' incomes is not necessarily a sign of perfect equality of opportunity. As Roemer (2004)

suggests, better indicators of intergenerational influence are parental education and status, rather than income.

The radical perspective of Roemer (2004) is that of having zero influence from family for children to be considered on the same level in terms of opportunities. In this case, the transition matrix would have equal rows, meaning that no matter the situation of their parents, children can reach whatever outcome. A less radical view is that of Bowles and Gintis (2002), who suggest investigating the unfair mechanisms of intergenerational transmission and act on those, instead of drastically eliminating the whole background.

Despite the several contributions on the topic, Bowles and Gintis (2002) define the intergenerational transmission of income as a 'black box'. In fact, the results of a transition matrix are difficult to interpret because the mechanisms in action are several and some still have to be detected. Among the identified ones, there are the Roemer (2004)'s four channels through which parents exercise their influence over the children, already explained in Section 2.7. Bowles and Gintis (2002) approximately predict the same channels but their names are different and more generic: genetic inheritance of cognitive skills, a combination of genetic and environmental inheritance, human capital, wealth, being a member of a group as influencing personality.

Consequently, based on the present literature that applies the transition matrix tool, it is possible to affirm that this model does not provide precise information about the causes of intergenerational mobility, but it gives a direction where to look to find those causes.

4.3. Education

Despite the heterogeneity of educational systems across nations, some scholars succeeded in finding comparable data to investigate educational mobility, such as Wößmann (2004). These data show that children's cognitive skills are strongly impacted by the family background, and an example of proxy used to measure the educational and socio-economic situation of the family is the number of books at home.

Part of human capital and a pre-requisite to education in immigrant families is language proficiency, which has been analysed by some literature on second-generation immigrants such as Bleakley and Chin (2008) for the US, and Dustmann and Van Soest (2002) for Germany. For the firsts, language represents a fundamental requirement to succeed in school. For

the latter, the knowledge of the destination country's language also gives good prospects for future jobs and earnings.

Heath et al. (2008) resume the concept of the double effect of social background on the children of immigrants. This concept has been introduced by the sociologist Boudon (1974), cited in Heath et al. (2008), and consists of a primary effect, detected during the years of compulsory schooling, and of a secondary effect, which would remain even after the mandatory years of school. The social background can be partitioned into its components, such as ethnicity, gender, age, in a way to understand the weight of each component on children's performance.

The family's characteristics that impact the education and labour market outcomes of children are the 'parental socioeconomic circumstances' (Breen and Jonsson, 2005). The term 'circumstances' is taken up from Roemer (2004), indicating those conditions that do not depend on children's efforts but are inherited from the family. The circumstances that are specifically linked to the educational outcomes would be the following: the socioeconomic, educational status and motivation of parents, cultural belonging, and social networks. These characteristics influence the educational choice, which has been studied by many scholars cited in Breen and Jonsson (2005), (Boudon 1974; Gambetta 1987; Breen and Goldthorpe 1997; Erikson and Jonsson 1996a; Esser 1999; Morgan 1998, 2002), through the development of theories and models specifically focused on the educational decision-making process. According to the above-mentioned authors, before making a choice about education, the subject considers the 'expected benefits, costs, and probability of success for different educational alternatives' (Breen and Jonsson, 2005, p. 227). This process reveals a rational-choice attitude, who tries to avoid the risk of downward mobility with respect to the parents. In other words, while making their educational choice, children are trying to perform either on the same level or better than their parents (Breen, 2001).

4.4. The 'Immigration Shock'

Parental influence on the children born in immigrant families may suffer from what Gang and Zimmermann (2000) call a 'shock' for first-generation immigrants. According to them, the migration experience would either strenghten or weaken the impact on second generations' bequest. Their study on the German population of the late 1900s reveals that the education of immigrant parents does not determine the family's investments in children's education. In opposition, German parents' education, especially

that of fathers, would shape the educational attainment of their children. However, Gang and Zimmermann (2000) point out that this evidence does not mean that there is no influence of immigrant parents over their children but that parental education may not be a good proxy for measuring parental effect for the case of immigrants.

4.5. The Case of Switzerland

Studies on the intergenerational transmission of educational attainments tend to focus on specific countries because this process depends on the combined effect of characteristics inherited from parents and environmental factors. Bauer and Riphahn (2007) concentrate on Switzerland for the reasons illustrated in Section 3.1.

Bauer and Riphahn (2007) believe that the performance of the second generations may represent proof of succeded or failed integration of the immigrant population in the destination country.

Meunier (2011) investigates whether the disadvantage in Swiss schools for the children of immigrants is determined by the impact of migration status by itself. The same author concludes that other characteristics would affect the educational inequalities, such as 'lower language skills, less educated parents', etc.

In the case of Switzerland, the intergenerational transmission of educational attainments would be influenced by direct and opportunity costs, and the number of siblings living in the same household. One example of direct cost is paid to reach the school building. Assuming that the lower the population density, the higher the distance to get to school, the higher will be also the transportation price. One example of opportunity cost in Bauer and Riphahn (2007) is instead the youth unemployment rate. Where this rate is high, young people should be motivated to study more because they would have less possibility to find a job, therefore decreasing the opportunity cost of education. The opportunity cost emerges when a person chooses between two options. It is therefore determined by the action of giving up something in favour of something else.

Some interesting findings from Bauer and Riphahn (2007) are that the children of immigrants have more risks to experience downward mobility compared to natives, the parental impact is smaller in the immigrant population than in the native. This last result is in line with Gang and Zimmermann (2000), who predicted the weakness of using parents' education as a proxy for measuring immigrants' intergenerational mobility.

5. The Role of Host Country's Institutional Setup

The literature on intergenerational mobility tends to hold parental education, socio-economic situation, and genetic inheritance of abilities as the main responsible of second-generation immigrants' good or bad performances. Bauer and Riphahn (2007) instead assumes that children's achievements would be the result of both parental influence and environmental circumstances. In particular, the combined effect of an unfavourable environment and poorly educated parents represents a bigger disadvantage for the second generations. Liebig and Widmaier (2010) report that only one-third of the second generation immigrants' employment rates are influenced by the family background, leaving the remaining two-thirds, to a certain extent, unexplained.

This leaves the space for the investigation of environmental factors that would partially explain the lower performances of second-generation immigrants. The first environmental aspect considered in the literature is the 'ethnic capital' theorised by Borjas (1992) in terms of the presence of co-ethnics, their educational levels, and resources available to them (Gang and Zimmermann, 2000), (Fleischmann et al., 2013), (Chakraborty et al., 2019).

Another environmental factor is the educational system under various aspects: the presence of stereotypes and discrimination by both peers and teachers (Farkas, 2003), the age at which to make crucial decisions (Breen and Jonsson, 2005), class size, pre-school activities, and the type of school with regard to ability tracking processes (Entorf and Lauk, 2008).

A third external aspect is the legal framework according to the immigrant status of parents which determines access to rights and opportunities, indirectly shaping the children's future (Sohn, 2014), (Federico and Baglioni, 2021).

5.1. Ethnic Capital

The first environmental factor is introduced by Borjas (1992), who develops the concept of 'ethnic capital' as the framework where parents make their decisions. Even the investment choices for their children, such as education, are affected by the presence and quality of the influence exercised by co-ethnics. Moreover, the performance of subsequent generations would be shaped by the average performance of the ethnic group to which parents belong. This view implies that the successful or failed integration of first-generation immigrants would inevitably impact the lives of their descendants.

Many scholars pursue Borjas' ethnic capital theory by applying it to specific countries. Gang and Zimmermann (2000) focus on Germany and find a positive influence of ethnic networks on second-generation immigrants' educational attainments. In other words, the presence of a big group of co-ethnics living in the same region supports children's school attendance and results. Evidence from Belgium by Fleischmann et al. (2013) also supports the importance of ethnic capital introduced by Borjas (1992). Fleischmann et al. (2013) go beyond the mere presence or educational level of co-ethnics and investigate the resources available in an ethnic group, mainly referring to economic means.

The ethnic capital does not only provide support to family background, in some cases where parental education is low, the influence of highly educated co-ethnics positively compensates the weak educational effect of parents. Evidence of this from Germany is analysed in Chakraborty et al. (2019). The scholars deny Borjas (1992)'s idea that subsequent generations are shaped by the average performance of parental peers co-ethnics, finding that the children's education is not affected by that average.

5.2. Schools

In addition to the ethnic capital, the school's characteristics may play a role in the education of immigrants' children. These characteristics can refer to the system itself, like the organisation of the school or the years of compulsory schooling, and they can also refer to the people involved in the school, like teachers and other students.

In America, Farkas (2003) hypothesises the existence of discrimination in the educational system against the children of ethnic minorities. The three possible explanations of the 'learning deficit' found among these pupils are: inappropriate learning opportunities, incomplete or limited skills, absent or scant encouragement from teachers (Farkas, 2003).

In Europe, the influence of teachers on the performance of ethnic minorities' students is investigated by Glock and Böhmer (2018) in the specific case of Germany. Their study focuses on male students and reveals the existence of 'negative implicit stereotypes' linking ethnic minority pupils to negative education and professional outcomes. One example of this implicit attitude is nonverbal communication toward students, which is very hard to control.

Breen and Jonsson (2005) consider important institutional factors: the age at which the students make decisions about their future education, the selection process of pupils according to their abilities, the size of the

class. Educational decisions made at a later age would be better for the children from a disadvantaged background because children would make these choices in a more detached way from their social origins, and they would be more projected towards their own future. In addition, classes with a small number of students would be better for disadvantaged pupils according to Breen and Jonsson (2005).

Furthermore, the type of school plays a role in intensifying the educational inequalities for the children of immigrants. Entorf and Lauk (2008) investigate the effects of social interaction with peers in combination with the type of school. The scholars differentiate between comprehensive and non-comprehensive schools, being the former a type of school that does not select the pupils according to their attainments, including everyone. The Entorf and Lauk (2008)'s results show a stronger peer-to-peer effect (for both natives and immigrants' groups) in non-comprehensive schools. In addition, non-comprehensive schools would intensify the educational inequalities between natives' and immigrants' children. Cobb-Clark et al. (2012) contribute to this comparison between the two groups of students by analysing the educational achievement gaps emerging from the results of PISA (Programme for International Student Assessment). Starting school at an earlier age is preferable for some children of migrants, but not for all. The ability tracking process, which is another institutional factor, seems to positively influence the educational achievements of some migrant pupils only when it is applied in a limited manner.

On the same wave of previous scholars, Bauer and Riphahn (2013) focus on the age at which immigrants' children enter school, and at which they are selected into specific school tracks. Bauer and Riphahn (2013) find an important dissimilarity between immigrants' and natives' children regarding enrolment age into pre-school activities in Switzerland. In particular, an earlier age of entry for immigrants' children means more intergenerational educational mobility. The innovative aspect of Bauer and Riphahn (2013)'s study is that it considers the joint effect of educational institutions and the intergenerational transmission of education.

5.3. The Indirect Effects of Immigrant Status on Second Generations

The nurture mechanism of Huang (2013) introduced in Section 4.3, considers the parents as principal investors in the future of their children. However, the possibility to make investments, such as in education, strongly depends on the available opportunities offered by the State. Sohn (2014) studies the link between the legal statuses given to immigrants when en-

tering Germany and their integration opportunities. Sohn (2014)'s attention focuses on the indirect or 'mediated by the parents' effects of legal status on second-generation immigrants and finds a positive correlation between advantageous legal statuses and more successful educational experiences. Federico and Baglioni (2021) explore the European situation and provide a clear overview of the rights enjoyed by immigrants, which in turn can determine their labour market integration and consequent economic means. Immigrants with the status of refugee, subsidiary protection, and long-term economic migrants are located at the top of the hierarchy, as having the same rights as nationals. Moving toward the basis of the hierarchy, Federico and Baglioni (2021) collocate national forms of humanitarian protection, and short-term economic migrants. Finally, in what is called the 'legal periphery' asylum seekers and undocumented migrants enjoy a very limited amount of rights compared to natives (Federico and Baglioni, 2021).

This heterogeneity in terms of rights not only conditions the integration of first-generation immigrants, but may be transmitted in subsequent generations in the shape of limited economic availability, limited access to social networks, and a limited possibility to freely move across Europe.

Concluding Remarks

The current knowledge about the children of immigrants in Europe is based on the theoretical idea of 'level the playing field' (Roemer, 1998), which for some means an equal allocation of resources (Rawls, 1958), (Anderson, 1999), while for other scholars expresses the necessity of equal provision of opportunities (Arneson, 1989). Only when opportunities are fair, inequality in outcomes can be acceptable. Roemer's model lays out important concepts for future contributions: circumstances and efforts. From these notions, subsequent researchers develop the principles of responsibility, from the individual's side and of compensation, from the institutions' side.

Some evidence indeed seems to demonstrate that immigrants' children enjoy different opportunities than natives because of a double disadvantage (Schnepf, 2007) due to migration, affecting their education and labour market performances. The place where immigrant parents settle matters (Bauer and Riphahn, 2007), so what is valid for the US is not necessarily valid for Europe. In addition to the institutional setup, a migratory family

background is proved to be important in the intergenerational transmission of socio-economic conditions.

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Migration and Human Rights: Remarks on Non-State Actors' Obligations under International Law

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Abstract: In recent years, thousands of people have been forced to move across the Mediterranean Sea to reach Europe, in search of safety and opportunities. Their harrowing journeys are often marked by human rights violations and abuses. As non-State actors (NSAs) such as private shipping companies, non-governmental organisations and criminal groups have become the 'gatekeepers' of the State in the context of migration, they are involved in different ways in maritime migrants' journeys. However, NSAs' legal status and obligations under international law and, in particular, under international human rights law remain disputed. This literature review integrates current academic debates as it explores the legal obligations of NSAs under international law in the context of maritime migration, with a focus on the central Mediterranean Sea route. The main question behind this review is: what is the state of international law and relevant academic literature on NSAs' legal obligations in the context of maritime migration? This chapter reflects on the state of the law and the scholarly literature, identifying relevant gaps and highlighting the need for new approaches.

Keywords: human rights, migration, non-State actors, international law, Mediterranean Sea.

Introduction

The state of migration in the Mediterranean Sea does not qualify as a 'crisis' anymore. The first attempts to cross the Mediterranean Sea through the central route date back to the early 2000s and have not stopped, in a continuum of human movements often resulting in tragic events. (Moreno-Lax 2018; Dembour 2015) According to the International Organization for Migration (IOM), in 2020 1,366 people died during their attempts to cross the Mediterranean Sea while 11,891 migrants were returned to Libya. (IOM 2021) The ongoing involvement of non-State actors (NSAs) - including criminal organisations, non-governmental organisations (NGOs) and private shipping companies - has become a central issue in international law. For instance, NGOs have been the main actors involved in search and rescue operations at sea in the past few years, providing assistance and support to migrants in distress. (Scovazzi 2016; Cusumano and Villa 2021) Conversely, States have been involved in actions to hinder migratory movements and have been involved in NSA-led practices of migration management. As claimed by Moreno-Lax and Giuffré, '[s]tates the world over, including in the EU, have erected barriers to (mixed) migration flows, [...] in seeking not only to deter, but also to pro-actively restrain the onwards movement of refugees and migrants to European territory.' (2019, 2) Thus, as States seek to hinder maritime migratory movements, migration management operations are largely carried out by NSAs, though their responsibilities and legal obligations remain disputed and unclear.

The question behind this literature review is: what is the state of international law and relevant academic literature on NSAs' legal obligations in the context of maritime migration? Accordingly, the objective of this chapter is to engage with international legal regimes and the literature dealing with NSAs' obligations relation to maritime migratory movements. The sources collected have been collected via a desk review process. Moreover, this review prioritises primary sources and academic secondary sources whilst still relying on some grey literature and case law.

First, this chapter sets the scene by focusing on the context of the central Mediterranean route and specifically on the pathway between Libya and Italy. Second, the review deals with the current state of NSAs' under different frameworks of international law: international human rights law, refugee law, international humanitarian law, international criminal law, and the Council of Europe system. Third, the chapter presents the academic debate concerning the issue of NSAs' obligations. Lastly, this review re-

flects on the state of the law and the literature, identifying gaps and highlighting the need for new approaches.

1. **Context: Migration and the Central Mediterranean Route**

The central Mediterranean route is typically identified as the one that connects North Africa (mainly Libya) to Malta and Italy. In the past few years, the political debate has been strongly focused on the migratory flow of the Mediterranean, often described as an 'invasion.' (Khrebtan-Hörhager 2015, 88) Data speaks volume: in 2021, the total number of people who have arrived at Italian shores by sea amounts to 340. The number increases up to 34,154 in 2020 and 11,471 in 2019. (IOM 2021) Migratory flows to Italy have overall increased in the past few years whilst arrivals to Greece have dropped due to the EU-Turkey Statement (2016) and stricter border controls in the Western Balkans. (Moreno-Lax and Giuffré 2019, 3)

Recently[1], Italy has aimed to externalise border controls, seeking to eradicate migrants' entry into Europe. This strategy has led to a number of arrangements. First, Italy's efforts to externalise arrivals have resulted in the country's funding of Libyan naval forces. Indeed, the Italy-Libya 2Memorandum of Understanding (2017) establishes the need to train, equip and fund the Libyan Coastguard as part of a 'containment scheme designed to completely outsource controls and thwart departures.' (Moreno-Lax and Giuffré 2019, 3) Second, Italy has put effort into the creation of a readmission agreement with Libya, intending to avoid legal responsibilities for migrants arriving on Italian shores. The readmission agreement aims to 'create a legal framework for forced returns that allow border authorities to handle transfers of third-country nationals swiftly.' (Moreno-Lax and Giuffré 2019, 8-9) However, Libya's detention facilities have been criticised for violating basic human rights of migrants and for allowing torture, sexual violence and inhumane bodily treatment on detainees. (Amnesty International 2021) Therefore, Libya cannot be considered a safe country for migrants. Indeed, as noted by Moreno-Lax and Giuffré, 'Libya, under the constant threat of violent and armed militias, needs stabilization and democratisation before any cooperation on the life of migrants and refugees can be set up.' (2019, 25)

[1] The history of migratory flows of the Mediterranean Sea and related policies do not constitute the focus of this analysis. The timeframe of interest for this chapter broadly goes from the early 2000s to mid-2021.

Third, Italy has (not) been dealing with boats of migrants in distress at sea. There are numerous examples of these tragic incidents. One recent instance is the decision of the UN Human Rights Committee (2021) in the *A.S., D.I., O.I. and G.D. v. Italy* (*Libra*) case where the Committee found that Italy violated the right to life of hundreds of people who died at sea following a shipwreck. The facts of the case are as follows: in October 2013, a group of asylum seekers left Libya on a boat that was soon shot at, causing large quantities of water to enter the dinghy. One person on the vessel called the Italian number for emergencies at sea several times explaining that it was going to sink, and that they were fearing for their lives. During the final call, the Italian operator stated that the vessel was in the Maltese search and rescue (SAR) zone and gave them the number of the Maltese Rescue Coordination Centre. The people on the vessel called the number several times and were told that the rescue units were on their way. Ultimately, a Maltese rescue boat arrived closely followed by an Italian ship, the *ITS Libra*. However, the migrant vessel had already capsized at that point. It is estimated that around 200 died, including 60 children. (ECRE 2021)

Parallel to the State's involvement, NSAs have been increasingly active in migration management operations. Lahav (2003) has stated that NSAs have become the 'gatekeepers' of the State in the context of migration. Key NSAs involved in these activities – especially deportation and detention - are transport companies, criminal organisations and migrant smugglers. (Scholten and Penninx 2016) Notably, some of these NSAs such as private security agencies engage in migration control with very little or no training investment, which leads to managerial and logistical issues. (Lahav 2003, 98) Other NSAs, especially NGOs, are seeking to save peoples' lives at sea to compensate the national reluctance to confront the migration mismanagement of the Mediterranean route. Some NGOs have also been investigated by Italian authorities for illicit behaviour as they continue to carry out SAR operations at sea to save lives. Indeed, it was reported that 'Italian prosecutors have charged dozens of rescuers, from charities including Save the Children and Médecins Sans Frontières, who were accused of collaborating with people smugglers after saving thousands of people from drowning in the Mediterranean.' (Tondo 2021)

Overall, NSAs have become 'crucial immigration agents in extending the area of what is referred to as "remote control" immigration policy.' (Lahav 2003, 92) These strategies combined with the process of externalisation of migration control have led to a worsening of the condition of migrants' fundamental rights. (Lahav 2003, 101)

2. Non-State Actors and International Law

This section presents the legal framing of NSAs' obligations in international law. The legal frameworks under review are international human rights law, refugee law, international humanitarian law, international criminal law and the Council of Europe system. Although other legal systems may be relevant, including national legislation, the scope of this review is limited to key international frameworks to restrict the fields of inquiry.

2.1 International Human Rights Law

According to international human rights law (IHRL), NSAs cannot be held liable for human rights violations. They may be considered responsible under other legal systems, but, within the scope of IHRL, they are not explicitly duty-bearers. Under the main international legal instruments aimed to protect human rights, such as the Universal Declaration of Human Rights (UDHR) (1948), the International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights (ICCPR, ICESCR) (1966) specify that the State is the legal subject, the duty-bearer that has the responsibility to respect, protect and fulfil human rights. Philip Alston has illustrated how IHRL tends 'to reinforce the assumption that the State is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve.' (2005, 3-4) Furthermore, Hessbruegge argued that the aim and purpose of human rights treaties 'is not to limit a State's policy choices, but to ensure that the policy eventually chosen still allows the individual to enjoy his basic freedoms and rights.' (2005, 4-5)

IHRL, embodied in declarations, conventions and treaties, creates obligations which have a vertical effect, i.e. from the duty-bearer (the State) to the duty-holder (the human being). Horizontal obligations amongst NSAs are not contemplated in the wording of these legal instruments. Yet, as NSAs have been playing an increasingly relevant role in international human rights governance, their involvement and consideration within legal debates has developed. Marks and Clapham (2005) have argued that human rights have often been critiqued for being too State-centric. Nonetheless, it has been challenging for the IHRL regime to adapt to the role played by NSAs and their potential horizontal legal obligations. In Alston's account, '[a] crucial issue related to NSAs is their elusive definition, apart from being negatively connoted as non-State entities.' (2005, 14) The vagueness that characterises NSAs leads to difficulties in providing a definition for legal and governmental entities which are 'wary of dignifying

the nefarious activities of certain such actors by focusing specifically upon them.' (Alston 2005, 5)

Whilst it is virtually impossible to determine direct obligations for NSAs under international human rights law, there may be ground to establish indirect legal responsibility. By referring to the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA) (2001), Hessbruegge (2005, 12) argued that indirect responsibility of NSAs for an act or an omission under human rights law can be sometimes imputed when the State has interfered in private conduct. In such instances, the indirect obligation is imposed by virtue of 'attribution' which occurs when the conduct of the NSA – either act or omission – is so closely linked to the State that it is considered that of the State itself. As noted by Hessbruegge, 'the State is responsible for the conduct of all persons that it has designated to be its agents by way of an act of domestic law. These persons can be referred to as *de jure* agents.' (2005, 13) Moreover, *de jure* agents may be identified in cases where individuals and NSAs receive specific instructions from the State on how to act and, therefore, adopt a conduct which can also be attributable to the State. Importantly, human rights treaties specifically contain provisions which can lead to attribution of legal conduct. For instance, Article 10(3) of the ICESCR stipulates that children and young persons should be protected from economic and social exploitation. Further, ICCPR's Article 6(1) obliges States to protect the right to life. Moreover, IHRL also requires States to control non-State activities. Indeed, Article 2 of the ICCPR 'provides that States not only undertake to "respect" the rights in the Covenant, but also that they "ensure" those rights to all those within their territory and subject to their jurisdiction.' (Hessbruegge 2005, 23)

The legal responsibility attributable to NSAs for human rights obligations can only be indirect, meaning that the State will always be the ultimate entity responsible for the human right violation. As follows, NSAs have a virtually inexistent subject status under IHRL, as the State remains the primary legal subject. Hessbruegge has argued that '[i]nternational law permits the creation of binding human rights obligations for non-State actors. […] Subject status results from rights and duties under international law, not vice versa.' (2005, 5) Indeed, NSAs' obligations extend as far as they are connected to the State. As such, some human rights mechanisms have recognised the obligations of NSAs in the promotion and protection of human rights, such as in the case of the right to health, even though in a moral rather than formal way. (Obokata 2005, 404) The UN Human Rights Committee has stated in its General Comment no.31 that 'obligations are

directed to States and do not, as such, have direct horizontal effect as a matter of international law.' (2004, 8)

Smuggling can be an illustrative example of NSAs' obligations dispute since many migrants to smugglers to cross the Mediterranean Sea. Smuggling is largely carried out by NSAs, with a few cases where the State is also complicit. (Triandafyllidou 2018) Therefore, who is legally responsible for the human rights abuses committed against the victims of smuggling? Obokata has claimed that the legal obligation to protect and respect human rights in the context of smuggling stems from the State's failure 'to take positive steps to prevent human rights abuses committed by non-State actors with due diligence.' (2005, 408) In particular, States – including origin, transit and destination countries - have the primary duty to compensate the victims of smuggling but the role of NSAs remains largely unexplored and their involvement legally unclear. Obokata has also noted that '[a]t a theoretical level, this calls for a comprehensive analysis of smuggling which embraces all human rights. Furthermore, the time may be ripe for re-conceptualisation of the role of non-State actors in the protection and promotion of human rights.' (2005, 414) Further, Obokata contended that a human rights approach and an analysis of international legal instruments in relation to NSAs' obligations for smuggling can provide a holistic 'framework for understanding the nature of the problems intrinsic in smuggling and for seeking not only legal, but also political, social and economic solutions.' (2005, 415)

In sum, whilst under IHRL NSAs cannot be considered directly liable, their obligations could be re-examined 'in line with global changes which have facilitated the growth of powers on the part of non-State actors and the consequent limits imposed upon the powers of States.' (Obokata 2005, 403) As the International Court of Justice (ICJ) has stated, 'subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.' (*Reparations case*, 1949, 178) Therefore, the debate remains open as the nature of NSAs as legal subjects under international human rights law is yet to be defined. (Alston 2005)

2.2 International Refugee Law

The right to seek asylum was initially enshrined in Article 14 (UDHR) and it states that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.' Eventually, international refugee law has been cemented in the Convention relating to the Status of Refugees

(Refugee Convention) (1951) which 'lays down basic minimum standards for the treatment of refugees, without prejudice to States granting more favourable treatment' and related Protocol (1967). In international refugee law, the primary actor, the legal subject owing an obligation to recognised refugees is the 'Contracting State.' However, States may have legal obligations towards refugees and other migrants that can be put in danger by NSAs, reinforcing the argument that NSAs are playing an increasing central role in the international framework for refugee and forced migrants' protection. (Nykanen 2012)

How and to what extent are NSAs relevant for refugee law? Lahav has contended that '[s]ecurity is a powerful issue that motivates voters to transfer such authority to bureaucracies and other non-State actors in the name of law and order.' (2003, 89) With migration becoming a phenomenon increasingly linked to security, many States, caught under the pressure to effectively control their borders, devolve certain powers to NSAs. NSAs are often the providers of services, resources and practices that are otherwise unavailable. In other words, whenever the State fails to intervene or lacks the capacity to intervene in matters related to migration, NSAs step in and sometimes collaborate – to different extents and capacities – with State authorities. In this regard, Lahav has stated that 'policy implementation has relied on the enlistment or collaboration [...] of non-State actors, who have the economic, social and/or political resources to facilitate or curtail immigration and return.' (2003, 91) For instance, NSAs can violate refugee law when they are involved in push-back operations as they may be in violation of the principle of *non-refoulement* enshrined in Article 33 of the Refugee Convention[2].

The involvement of NSAs in migration processes and refugee legal practices is undeniable. As Forst has highlighted, States commonly outsource some of their administrative functions to NSAs including, but not limited to, 'the inspection of travel documents, the provision of social housing and, in some cases, the management of detention facilities.' (2018, 16) Indeed, the Refugee Convention recognises fundamental rights such as the right

[2] Article 33(1) recites: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

to property (Article 13), access to courts (Article 16), employment rights (Chapter III), and welfare rights (Chapter IV) including housing (Article 21). These rights are often violated by NSAs. The growing role that NSAs are playing in people on the move's lives also has indirect effects on other actors and on the implementation of refugee law, for instance in relation to human rights defenders. (Forst 2018, 3) Therefore, whilst States are the actual makers of international refugee law and bear legal responsibilities, NSAs do participate in 'international formal legal processes [although] in a manner qualitatively and quantitatively different from governments.' (Peters et al. 2009, 546-547) As Peters and others (2009, 547) have argued, governmental authorities themselves often integrate non-State practices and standards into their own legal systems, thus formalising NSAs' role.

In sum, when it comes to NSAs' involvement in international refugee law enforcement and implementation, '[w]hile non-State actors have become rule makers, this rule is [...] 'flanked' by governmental law enforcement.' (Peters et al. 2009, 547)

2.3 International Humanitarian Law

International humanitarian law (IHL), otherwise known as *jus in bello*, is mainly embodied in the Geneva Conventions (1949) which aim to regulate wars and conflicts. (Crawford and Pert 2020) IHL differs from IHRL in several ways. First, IHRL is based on the philosophical stance that the human being is the rights holder because of his qualities, not because of his status during a conflict. Second, IHL is limited to certain situations and contexts and the right holders are normally civilians and opponents in the conflict, whilst IHRL has universal application. Third, IHL places human rights obligations on NSAs. Indeed, according to Common Article 3 of the Geneva Conventions, certain armed groups have legal obligations since the Article itself refers to conflicts where at least one of the two parties are not the State. Common Article 3 reads, in fact, 'each Party to the conflict'[3] which includes NSAs. As Jochnick has further explained, the Geneva Conventions 'contain a minimum set of obligations applicable to all parties to a conflict, regardless of their status as State or non-State actors.' (1999, 62)

This brief account of Common Article 3 of the Geneva Conventions shows that there are bodies of international law which consider NSAs as legal subjects and place obligations upon them. Specifically, Common Article 3 requires NSAs to respect fundamental human rights of the parties

[3] Convention (I) (II) (III) (IV) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Common Article 3.

involved in the conflict and in particular of civilians. As such, Article 3's presence in the international legal landscape shows that there is a willingness, in certain instances, to consider NSAs as legal subjects with legal obligations. Therefore, whilst IHRL and IHL as two separate bodies of law are inherently different, 'there is every reason to make customary human rights law fully applicable to these State-like groups, which would otherwise only be bound by the limited prescriptions of the law of internal armed conflict.' (Hessbruegge 2005, 9)

2.4 International Criminal Law

The main legal instrument which roots the international criminal legal framework is the Rome Statute of the International Criminal Court (Rome Statute) (1998). Hessbruegge (2005, 5) has claimed that 'a framework of quasi human rights obligations is forming on the basis of international criminal law' meaning that international criminal law indirectly aims to respect, protect and fulfil human rights via the criminalisation of certain activities which are harmful to human beings. Still, a substantial difference between IHRL and criminal law consists in the procedural consequences: international criminal law does not guarantee, as IHRL does, restitution, compensation or satisfaction to the victims once the trial is over.

NSAs can violate human rights, but can NSAs be considered as legal subjects with specific obligations under international criminal law? Indeed, there are several crimes listed in the Rome Statute, such as crimes against humanity (Article 7), which do not require State involvement. Besides, in relation to human trafficking, according to Article 6 of the Rome Statute, trafficked people should be protected and assisted. Moreover, Article 75 of the Rome Statute specifies that an international criminal provision entails a primary and secondary obligation. Hessbruegge has claimed that '[t]he primary obligation is the obligation not to engage in certain criminal conduct. The secondary obligation has traditionally been the duty to endure the criminal penalty.' (2005, 10) NSAs fall under both these obligations under criminal law.

The Nuremberg Judgement established that an individual could have duties and obligations under international criminal law: 'international law imposes duties and liabilities upon individuals as well as upon States has long been recognized [...] Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' (1946, 466) Thus, individual legal responsibility can be established under

international criminal law. Furthermore, there can be cases of 'adopted conduct' whereby a State is responsible for criminal conduct exercised by NSAs when this unlawful conduct was authorized by the State itself. (Hessbruegge 2005, 13)

This brief analysis of key international criminal law provisions has shown that there are legal systems that determine legal obligations on NSAs, namely individuals in the case of criminal law. This is an important point since, as Obokata (2005, 456) has highlighted, 'the indirect enforcement of human rights norms and principles against non-State actors becomes possible' via criminal legal proceedings and paves the way for new interpretations of NSAs' obligations under other regimes.

2.5 The Council of Europe System

Since the context for this literature review is the central Mediterranean route, the European framework ought to be considered. For what concerns the system of the Council of Europe and the European Convention of Human Rights (EHCR) (1950), States have signed and ratified the ECHR and are, therefore, the main duty bearers for the respect, protection and fulfilment of human rights. Indeed, the case law of the European Court of Human Rights (ECtHR) has shown that, in a few instances, the State was held liable for human rights violations of migrants for living conditions in detention centres in Italy[4]. However, Article 17 states: '[n]othing in this Convention may be interpreted as implying for any State, *group or person* any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein.' This provision importantly mentions NSAs, and not just the State as subjects who should not engage in activities aimed at the violation of human rights.

The position of the ECHR as a Convention creating legal horizontal obligations has been widely discussed. Clapham (1993, 91-92) has argued that the ECHR establishes direct obligations between NSAs, stating that the fact that the Convention only provides for an action of individuals against the State and not against other NSAs (see Article 25 ECHR) does not exclude the existence of other obligations amongst individuals themselves. Hessbruegge claims that '[i]nternational law routinely recognizes the existence of rights and obligations without offering a judicial forum in which to enforce them.' (2005, 6) Furthermore, Clapham (1993) has listed

[4] See, *inter alia*, *Khlaifia and Others v. Italy*, Application no.16483/12, 15 December 2016; *A.E. and T.B. v. Italy*, Application no. 18911/17, Communicated 24 November 2017; *Sadio et al. v. Italy*, Application no. 3571/17, Communicated 2 February 2017.

several cases decided by the ECtHR where the Court held that States had to adopt measures to protect NSAs from one another, further recognising the increasing relevant legal role of NSAs in respect of the State. Yet, this account by the ECtHR is very different from the actual recognition of direct legal duties between NSAs, i.e. recognition of horizontal legal responsibility. Indeed, the 'Court's position [provides] that States must at times step in and regulate relations between non-state actors.' (Hessbruegge 2005, 7)

In conclusion, though NSAs are not recognised as legal subjects with horizontal obligations under the ECHR, their role in the migration framework cannot be underestimated. As De Perini has discussed, from a political point of view, '[t]he key obstacle to the definition and implementation of a consistent EU human rights action in the Mediterranean is thus that policy-makers' interests on these matters are and remain distinct and distant.' (2020, 465) Indeed, the focus of policy-making within the EU is shifting towards an actor-centred rather than a State-centred approach which means that, at least at the policy and political level, the recognition of the role of NSAs on migration policy-making is becoming increasingly relevant.

3. Non-State Actors, Obligations and Human Rights: A Debate

As a premise, it ought to be noted that the international legal order has been established around the institution of the State as the primary legal subject. Accordingly, the idea of State sovereignty has been the basis for the development of international law for decades. Yet, as noted by Benhabib, '[t]he status of international law and of transnational legal agreements and treaties with respect to the sovereignty claims of liberal democracies has become a highly controversial [...] issue.' (2004, 117) Jochnick has argued that 'the vision of the powerful State sovereign has become increasingly anachronistic.' (1999, 63) Overall, the creation of international economic agreements, the increase of privatisation activities and the creation of transnational organisation as well as quasi-governmental entities have limited the powers of the State. Accordingly, scholars have different views regarding the legal obligations of NSAs under international law for potentially violating human rights.

Hessbruegge has stated that '[c]ritics of the human rights orthodoxy would like to see that human rights are also applied horizontally between non-state actors, turning them into human rights duty holders (in addition to the State).' (2005, 4) Hessbruegge (2005, 4) has noted that the State is becoming more and more disperse in its functions and many jurisdictional

roles are now played by NSAs themselves. In this sense, it is becoming increasingly difficult to draw a line between State-driven and NSA-driven action. Against this backdrop, Hessbruegge has proposed a framework that distinguishes two categories of human rights: existential rights and social good rights. In particular '[e]xistential human rights are those which protect the individual's very physical existence [...] this category corresponds roughly with what Henry Shue has called basic rights.' (2005, 27) In his account, this classification is important because existential rights create more extensive legal duties than social good ones, namely that '[i]f non-state conduct threatens to frustrate existential rights, the State always has an obligation to adopt protective measures.' (2005, 28) Thus, in these instances, the State holds the primary obligation. What happens when NSAs are violating 'existential rights'? Hessbruegge (2005, 32) has argued that customary international law is playing a role in bringing perpetrators to justice and extending human rights obligations to the horizontal level. Ultimately, he has suggested that horizontal obligations should integrate the current legal framework of vertical human rights obligations for those actors with accumulated power, for instance big transnational corporations. As a first step towards this direction, Hessbruegge points at the 'emerging duty for non-state actors not to become complicit in human rights violations of States.' (2005, 32)

Peters et al. have also argued that 'non-state standards fulfil a pre-law function. They are often adopted with view to the elaboration and preparation of future international law.' (2009, 549) This view reinforces the idea that the law – legal concepts and frameworks – stem from real life experiences, develop into customary law and are lastly crystallised into hard law. Thus, Peters et al. (2009, 552) have also considered the legalisation of NSAs into power positions, often replacing States. For instance, they provide the example of 'warlords', since they violate human rights standards and rights by exercising control over a territory. In these instances, though NSAs do not necessarily claim the authority of the State, they in fact occupy power positions in governance. Peters et al. (2009, 556) have claimed that the sovereign State governance framework is shifting towards a NSA-centered system. Indeed, 'standard-setting is no longer organized along the lines of State versus non-state actors. The formation of standards and norms takes place in spheres where the State and its institutions and representatives are dominant, but there are more and more spheres where other actors dominate.' (Peters et al. 2009, 569) In her seminal work, the philosopher Hannah Arendt (1958) has similarly argued that the dichotomy 'public-private' cannot stand in the modern world as we are witnessing the

rise of a third sphere, that of the 'social'. She further notes that the social sphere is composed of independent domains and actors that express and act in political, legal and governance frameworks. The 'social sphere' that Arendt has coined is today closely related to NSAs and their growing role in the governance framework.

This 'social sphere' governance framework also affects the concept of accountability. For instance, Wheatley (2009) has noted that accountability is seen more as a 'dialogical activity' which requires governments to pursue the needs and wishes of citizens in a responsive fashion. This intersection between the public and private sphere translates into legal terms as well. The concept of 'transnational law', for example, was created 'to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.' (Peters et al. 2009, 576) Thus, these issues need further exploration as the role of NSAs in legal and governance systems is increasing. (Peters et al. 2009, 580)

Building on the public-private spheres' separation, Jochnick (1999, 57) has discussed that moving beyond the State-centric paradigm, strongly rooted in the public-private dichotomy, could be beneficial in many ways. First, he has argued that this change 'will challenge the reigning neo-liberal extremism [...] Second, it will provide a legal framework with which to begin holding the most influential non-state actors -corporations, financial institutions, and third-party States.' (1999, 57) Further, Jochnick has stated that '[t]he exclusive concern with national governments not only distorts the reality of the growing weakness of national-level authority, but also shields other actors from greater responsibility.' (1999, 59) Indeed, the focus of human rights law on State obligations and accountability tends to hide the reality of current power relations and governance systems which witness the growing role of NSAs.

Some scholars have presented conceptual frameworks for the interpretation of NSAs' obligations under international law. Jochnick (1999, 77) has focused on the context of economic, social and cultural rights. Thus, he has identified two elements that should be considered: first, the actor's influence and proximity to the violations and, second, NSAs should be held to the most basic level of obligation which consists of respect. Moreover, Jochnick concludes that '[f]or the human rights regime to remain relevant to this constituency it must be free to challenge the full range of actors that currently threaten human dignity.' (1999, 79)

Regarding NSAs and IHRL in general, Clapham (2014) has argued that there are specific challenges to be met: to ensure jurisdiction over NSAs,

to translate and extend certain norms and to adjust assumptions as to who are the duty-bearers under IHRL. Currently, NSAs are not recognised as legal subjects under IHRL but they also do not respect fundamental human rights, whose foundation is the recognition of each person's dignity. (Clapham, 2014) Furthermore, NSAs' exclusion from human rights discourse relates to issues of dilution and fragmentation of the State as a legal entity, linked to devolution processes. (Clapham 2014; Koskenniemi 2007) According to Clapham (2019), NSAs already have human rights duties but the scope of that obligation depends on three key elements: capacity, context and commitment. Indeed, these three elements constitute the basis upon which human rights obligations could be imposed on NSAs. His view builds on Antonio Cassese's (2005) argument that international law already provides certain requirements for NSAs to be considered as legal subjects. Accordingly, Clapham (2019) has noted that everything is context-specific, NSAs have different means and capacity to violate human rights, and the commitments of NSAs vary in relation to other actors (horizontal obligations). For instance, the obligations of armed NSAs in the context of conflicts has been already studied and analysed by many scholars who have mostly concluded that NSAs indeed have legal obligations under IHRL. (Clapham 2006)

Considering that 'international law has long contemplated duties for non-state actors', some scholars have considered concrete situations. (Jochnick 1999, 61) In the context of migrants' labour, refugees and businesses, Goethals and others have contended that 'at a minimum, global companies should pay particular attention to their operations and supply-chains in countries with large migration flows given the enhanced vulnerabilities of refugees and migrant workers.' (2017, 336) NSAs play an important role in the way migrants are treated and these actions should not pass unnoticed. Indeed, within the employment system, '[i]nvestors, business partners and civil society actors should also press for increased transparency from companies, rewarding those that take a responsible approach to the recruitment and employment of migrant workers and drawing attention to company inaction.' (2017, 341) Ultimately, Goethals and others (2017, 339) found that businesses have changed their attitudes towards refugees and have started to respect their human rights. However, there is still a long way ahead before the life conditions of refugees and forced migrants can be considered as with full respect of their human rights: the 'exploitation of refugees remains endemic' in Europe. (Goethals et al. 2017, 339)

Regarding migration in the central Mediterranean context, violations of human rights are not confined to the country of origin: they are also

committed in transit and in the country of arrival with NSAs often getting involved. Many migrants are already victims of smuggling or human trafficking, furthering their vulnerable status. (UNSMIL, 2016) Therefore, who is responsible for these violations of human rights? The answer is not clear. In this sense, '[h]uman rights promise to fill in the gaps, [...] between the rights of citizenship and residency', yet the promise is not always fulfilled. (Dembour and Kelly 2011, 7) Moreover, externalisation remains a major challenge in determining accountability. Moreno-Lax and Giuffré have argued that States regularly transfer 'coercive management of exiles to third countries, [aiming] to eliminate any physical contact, direct or indirect, between refugees and the authorities of would-be destination States.' (2019, 4) According to Moreno-Lax and Giuffré (2019), these practices lead to many difficulties in terms of establishing legal accountability for migrants' violations as the control exercised by EU authorities and national forces is not direct and NSAs are often involved. Can responsibility be placed on the State regardless of the involvement of NSAs? Conversely, how can States' responsibility be established when they interfere with NSAs' operations? These issues remain contended and unclear in the literature.

Conclusion

This literature review has shed light on the important role that several NSAs play in migration governance, focusing on the central Mediterranean context. The review considered the following question: what is the State of international legal provisions and academic literature on NSAs' obligations in the context of maritime migration? Accordingly, this chapter has reviewed the main international legal frameworks *vis-à-vis* the status of NSAs. Subsequently, the scholarly debate has been examined. Considering the different views and positions in relation to NSAs' obligations under international law, the issue is still contended. States remain the main actors and subjects under international law; yet this review highlighted the complex and multi-layered nature of NSAs' role in migration governance and the debated issue of obligations in the context of migration management operations. In particular, considering NSAs as legal subjects with obligations under IHRL remains a disputed issue and, arguably, the lack of academic enquiry on States' interference with NSAs' actions in the context of migrants' rights constitutes a gap in current academic literature. Thus, more research and academic investigation is needed in this field. Another gap identified in this literature review concerns methodology since all the studies reviewed in this

chapter adopt a doctrinal approach. Hence, there is a lack of empirical legal studies which would be crucial to highlight the point of view of migrants and other stakeholders and to involve them in academic legal work, 'as a way of taking human rights seriously.' (Baxi 2011, 232)

As 'obligations are largely disclaimed – through blame games and accountability gaps', the struggle of maritime migrants continues. (Moreno-Lax 2018, 120) Indeed, migrants are the ones stripped of their human rights in a never-ending unfolding of the 'birthday lottery.' (Shachar 2009) Thus, greater attention to these issues and the adoption of a human rights-based approach are needed to promote a culture of accountability and justice and to counteract impunity for the human rights abuses suffered by migrants in the central Mediterranean route.

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First Steps towards a Legal Understanding of Minority Groups Discrimination: the Case of Kashmiri Pandits

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Abstract: Starting in the 1990s, the Kashmiri Pandits - who are a minority in the predominantly Muslim State of Kashmir, but belong to the Hindu majority in the Indian confederation - were forced to flee their homeland. They consider themselves victims of human rights violations of the right to life and physical integrity, to liberty and security, civil and political, economic, social and cultural rights, and to national judicial protection; some of them speak of genocide. The recent movie The Kashmir Files, rekindled public interest in their struggle to access justice and fair trials but more importantly to the politicisation of the exodus. This literature review considers the broader theme of the (in)visibility of minority groups in India and how institutions may increase vulnerability and marginality. Through the angle of Kashmiri Pandits, this text analyses the current research and literature around the minority groups exodus and its impact for setting judicial precedents.

Keywords: India, Kashmiri Pandits, Kashmiriyat, exodus, collective memory.

Introduction

Human rights violations in Kashmir and the consequences for Kashmiris has been studied from different angles and approaches. These have followed the path of international relations, and the regional negotiations between India and Pakistan, from an anthropological perspective to economic considerations, and finally through the prism of the various United

Nations resolutions. These studies have investigated and tried to clarify the complexity of the Kashmir imbroglio. At the beginning of the twenty-first century, a new turn has appeared through the analysis of cultural and artistic productions, such as poetry, paintings, oral histories and film. The Kashmir conflict has been extensively studied over the last decades by scholars (Ankit 2016; Mathur 2016; Wanner 2019), by UN experts (OHCHR 2019; 2020), reports (United Nations Human Rights Office of the High Commissioner 2018) and novels (Waheed 2014; Sajad 2015; Batool et al. 2016), particularly since the abrogation of article 370 of the Indian Constitution and its descent from State to Union territory. Bitterly disputed over by Pakistan and India, its unstable political history and internal fragility has made it a focus for political analysts. Inevitably this focus affects the writings on Kashmir, limiting it to politics, religious belonging and questions of identity.

While the Kashmir region is well referenced as a terrain of conflict and object of Indo-Pakistan rivalry, the Kashmiri Pandits' forced displacement in the 1990s is a comparatively neglected area. In fact, only a handful of researchers have focused on this question, shedding partial light on the consequences of this exodus for the group as well as for the regional crisis (Duschinski 2008; Datta 2016). Though this imbalance between a profusion of studies on Kashmir from a historical, political, or military perspective is being redressed, the field remains open to further investigation especially concerning the Kashmiri Pandit's exodus which remains largely in the shadows. Scientific approaches are limited to health care questions, mental, physical and psychological outcomes of the displacement. At most, they tackle the economic aspects, and differences within the narratives of Hindus and Muslims.

Compared to the profusion of studies on the political situation of Kashmir, there is little serious scholarship on the long history of the Pandits roots in this region. Scholars who have studied the political, spiritual strains, or colonial interventions that contributed to the development and elaboration of different Kashmiri communities and their ties of belonging are inclined to focus on the Islamisation of the region (Zutshi 2003). In fact, authors like Parmanand Parashar or Bakshi rapidly refer to the classification of Pandits in Kashmir as a minority back in the 14th century (Bakshi 1997, 5:169; Parashar 2004, 136). Information about the community under the British is more forthcoming. Parashar highlights the important place of Pandits from the lower branches of administration to the Indian High Courts, up to the nascent Congress movement (Parashar 2004, 110). In fact, the first Indian to be appointed a judge in a High Court was Pandit

Shambu Nath in 1862, at Calcutta; then Ram Narain Dar, also a Kashmiri Pandit was the first Indian appointed as Judge to the Punjab Chief Court.

This literature review is a starting point for a reflection on discriminatory policies, legislations and practices in India towards minority groups. It takes a legal perspective to interrogate their impact on the country's political cultures and its democratic foundations. Kashmiri Pandits are a minority in the predominantly Muslim State of Kashmir even though they belong to the Hindu majority in the Indian confederation. However, seen in the specific frame of Kashmir, they can be considered as a minority group.

The Kashmiri Pandits' exodus is usually traced in the political frame of central government policies and the State's regional configuration, with attention to the different positions of political parties on religious and ethnic questions. Yet, the Kashmiri Pandit question is tied to India's ratification of major treaties that have defined the bases of international human rights law.

To understand this minority group discrimination, it is essential to examine how such discrimination takes place within the legal framework that national and local governments claim to respect. More significantly, what are the legal loopholes that allow government to discriminate against minority groups?

While this paper does not focus directly on discrimination faced by Kashmiri Pandits, it locates the studies around the group since 1989 within a legal framework. The larger context allows us subsequently to understand how discrimination increases their invisibility.

Numerous studies have investigated select aspects of human rights violation in the case of Kashmiri Pandits, narrowing down the analysis of events to three main angles: (i) narrative accounts of their exodus; (ii) physical impact of the exodus on the refugees themselves; and (iii) the communalisation of the question.

Through these three approaches, studies have highlighted the different aspects of the crises, which can be summarized as the importance of memories, the psychological impact of displacement, and cultural loss. Interestingly, this literature draws attention to the centrality of this trauma in shaping the Pandits' collective awareness of themselves as a community while raising questions about the future of the idea of *Kashmiriyat*, understood as a distinctive syncretic form of nationalism that characterised the Kashmiris (Muslims and Hindus).

1. Collective Memory through Narrative Stories

The silence surrounding the Kashmiri Pandits' exodus in 1989-1990 has given birth to a need amongst the community to recall their struggles and their forced exodus from the land of their ancestors. Weaving these individual and collective memories together in narratives has become a significant means of reminding national and international opinion of their loss and recalling their membership of a distinctive ethnic and religious group. The British sociologist and historian Anthony D. Smith has defined ethnic community as a population with 'common historical memories' (Parashar 2004, 110). Along with John Armstrong, he understood memories as perpetuating the ethnic community and maintain a group identity over time (Armstrong 1982, 3).

The exercise of not forgetting has turned into an intellectual process in which diverse approaches, from the historical, to the philosophical or even neuroscientific, have converged to analyse the different facets of memory. Individual or collective memory involves not only past experiences, but also takes into account its significance and impact on present and future lives (Altanian 2017, 13). Whether belonging to the realm of a single person, or on the contrary, to more than one person, they may be mobilised to serve a common interest (Russell 2006, 793). For the French sociologist, Maurice Halbwachs[1], *mémoire collective* is an assemblage of individual memories; while individuals have a personal perspective, collective memory leads to a certain reconstruction of the past (Halbwachs 1950, 67). It is also considered as an essential foundation for ethnic identity (Stauber and Vago 2007, para. 6).

The interest in collective memory amongst researchers as well as ethnic groups took off in the late 1960s (Klein 2000). It began with a focus on the events of World War II. In fact, this delayed interest can be explained due to a simple geopolitical factor of the Cold War (Verovšek 2016, 530). While the unification of the European continent with the fall of the Iron Curtain promoted the politicisation of memories (Judt 1992), collective memory developing from individual experiences led to a new kind of historical consciousness (Klein 2000, 127–28). This construction by two different entities with different goals may have increased the interference of other concepts in the field of collective memory, such as ethnicity, nationalism or cultural identity (Verovšek 2016, 532). In fact, collective memory

[1] Maurice Halbwachs is the first sociologist to talk about the concept of memory in the field of social interaction. His two books published in 1925 (Les cadres sociaux de la mémoire) and 1950 (La mémoire collective) are today considered core reference on the subject.

plays a key role in the emergence of interdisciplinary approaches in memory studies (Roediger and Wertsch 2008). The vast literature on this concept has been produced by sociologists (Zerubavel 2003), anthropologists (Cole 2001; Wertsch and Roediger 2008), psychologists (Brown and Middleton 2005), literary analysts (Young 1993) and historians (Bodnar 1992). While these approaches broaden and enrich the field of collective memory, they mostly focus on one specific aspect and do not interact with other studies, leading to a certain difficulty in grasping the concept (Huyssen 2003, 3), and to a fragmentation of the discussion.

An important distinction between collective memory and history needs to be highlighted. Whilst history builds its case on documented facts, or cross-checking of different sources, collective memory can be considered as popular and subjective (Gibson 2004, 70–71). Ernest Renan in the nineteenth century (Renan 1882) and Halbwachs in the 1920s tried to differentiate history and collective memory as both deal with representations of the past (Wertsch and Roediger 2008, 320). For Renan, history could counter the divisive effects of collective memory to contain historical cleavages (Renan 1947). As developed by historians like Pierre Nora (Nora 1989) or Peter Novick (Novick 1999, 3–4), collective memory is linked to identity, and although it is rooted in the past, it is also closely tied to the present. For ethnic groups, collective memory may deviate from the strict historical version and can be perceived as not accurate (Hobsbawm 1992, 12–13). Contrary to history which provides and aspires to establish accurate facts and recognizes the complexity and ambiguity of events, collective memory can be distorted (J. Assmann 1997, 9). For instance, the British diplomat Alexander Evans, in his 2002 article on Kashmiri Pandits, recalls the chronological events of 1990 from a historical perspective (Evans 2002), and highlights the complex reasons leading to the exodus. In contrast, collective memory highlights personal experiences, without situating them in the larger political stakes or making distinctions between the different Muslim positions.

While memories are often perceived as an element reserved to the social group that has lived through those events, the publication of Pandits' memories (S. Gigoo and Sharma 2015; A. Gigoo et al. 2015) has become a strong means to publicise the community's exodus from their ancestral lands. Their memories presented in the form of personal narratives through fiction or even non-fiction, function as a social process. They aspire not only to remember the event, but also to insert it in the contemporary moment, in order to inflect public opinion and political decision making. Pandits' memories thus move beyond the narrow circle of their own community.

In fact, making the shift from personal memories to functional memories through the publication of these stories has enabled the community to re-constitute itself. Their trajectory illustrates the distinctions drawn between two types of memory by the anthropologist Aleida Assmann (A. Assmann 2018, 134): (i) storage memory, which refers to past information that is not used; and (ii) functional memory which serves a purpose. However, while both memories can be perceived as different, they interact and can be part of a collective memory. Contrary to storage memory, functional memory is often politicised and used as a tool to legitimise, delegitimise or highlight their distinctive identity (Altanian 2017, 13). Because of the political context, Kashmiri Pandits' memories are often perceived as a tool to protest against government policy and are used to highlight the community's sufferings and victimisation. The lack of media attention and government and judicial measures has led to the birth of a new genre of literature in exile. Similar patterns can be perceived through an analysis of other ethnic group memories such as the Roma. In his study of this group, the Polish sociologist Slawomir Kapralski concludes that narrative memories when describing events in a chronological way can be seen as a contribution to the development of a historical consciousness and the recognition of ethnic groups and their past (Kapralski 2004, 210–11).

Short stories which take the form of anthologies have sought to highlight their experiences as trauma: of the developments in Kashmir that forced them to flee, their struggles in the camps, and their desire to go home. Two significant publications in this sense are *A long dream of Home* (S. Gigoo and Sharma 2015) and *From Home to House* (A. Gigoo et al. 2015). These books relate stories of the exodus. Yet, none of them refer to Pandits who decided to stay on in Kashmir. In fact, Kashmiri Hindus who stayed on in the valley are fearful of speaking up ('Kashmiri Pandits: When Home Is a Dream' 2016).

While some events are related through olfactory, or visual memories (Kilam 2015), others are more chronological, simply tracing key moments prompting them to flight, the trials of their journey until their arrival in Jammu (Saraf 2015; Pandita 2013). The precise dates, from 30 April 30 or 1 May 1990, the narrative of monthly escalation of violence in August, October-November up to December 1989 adds authenticity (Chowdhury 2015).

Literary productions have served as a significant platform for forging these memories into a common family, even community heritage. This approach highlights the continuity of the impact on Pandits' whether they experience the events of January 1990 directly, or through the family stories

they have heard. Thus, a family trauma is passed on to the next generation of children, nieces or nephews, and re-lived indirectly in subsequent visits as tourists or a kind of pilgrimage to what had been a family home in Kashmir (S. Pandit 2015)[2].

Although experiences remain individual, shared experiences, especially for minorities, shape a collective memory, conflating the individual's identity with the group. Consequently, collective memory differs for each group, but it may also change within the group. The age of the narrator can affect the approach to the narrative: an adult will have a more retrospective approach, while young adults are forging their identity (Linde 2015, 4). While elderly parents looking back into the past, are sunk in nostalgia and overwhelmed by feelings of helplessness, younger children who speak only Hindi, are likely to visit Kashmir more as tourists (A. Gigoo, et al. 2015, 283–95). For them the region is more of a backdrop to their life and family histories than an active, powerful field of action. Kashmiri Pandits' narratives integrate the new generations' in their narratives, encompassing them within the family or clan culture, even if the youth are no longer speaking Kashmiri or adhering to former customs and lifestyles. The choice of bringing to light different generations' memories, points to the complexity behind narrative memories.[3] This literature based on memories often reveals two forms of narratives, those based on real experience, and fictive, imagined accounts (A. Gigoo et al. 2015).[4]

In parallel to literature, photography (Dhar 2011), interviews and cinema play an equally important role, often giving a dramatic, emotional form to collective memory through dramatic plots. Interviews of Kashmiri Pandits revive common memories from the exodus (Kumar 2020; Humlog: Will Kashmiri pandits return to Kashmir? 2015), and interestingly, this collective memory and ethnic identity is also reinforced through interviews of non-Pandits, who have been actors in the events of the 1990s (Karate 2008).

The relationship between cinema and memory cannot be underestimated, particularly in the case of a strong cinematic industry whose productions exercise a powerful influence over public opinion. In fact, mainstream cinema has served as an important site of projection. This has maintained

[2] Sushil Pandit, a Pandit born in Delhi before the events of 1990, deals with his return to Kashmir for the first time after that event, through his own subjective vision, but brings his father and his children and nieces into the picture as well.

[3] From home to house, the editors Arvind Gigoo et al. choose to look at three generations, to scrutinize these differences. 'Life in the camp' by Maharaj Krishen Koul Naqaib highlights the rupture between two generations.

[4] From Home to House, contains with twelve fictive stories and fifteen non-fiction essays.

Kashmir in the public imagination far more than political manifestoes or public debates, ensuring patriotic reactions and cultivating public attachment and sentiment for the region. The movies explore events not only from the 'inside' and 'outside', but equally the personal and social aspects (Radstone 2010, 326). The movie *Kashmiri Files* released in 2022, recalling the horrors of the Kashmiri Pandits massacres has revived a polemics around the Pandits exodus from their land from 1990s onwards. The heat with which it has been received and the passions it has revived amongst the Hindu and Muslim communities as well as amongst political parties with different ideological positions, underline the importance of addressing problems of minority discrimination through the legal prism, within the framework of international juridical conventions.

An evolution in cinema on the subject of Kashmir is perceptible: (i) movies before the insurgency in the 90s; and (ii) movies post-insurgency in which the Indian cinema focused on the region with a political slant. Until 1989, the Kashmir Valley was used as a background for romantic movies (Akhtar 2012, 2). *Junglee* (Mukherjee 1961) or even *Kashmir Ki Kali* (Samanta 1964) presented the region as the backdrop for an urban, modern identity, played out by Indian youth, embodying the region as an integral part of the Indian nation (Zutshi 2012, 1041). In contrast, after the exodus and the insurgency at the beginning of the 1990s, movies, while still evoking the region as a place of fantasy and love (Kabir 2009, 49), highlight the violence, terrorism, and subsequent Kashmiri trauma. The Indian cinema industry used the region as an epicenter for Indian patriotism, often portrayed Kashmir as a hub of terrorists and a site of terrorism (Ratnam 1998; Chopra 2000; Kohli 2006; Sivan 2008; Bashir 2010; Dholakia 2010). While movies are perceived as entertainment, movies related to Kashmir are above all conveying political message. The 1992 movie *Roja*, considered as the first movie in which Kashmir's concerns are at the heart of the plot, is a proof of this analysis.

Films of course, have throughout history been repeatedly used as a tool of propaganda, from the Soviet Communist Party in the 1920s, through Adolf Hitler before and during the Second World War, to American cinema during the Cold War. However, propaganda movies are not confined only to wartime. Today, countries with developed cinema industries still use movies as a political tool.

Filmmakers such as Abir Bazaz have chosen to focus on the multiple experiences in Kashmir. Bazaz in his 2002 documentary, provides a more realistic alternative to the romantic vision of the 1960s' movies on Kashmir. He chooses to map individual and collective memories of the region

in this manner. This cinematic medium support views of Kashmir through a different gaze, that works to develop a collective memory of Kashmiri Pandit. In fact, through cinema, events are 'permanently recorded in terms of sound and sight' (Benjamin 1972, 182). Two recent movies related to the Kashmiri Pandits' exodus are *Sheen* (A. Pandit 2004) and *Shikara* (Chopra 2020). Both portray the political conflict which resulted in the mass exodus of the Pandits in the 1990s. While in *Sheen*, the character travels to Geneva to alert international groups of the situation, in *Shikara*, inspired by Rahul Pandita's book, *Our Moon has blood clots*, the film director Chopra focuses on the struggle for survival. Building on personal memories, films thus place them in the public domain, revising and modifying them through a process of selection, exaggeration or suppression.

They can even be seen, in Frederic Jameson's sense to displace real history (Monteith 2003). Consequently, they have played a significant role in shaping public impressions of Kashmiri Pandits identity and place in a national configuration.

2. Displacement of Kashmiri Pandits

Though few studies have dealt with the question of the displacement of Kashmiri Pandits, some attention has been paid to the cultural, economic or more medical consequences (Evans 2002). Forced displacement, whether resulting in temporary residency in camps or dispersal in different regions of India has brought in its wake both material loss, cultural dislocation and degradation.

On a material level, few inquiries have investigated the evaluation of their loss of property, livelihoods or subsequent rehabilitation. More work has drawn attention to the gradual erosion of their language, lifestyles and customs, rooted in a distinctive regional context. The second generation of Pandit refugees has thus been driven to a very confined, limited practice of their language, or observance of their customs. This deterioration has been observed by Evans (Evans 2002), and Shekhawat (Shekhawat 2012, 57) as a threat to the Pandits' folklore. music or even customary beliefs and practices. The impact is perceptible in their lifestyle, dress, food, inter-religious marriages and rituals. The increase of inter-religious marriages is further perceived as a threat to the community identity. Though this development could be read as a common phenomenon and a sign of modern, contemporary social behaviour, it is used by community organisations to announce the eradication of the community itself. Indeed, in the absence of serious

scholarly work on these questions, the field is left open to community organisations to draw their own conclusions. One such example is provided by the Satisar Foundation, which aims to preserve and promote Kashmiri Hindu values and cultural traditions. It takes a conservative stance to the protection of their identity, quoting questionable scientific studies to strengthen their case against inter-community marriages.[5]

More serious studies by sociologists investigate the deepening inequalities engendered by such forced displacements, that necessarily first disrupt, then deepen educational pursuits.

A comparative study between Kashmiri Pandits living in camps in Jammu, and those living in Noida, in the State of Uttar Pradesh, but practically a suburb of New Delhi, by the sociologist Sawhney revealed these inequalities. In a sample of fifty refugees in the Jammu camps, only eleven men had a graduate degree. On the contrary, an inquiry on the same number of informants in Noida, showed nineteen graduates, eight postgraduates and two people with doctorates (Sawhney 2019, 1068).

Despite a loss of income linked mainly to the loss of property in Kashmir, pointed out by Shekhawat (Shekhawat 2009, 34–35), refugees from Srinagar with more educational capital in the form of higher qualifications and university degrees increased their ability to get better jobs (Sawhney 2019, 1068). On the contrary, refugees in camps not only faced a loss of income but were also exposed to discriminatory practices in access to education. In a way they were condemned to remaining in the camps. Pandits living in camps belong to the lowest social category within the community (Shekhawat 2012, 64), and come from rural areas of Kashmir such as Kulgam, Kupwara, Anantnag and Baramulla (Malhotra 2007, 74). Such studies reveal the results of discriminatory situations, particularly in the camps. But even more, they accentuate the official failure to elaborate policies that could counter these developments.

This absence has repercussions at three different levels as Kaul underlines:(i) human rights groups in India have failed to advocate justice for the violence suffered by the community; (ii) official authorities have not instituted policy guidelines to deal with the situation apart from arranging for material compensation, such as lodging; and (iii) a large mediatic takeover in newspapers, magazines or television, of the problem (Kaul 2012). Much of this literature has made the Kashmiri Pundit issue part of a public

[5] Their publication on inter-caste marriages recalls five social codes: (i) preserving and promoting Kashmiri language; (ii) protecting Kashmiri identity; (iii) upholding traditions; (iv) strengthening brotherhood; and (v) strengthening socio-cultural institutions; ('Satisar Foundation')

debate, delivering it into the hands of non-experts, who invest it with their own private or group interests.

The health assessment of refugees has become a standard practice in the world today, recommended by international guidelines. This would include migration history, medical history that includes current concerns. The subject has generated a rich corpus of literature (Fullilove 1996, 1516; Fjaer 2003; Brun 2010, 337). In the case of the Kashmiri Pandits medical issues have been examined by Raina and Shekhawat (Shekhawat 2009), the former using surveys to investigate the deeper consequences of the forced internal displacements on Kashmiri Pandits. A survey conducted in a camp in Jammu in 1993 pointed to the rise of deaths among the community after the exodus due mainly to a mental and physical deterioration (Rajput 2019). This conclusion was also noted by the Kashmiri physician Dr. Chowdhary who further reported premature aging ('Low Birth and High Mortality Rates Ensures That Kashmiri Pandits Are a Vanishing Breed'). Raina's studies showed that among the participants in the survey, 79% had faced depression, 76% had anxiety disorders and panic attacks, 20% had sleeping disorders, and 8% disorders and psychosis (Rajput 2012, 37). In 2010, Raina did another study on 964 individuals in a camp site. This showed a gender disparity, with more women than males being affected by strokes (Rajput 2012, 37). Chowdhary's inquiries revealed that during the first ten years after displacement, 8000 refugees died prematurely because of the environment. In fact, in the first displacement, 1056 individuals died of heat strokes (Chowdhary 2003). Interestingly, these studies did not attribute this to the impact of the exodus but to the conditions in the camps and the overcrowded conditions in these sites. Few researchers consider the camps' infrastructure as a key factor heightening their trauma (Shekhawat 2012, 54). Deaths in the camps were also studied by researchers. In fact, they identified the spread of malaria as well as dengue fever amongst the community (Chrungoo 2003). An examination of forced group displacement from a mental, physical and psychological angle highlighted the damages and impact on individuals and the community's mental health and well-being. For the present, the question of Kashmiri Pandits' well-being awaits deeper inquiry. It has in the main been treated as a political problem, interpreted by parties, the local State, central government and public opinion as part of an Indo-Pakistan conflict on the State's political status, that can only be resolved politically.

3. Dividing Communities

In the discourse on Kashmir, *Kashmiriyat* has come increasingly to play an important role. This concept echoes the idea of a common culture and peaceful coexistence between the two communities in Kashmir (Akbar 1991; Puri 1995). It holds that despite different religions, Kashmiris are linked through socio-cultural practices specific to the region, and to shared historical events (Punjabi 1992). For certain scholars like Sufi (Sufi 1948) and Khan (Khan 1994), *Kashmiriyat* seems to be the result of a mixture of influences in Kashmir, especially Hindu Shaivism and Sufi Islam. Other scholars on the contrary, amongst whom Madan (Madan 1989) and Rai (Rai 2004) declare that *Kashmiriyat* is not the result of a mixture of religions, arguing that the two religious groups are separated in matters of religious practices. While appearing as the symbol of coexistence between cultures and religion, *Kashmiriyat* has rapidly been integrated in political discourses and movements.

Since the beginning of the 21st century, scholars, activists, civil right actors, have begun paying attention to the historical antecedents and development of this concept (Zutshi 2003; Rai 2004; Rao 2008). The lawyer Nandita Haksar points out that *Kashmiriyat* seems to be a State sponsored term (Sharma 2015). It is not only used as the symbol of Kashmir's association with India, but more importantly the peaceful relations between the two principal religious groups at two levels: firstly, at a regional level in Kashmir; and secondly, at a national level between the Hindu majority and the Muslim minority. Pandit poets, authors and public figures have used their platforms to give a favorable voice to *Kashmiriyat*, among them the poets like Dina Nath Nadim, Zinda Kaul or Moti Lal Saqi. But at the national level, this concept used in political discourse articulates a nationalist perspective aimed at establishing a specific Kashmiri identity within a secular State. However, this seems to put aside religious, regional and linguistic cleavages in Kashmir (Zutshi 2003, 339). For some Kashmiri Pandits, *Kashmiriyat* used as a political tool in favor of secularism by Kashmiri politicians is not acceptable, as the State has done little to secure the economic and political rights of the minority (Zutshi 2003, 339).

Kashmiriyat was always close to politics and political nationalism. The spread of nationalist discourse, linked closely to the rise of Kashmiri journalism as in *Aftab* and *Srinagar Times*, may have advanced the concept, which has now become crucial to the understanding of Kashmir. The Indian anthropologist T.N. Madan sees *Kashmiriyat* as a non-Kashmiri word which emerged in the 1980s, as an artificial clone of Punjabiyat (Madan 1995,

63). However, the Kashmiri historian, Mohammad Ishaq Khan, recalls the use of *Kashmiriyat* back in the mid-1970s (Khan 2015) in link with the roots of Kashmiri and the region's culture. In the journal *Srinagar Times*, the term appears in an article dated 23 September 1975 (Tak 2013, 29–30). In this article, *Kashmiriyat* refers only to 'Kashmiri-ness'. The element of nationalism and ethnic identity is strongly present.

Despite the use of this concept by the Prime Minister and Head of Government of Jammu and Kashmir, Shiekh Abdullah in the 1930s during the struggle against Hindu Dogra rule, the term *Kashmiriyat* remained in the shadow until the 1980s, and was popularised in 1983 by his son, politician Farooq Abdullah during the National Conference election campaign (Rai 2004). Through the use of *Kashmiriyat*, Farooq Abdullah chose to play the card of Muslim identity as integral to Kashmiri identity in comparison to Indira Gandhi, who as leader of the Congress, focused on the Hindu card to appeal to electorates in Jammu (Tak 2013, 31). In this context, *Kashmiriyat* became a slogan to counter the central government (Ahad 2015). However, it travelled outside the region only in 1990, being popularized in 1991 by the Indian journalist and politician M. J. Akbar in his book *Kashmir: Behind the Vale* (Akbar 1991). The central government's need to foster a united India and battle separatist tendencies favoured rhetoric and analysis that underlined Kashmir's ties and place in secular India. This new use of *Kashmiriyat* corresponded to Nehru's approach to the region. He himself belonged to a family of Kashmiri Pandits, who had settled in Allahabad, and his outlook, far from being communitarian, was strictly national and inclusive.

Kashmiriyat was progressively hijacked by fundamentalist and nationalist groups: on one side by the Hizbul-Mujahideen, a militant separatist group which fights for the integration of Jammu and Kashmir with Pakisan, and on the other side, by the Sangh Parivar, the family of Hindu right wing group, who supported the refugee Kashmiri Pandits. The links between Pandit organisations such as Panun Kashmir supported by the RSS and its branch the Bajrang Dal have deepened. This support by nationalist Hindu groups and its use of the *Kashmiriyat* concept has deepened the gulf between the Kashmiri Pandits and Muslims. In fact, this association has led Muslims to see the Pandits' association as part of broader communal politics (Hassan 2009, 11). On the other side, the Pandits' seems to associate the Kashmiri Muslim community with an Islamic identity rather than a Kashmiri identity.

The Hindu identity of the 140 000 displaced Kashmiri Pandits has inevitably become a key factor, contributing to the communalisation of the

question, pitting Pandits (Express News Service 2020), against Muslims. This opposition has been highlighted by Muslim Kashmiris through a strong counter-narrative discourse. Kashmir region is referred to the 'Valley of Versions' (Geelani 2013, 179) by the Kashmiri journalist Gowhar Geelani, as multiple angles of the narrative have been advanced: religious, journalistic, individual or those countering the Pandits' narrative. These different approaches highlighted in Geelani's articles plead for a need to acknowledge the massacres of the Muslim community as well, such as the Chota Bazar massacre or the Kunan Poshpora mass rapes. Other authors such as Khalid Bashir Ahmad, a former civil servant in Kashmir, tries to counter Kashmiri Pandit claims of persecution by Kashmiri Muslims throughout the region's history (Ahmad 2017). Focusing on the two religious' communities in Kashmir has reduced the complexity of the situation to a competing narrative of Hindu versus Muslims persecution, putting Kashmiri Pandits in the spotlight, and has deepened the cleavages between the two communities. In fact, the author's claim to expose the myth behind the narrative, does mask his own bias. While different perspectives have been taken to account for the 1990 exodus, authors of both communities have used the religious issue as a background and have highlighted the political conflicts in this region. This is particularly evident in newspaper reports and television debates (Kashmiri Pandits: In Search of Home 2014, 18-19).

While Kashmir State government heads have underlined the syncretic nature of the Valley's demographic traditions, the Hindu-Muslim divisions in the region have inevitably dominated the subject. The situation of the Pandits is perceived, interpreted by parties, the local State, central government and public opinion as part of an Indo-Pakistan conflict on the State's political status, that can only be resolved politically (Manzar 2013, 178). Caught in this religious divide, Pandits have largely sought to emphasize their Hindu identity, taking on the label Kashmiri Hindus after 1990 in order to place themselves as an integral part of the Indian nation, in contrast to the Muslim population in Kashmir whose loyalty and commitment to the Indian nation is consistently questioned and doubted. This division between communities has challenged a process of reconciliation between the two communities, as Kashmiri Hindus are perceived as associated with the central government (Munshi 2013, 116).

Pandit organisations have employed Hindu nationalist rhetoric. The patronage of Hindu nationalist groups like the Rashtriya Swayamsevak Sangh, Bajrang Dal, and Vishwa Hindu Parishad, have fuelled religious divisions. In addition, Hindu groups have used the Pandit cause as a vote bank. In fact, in 2014 the Bharatiya Janata Party called for 'the return of Kashmiri

Pandits to the land of their ancestors with full dignity, security and assured livelihood' (Aswani 2020), and in 2013 the Party produced a documentary on the plight of the community (Bharatiya Janata Party 2013).

On the Muslim side, the Hanafi tradition prevailing amongst Kashmiri Muslims is rivalled by Wahabi ideologues, portrayed as authors of the prevailing climate of violence. Kashmiri Pandits' discourse feeds public resentment against Kashmiri Muslims, creating fertile ground for government and military actions against anti-national activity in the Valley. The Kashmiri Pandit exodus has allowed the government to build on their trauma, as well as the general prevailing insecurity in the Valley to justify its amendments regarding existing constitutional provisions for Kashmir (Trisal 2019).

Conclusion

From a legal perspective, Kashmiri Pandits remain in the shadow. While the community is considered as an ethnic and religious minority, the fact that it is part of a majority Hindu religious group on a national scale complicates its situation as a minority in India. Diverse political parties in fact, use this community as a tool for the pursuit of their own agendas, which deepens the rifts between Kashmiris. Journalistic pieces, political statements from parties defending their positions, or personal emotionally charged narratives have tended to reinforce old prejudices and widened the chasm amongst Kashmiri Pandits and Kashmiri Muslims, as seen with the release of *The Kashmir Files*.

No doubt, the absence of legal literature is compensated by a certain abundance of studies on the Pandits from the cultural, economic or medical angles. Even though further specific investigative inquiries are required for a more balanced appreciation of the Pandits' situation, these studies shed light on the changing situation of the Pandits in the long term, from their Kashmiri roots to their political affirmation as an ethnic minority of Hindu Pandits in an independent nation to a community classified as internally displaced.

The current approach to Kashmiri Pandits highlights the difficulties faced by the community since 1989 and the type of coverage in media or by politicians. It provides a framework to analyse Indian institutions' policies and practices and understand how it increases not only discrimination but their invisibility.

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Remarks on the Expansion of Universal Jurisdiction

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The article follows a chronological criterion to examine the development of universal jurisdiction. First, it delves into the origin of the principle and its following expansion according to a shift in its rationale. In doing so, it assesses the scope of application of universality. The establishment of the International Criminal Court appears to represent a significant step within such an evolution. The article then addresses the theoretical debate that arose around the consolidation of universal jurisdiction. In particular, it focuses on the application of the presence requirement and the principle of subsidiarity. Finally, it considers some relevant points concerning the current debate on the issue. The latter include the relationship between the use of universal jurisdiction by States and the ICC, and some major criticisms that have been addressed to universality, such as the risk of disruption for international relations and local conflict resolution, and colonialist biases. The research examines the current status of the principle in light of a recent in-depth survey and resulting considerations. In the last section, special attention has been paid to the correlation between forced migration and the displacement of asylum seekers and the exercise of universal jurisdiction. Finally, a glance is given to studies exploring the possibility of applying universality in civil litigations.

Universal jurisdiction, International law, International criminal law, International justice

Introduction

The principle of universal jurisdiction allows any State to prosecute offences representing an attack on the common fundamental values of the international community as a whole, regardless of the traditional jurisdictional links of territoriality and nationality. According to it, any State has

jurisdiction over such crimes irrespective of the place where they were committed, the nationality of the persons involved, and the existence of particular national interest (Brownlie 2003, 303).

Its rationale and its resulting exercise have changed over time. Such development can be historically framed alongside the concurrent evolution of international criminal law. In this regard, a milestone was a milestone was the establishment of the International Criminal Court. The principle of universality created a useful tool for strategic litigation in order to foster international justice. However, several features prove problematic in the implementation. In addition, new scenarios arising from current migration flows open up new application developments.

1. The Origin and Expansion of Universal Jurisdiction

The application of universal jurisdiction in the State practice dates back to the XVII century in relation to piracy on the high seas. At that time, the principle of universality served to establish jurisdiction in areas where no State had territorial power since they were 'terrae nullius'. Although one of the reasons traditionally given for such an application depicted pirates as stateless since their involvement in piracy deprived them of their nationality, the prevailing rationale relies upon the nature of the crime. Because piracy was committed indiscriminately against individuals and vessels of any State, pirates were deemed as 'hostes humani generis', enemies of mankind (Randall 1988).[1]

Subsequently, also the crime of slavery was subjected to universal jurisdiction. Firstly, some treaties in the XIX century provided universality for the conduct of slave trading committed on vessels on the high seas, and then its application was deemed justified by the universal condemnation of the crime (Hawkins 2003, Bassiouni 1999).

In the aftermath of the Second World War, domestic post-war trials contributed to the expansion of universal jurisdiction to war crimes and crimes against humanity.[2] The best known example is the Eichmann trial: in 1961 Israeli authorities kidnapped in Argentina Adolph Eichmann, chief of

[1] Today, the exercise of universal jurisdiction over piracy, which has gained customary value, has been codified under article 105 of the 1982 United Nations Convention on the Law of the Sea.

[2] With regard to trials administered by one of the Allies in the occupied territorial zone, the so-called zonal tribunals, there is a debate on their actual relevance in terms of universal jurisdiction or rather forms of territoriality, passive personality, or protective jurisdiction (Inazumi 2005).

the Gestapo's Jewish Section, and then prosecuted him also on the ground of universal jurisdiction.

The application of such a principle to war crimes is generally derived also from the common provision of the four Geneva Conventions of 1949, which, in relation to international armed conflicts, obliges States to search for perpetrators of 'grave breaches' of the Conventions and to prosecute them, regardless of their nationality.[3]

Crimes against humanity have not been comprehensively regulated by a dedicated treaty yet, though their subjection to universal jurisdiction is not controversial as they amount to *jus cogens* international crimes (Bassiouni 2001, 119; Kamminga 2001, 946).

During the 1970s and 1980s, the growth of cooperation among States against international crimes led to the signature of several multilateral treaties creating an extensive jurisdictional regime that empowered national authorities to prosecute human rights law and international criminal law breaches.

Some of these treaties included an 'aut dedere aut iudicare' provision, which is an obligation either to prosecute or extradite alleged offenders found within the State territory.[4] Some scholars characterize it as a ground for universal jurisdiction, but such a take is very controversial.[5]

The 1973 Convention on the Suppression and Punishment of Apartheid and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, are commonly read as providing universal jurisdiction.

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[3] For instance, Cassese 2003, Kamminga 2001, and the International Committee of Red Cross (ICRC) in Commentaries of Geneva Conventions I, II (sec. D.1). With respect to crimes committed within non-international armed conflicts, the Geneva Conventions do not provide for a basis of universal jurisdiction, though the ICRC held its application under customary international law, see International Committee of Red Cross, 'Universal Jurisdiction over War Crimes', 2021.

[4] Convention for the Suppression of Unlawful Seizure of Aircrafts, The Hague, 16 December 1970, in United Nations, Treaty Series, vol. 860, p. 105 ff., arts. 4(2), 7; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971, in United Nations, Treaty Series, vol. 974, p. 177 ff., arts. 5(2), 7; International Convention against the Taking of Hostages, New York, 17 December 1979, in United Nations, Treaty Series, vol. 1316, p. 205, art. 5(2); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, New York, 14 December 1973, in United Nations, Treaty Series, vol. 1035, p. 167 ff., arts. 3(2), 7.

[5] Inazumi 2005, 122; International Law Commission, The obligation to extradite or prosecute (aut dedere aut judicare), Final Report of the International Law Commission, 2014. Against such a view, Council of the European Union, The AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009.

In the late 1990s, the arrest warrants issued by Spain, Belgium, France and Switzerland against the former dictator of Chile Augusto Pinochet showed a growing interest of States to prosecute human rights violators and to resort to universal jurisdiction to this end.

It is possible to affirm that during the XX century the principle of universality extended its application to some core international crimes (war crimes, crimes against humanity, genocide, and torture), reflecting the growing commitment of States to the protection of human rights. Human rights violators became the new 'hostes humani generis'. Consequently, the rationale underneath that informed universal jurisdiction changed from supporting States to defend commercial naval trade threatened by piracy to promoting fundamental rights,[6] and this approach reflected the developing new paradigm of the international legal order that was shifting from a sovereignty-centred to an individual-centred system.

2. Universal Jurisdiction after the Establishment of the International Criminal Court

The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994 by the UN Security Council acting under Chapter VII of the UN Charter paved the way to the creation of the International Criminal Court (ICC). The concept of prosecuting individuals for grave international crimes before international courts was consolidating.

Contrary to the former international *ad hoc* tribunals, the ICC is based on the voluntary participation of States. Today, 123 States are party to it. The Rome Statute was adopted in 1998 and entered into force in 2002. It provides the Court with jurisdiction over crimes against humanity, war crimes, genocide, and aggression, when committed either within ratifying States' territory (territoriality principle) or by their nationals (active personality principle). Moreover, the Court has jurisdiction when non-party States accept it on specific situations and when the UN Security Council acting under Chapter VII refers to it any situation.

Although the Statute does not expressly oblige States parties to adopt national legislation that criminalises the conducts included therein, such kind of domestic codes of international crimes thrived after the adoption of the Statute. However, some contend that such an obligation may indi-

[6] This is also because grave crimes, unlike piracy, are often committed by or with the consent of State officials.

rectly be inferred from article 17, which governs the relationship between the Court and States parties according to the principle of complementarity.[7]

Numerous States, in enacting legislation to prosecute the core international crimes, included norms of universal jurisdiction (Langer 2015; Van Schaack and Perovic 2013)[8]. Such a regime has been described as 'an international archipelago of national legal institutions' (Langer 2015, 209).

The growing debate around universality was shown also by the drafting of the Princeton Principles on Universal Jurisdiction, and the Cairo-Arusha Principles within the Africa Legal Aid.

At the beginning of the 2000s, two States that were deemed among the standard-bearers of the use of universal jurisdiction, Belgium and Spain[9], took a major step down.

After opening investigations against Israeli and US authorities, Belgium underwent political pressure that led, first, to an interpretation of the law that narrowed down its scope, and then to a formal amendment in 2003, followed by a total repeal of the act. As a result, there was no longer a specific act regulating international crimes, and some provisions were incorporated into the Belgian Criminal Code. The latter grounded the jurisdiction of domestic courts on extended forms of active and passive personality and permitted universal jurisdiction only as long as there was a treaty obligation to prosecute, such as from the UN Convention against torture. Moreover, if the accused was not present on the Belgian territory, the prosecutor enjoyed discretionary power to dismiss the case.[10]

The same occurred in Spain. After Spanish authorities opened cases against US, Israeli, and Chinese officials, in 2009 the Parliament amended the law on universal jurisdiction, requiring the presence of the alleged of-

[7] Report of the International Crimes Commission established by the Italian Minister of Justice with the decree of 23 March 2022, available at https://www.gnewsonline.it/codice-dei-crimini-internazionali-ecco-la-proposta-della-commissione-ministeriale/ (accessed: 26/06/2022).

[8] There exist several surveys of domestic legislations providing universal jurisdiction, though different methodologies are used so that it is difficult to identify all of them definitively. See The AU-EU Expert Report on the Principle of Universal Jurisdiction supra note 5; Amnesty International (2011) Universal Jurisdiction: A Preliminary Survey of Legislation Around the World; Sixth Committee of the UNGA (2021) The scope and application of the principle of universal jurisdiction; REDRESS, FIDH, Extraterritorial Jurisdiction in the European Union: a Study of the Laws and Practice in the 27 Member States of the European Union, December 2010.

[9] See, for instance, the Guatemala Genocide, the Chilean and the Argentinian cases in Spain, and the Butare Four case in Belgium related to crimes committed in Rwanda.

[10] Kaleck 2009, 932-936; Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art, 2006, p. 37-45.

fender on the national territory or a relevant link between Spain and the case. Since several cases remained open, in 2014 a new legislative reform practically deleted universality definitively (Langer 2011, 40; Alija Fernández 2014).

In the meantime, the International Court of Justice issued its judgment in the Arrest Warrant case,[11] contending that the rule of State immunity stands against charges of core international crimes issued under the principle of universality.[12] Notwithstanding the contested character of the decision within the same Court,[13] the fact that the gravest international crimes are in fact State acts led to a great gap of impunity.[14]

These events contributed to developing a widespread disenchantment towards universal criminal jurisdiction (Reydams 2010; Cassese 2003; Fletcher 2003).

3. Adjusting Universality: Presence Requirement and Subsidiarity

After the consolidation of the universal jurisdiction scope of application over core international crimes (intended as crimes against humanity, war crimes, genocide, and torture), the dissemination of dedicated national legislations, and the above-mentioned occurrences, the discourse shifted to interrogate the extent of the principle.

Universal jurisdiction norms adopted different shapes. Against a 'pure' universal jurisdiction, forms that required some basic links between the case and the prosecuting State appeared.

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[11] International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.

[12] The same position was endorsed by the European Court of Human Rights, see European Court of Human Rights (Grand Chamber), Judgment of 21 November 2001, in the case Al-Adsani v. the United Kingdom, Applic. No. 5763/97; European Court of Human Rights (Fourth Section), Judgment of 14 January 2014, in the case of Jones and others v. the United Kingdom, Applic. Nos. 34356/06 and 40528/06.

[13] Arrest Warrant case, Dissenting Opinion of Judge ad hoc Van den Wyngaert; Dissenting Opinion of Judge Al-Khasawneh; Dissenting Opinion of Judge Oda.

[14] It is true that, at the domestic level, Italian courts have opposed such a view. In 2004, in the case Ferrini v. Federal Republic of Germany, the Italian Supreme Court affirmed that the customary norm of State immunity should be displaced when acts amounting to international crimes are at stake, as the conflict between these two provisions must be solved in favour of the superior peremptory norms. As a consequence, Italy was declared in violation of its international obligations by the International Court of Justice. In the aftermath of such conviction, the Italian Constitutional Court re-affirmed the prevalence of the constitutional right of access to a court over the international norm, Corte Costituzionale, sent. n. 238/2014, ud. 23.09.2014. The case is still ongoing as Germany on 29 April 2022 filed a new application before the ICJ.

The first condition generally required is the presence of the alleged perpetrator within the State territory. The legitimacy of universal jurisdiction *in absentia* was addressed by scholars and by the judges of the International Court of Justice in the Arrest Warrant case. President Guillaume, judge Ranjeva and judge Rezek denied the recognition of universal jurisdiction *in absentia* in international law.[15] On the contrary, judges Higgins, Kooijmans, and Buergenthal argued that the presence requirement is a safeguard of the right to a fair trial for the accused, but it is not *per se* in a necessary basis for jurisdiction under international law.[16] It has been contended that, since not all the national legal orders permit proceedings to be held *in absentia*, the presence condition provided in some international treaties[17] serves as a lowest common denominator to encourage participation. However, it does not represent a rejection of *in absentia* procedures (O'Keefe 2004, 751). The uncertainty of international law on this subject, due to the scarcity of State practice concerns for the fundamental rights of the accused persons, and considerations related to the instability that such an approach would possibly cause in international relations, led to affirm that such kind of trials may be held as long as other safeguards are assured, but are not so desirable.[18]

Another correction that has been proposed for universal jurisdiction was the principle of subsidiarity. In fact, an extensive jurisdictional regime may easily lead to the overlapping of jurisdictional claims over the same case. The need to avoid disputes among States and bring order to international relations is a crucial concern. Subsidiarity provides that a State entitled to exercise universal jurisdiction over a case ought to defer it if another State having a stronger nexus to it is able and willing to genuinely carry on a prosecution. Its application has been considered in several academic works;[19] several States included a reference to subsidiarity in their universal jurisdiction legislation; domestic courts applied it, and prosecutorial

[15] Arrest Warrant, Separate Opinion of President Guillaume para. 9; Arrest Warrant, Declaration of Judge Ranjeva para. 7; Arrest Warrant, Separate Opinion of Judge Rezek, para. 10.

[16] Arrest Warrant, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 56.

[17] E.g, UN Convention Against Torture, article 5 para.2

[18] Arrest Warrant, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 59; Rabinovitch 2004; Kluwen 2017.

[19] Institut de Droit International, Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide 2005, art. 3(c); Africa Legal Aid, The Cairo-Arusha Principles 2002, Preamble; Princeton Principles on Universal Jurisdiction, 2001, Commentary p.53; The AU-EU Expert Report on the Principle of Universal Jurisdiction 2009, supra note 5, Recommendations R9.

discretion is generally grounded on it (Ryngaert 2015, 280-281; Colangelo 2009, 922).[20] Subsidiary universal jurisdiction is particularly desirable as it permits to address practical issues. It may guarantee the respect of the sovereignty of other States and intervene only to the extent necessary to avoid impunity, but as it has been pointed out, the ability and willingness test must be undertaken with caution, as the directly affected State may need time to implement accountability mechanisms and legal reforms that allow dealing with the case (Ryngaert 2015, 286-287).

4. The Current Debate around Universality

4.1. The Relationship between Universal Jurisdiction and the ICC

The existence of two international criminal law regimes, one based on the International Criminal Court Statute and the other based on the principle of universal jurisdiction, has brought about the need to find some criteria to regulate their relationship.[21]

The ICC-State relationship is governed by the principle of complementarity provided by article 17 of the Rome Statute. According to it, a case is admissible before the Court as long as the State having jurisdiction is 'unwilling or unable genuinely to carry out the investigation or prosecution'.[22]

Consequently, if a State has adopted universal jurisdiction legislation, according to the principle of complementarity, its investigation would prevail over the jurisdiction of the ICC.

However, different versions of this relationship have been proposed. It has been suggested that the distribution of tasks between the States and the Court may be seen as a 'big fish versus a small fry': the ICC should address the most responsible perpetrators and the major leaders, whereas States should deal with minor perpetrators. Such an approach has been

[20] Colangelo suggested that the inclusion of such a principle in national legislations derives from the implementation of the Rome Statute, which is based on the principle of complementarity.

[21] It has been contended that the ICC itself exercises universal jurisdiction under article 13(b) of the Statute, that is when a situation is referred by the UN Security Council acting under Chapter VII of the Charter of the United Nations. In this case, the Security Council is only bound by limitations *ratione materiae* and *ratione personae* (intended as natural persons of more than 18 years old), while it is not bound by the territoriality and active personality principles (Bassiouni 2004, 46). On the contrary, an argument against ICC's universal jurisdiction grounds on the rule prohibiting a treaty to create effects on third States (Abass 2006).

[22] Rome Statute, article 17(a).

named 'positive complementarity', since it implies that the Court's Prosecutor would be active in providing assistance to national courts in their prosecutions, ensuring that States meet their responsibility to proceed (Ryngaert 2009).

According to another point of view, complementarity reveals unsatisfactory when universal jurisdiction comes into play. Since representing the international community in prosecuting international crimes is the role of the Court, and considering that the latter acts on the basis of vertical cooperation while States rely on the more burdensome horizontal inter-State cooperation, complementarity should be inverted when it comes to universal jurisdiction (Kress 2009, 157).

Another perspective assumes that the International Criminal Court enjoys a greater degree of legitimacy based on State consent, and on political, procedural, rational, and functional issues, compared with universal jurisdiction. For this reason, it has been argued that a 'weak primacy principle' should regulate the relationship between the ICC and universal jurisdiction prosecutions. 'Weak primacy' is based on both a contextual and a teleological reading of article 17: the former would exclude universal jurisdiction from the forms of *State jurisdictions* referred to in the article; the latter suggests that none of the rationales for complementarity favours priority to universal jurisdiction. Accordingly, formal priority should be granted to the ICC, whereas in practice the Court would generally defer a case to domestic courts under universal jurisdiction (Langer 2015).[23]

Finally, despite the creation of an international criminal court, scholars advance that universal jurisdiction has still a role to play. First, jurisdictional gaps and institutional or political constraints blocking the ICC may cause universal jurisdiction to be the only available mechanism to prosecute the perpetrators of international crimes. Second, the ICC has limited capacity and can prosecute only a small number of defendants as compared to the massive scale of the crimes it deals with. Therefore, prosecutions based on universal jurisdiction may prove necessary in pursuing the same international criminal law goals (Langer 2015).

4.2. Major Criticisms against Universal Jurisdiction

It has been maintained that universal jurisdiction realises the risk of a 'judicial tyranny' as it would arm any prosecutor with the power to de-

[23] Langer added that the Court *should* defer the cases to such prosecutions as there may be several circumstances that, despite the lower level of structural legitimacy, make domestic authorities best placed to prosecute.

mand extradition of culprits, intruding into domestic reconciliation processes and subjecting the accused to the unfamiliar legal procedures of the requesting country (Kissinger 2001, 90). Moreover, the arbitrariness that characterises universality would leave space for its use as a tool for political harassment (Kissinger 2001, 92).

Following this argument, it has also been argued that universal jurisdiction creates inefficiencies within the international law system. If the latter is intended as a platform where States can settle disputes through transactions, the right to prosecute (or not) represents a high value for settling a conflict, especially when waiving prosecutorial rights may be offered in exchange for other benefits (peace, democracy, the conviction of leaders, amnesties). The fact that universality vests any State with this power diminishes the bargaining power of the State directly involved in the situation. Therefore, universal jurisdiction makes efficient transactions harder to reach (Kontorovich 2008).

These arguments see the principle of universality as disrupting international relations and interfering in local political solutions to conflicts.

Against such a narrative, a different analysis of universal jurisdiction has been proposed. It has been argued that trials based on such a principle tend to concentrate on low-cost defendants, those who can impose little or no costs in terms of international, political or economic harm,individuals whom the international community has already disqualified. In light of this tendency, it appears highly unlikely that such proceedings would cause extreme international tensions. Moreover, States should be aware of such a jurisdictional regime and anticipate its consequences, so that unforeseen interferences on domestic political dynamics seem improbable (Langer 2011).[24] Finally, the argument about the use of universal jurisdiction as a political harassment tool fades when it is observed that the latter so far has mostly been exercised within mature democracies with an independent and impartial judicial system (Langer 2011).

With regard to politicization concerns, namely the need to contain the influence that political branches may exert on prosecutions, the latter position contends that politics is an unavoidable factor in international pros-

[24] On this point, a more extensive analysis has been undertaken with regard to the African States by Jalloh, who argued that, although it is not possible to prove the actual causation of political instability by universal jurisdiction indictments from the European States, it is reasonable to affirm that the dishonour that such warrants bring about is able to cause political destabilization in fragile governments (Jalloh 2010, 50). Jalloh then argued that, in any case, the distant European judiciary does not have the understanding of delicate political dynamics required to intervene appropriately (Jalloh 2010, 54).

ecutions, therefore it is only possible to reflect on what would be the best way to give it a role (Langer 2011).[25]

A second significant stream of criticism against universal jurisdiction consists in its use as a form of 'legal colonialism' (Van Der Wilt 2011). Such an argument has been strongly held by the African Union.[26]

An accurate analysis has allowed to deny the allegation pointing at universal jurisdiction as a European weapon to target primarily African leaders. Criminal proceedings against African officials represent only a minor part of the total number of cases[27]. Moreover, additional factors, such as a weak domestic judicial system, criminal complaints filed abroad by victims hosted as refugees, and the presence abroad of witnesses who left the country as migrants, have to be considered as fostering prosecutions of crimes perpetrated in the Global South by courts situated in the Global North. Nonetheless, it is true that the overall trend reflects an imbalance of cases held in the Global North affecting the Global South (Jalloh 2010).

Selectivity is a traditional problem of international criminal law as it brings about double standards. According to the low-cost defendant narrative outlined above, selectivity is a structural feature of universal jurisdiction. The system selection is imperfect as States may weigh considerations on different criteria (Langer 2011). It is noteworthy that the physical presence of victims on the territory of the proceeding court contributes to make a prosecution more likely (Jalloh 2010, 22; Langer 2011, 49).

Finally, another observation originates from the former colonial relationship that may exist between the prosecuting State and the State of the defendant. Although it may be said that former colonial powers have historical ties and familiarity with their former colonies and that the way in which such prosecutions are perceived in the latter may vary, it is generally unlikely that such proceedings would be seen as a form of credible justice. In fact, suspicions may arise that such a State may prosecute upon political calculations (Jalloh 2010).

[25] Referring, for instance, to the space that may be given to prosecutorial discretion as opposed to statutory or constitutional rules which make prosecution compulsory.

[26] African Union, Decision on the Abuse of the Principle of Universal Jurisdiction (2010); AU-EU Report 2009 supra note 5, para. 34-38.

[27] AU-EU Report 2009, supra note 5, para. 40 and section II.2 (para. 26). Out of 27 universal jurisdiction proceedings reportedly being pursued in eight European member states, about 10 relate to Africa (Jalloh 2010, 16).

4.3. Current Status of universal jurisdiction prosecutions

According to an in-depth survey on criminal cases based (fully or partially) on universal jurisdiction carried out between 1961 and 2017, the principle has undergone a 'quiet expansion' (Langer, Eason 2019). Such an expansion has been both numerical and geographical. Additionally, the review evidenced a tendency to mainly prosecute low-cost defendants and defendants who are present or residing within the territory of the State of the forum. Such a trend reveals a reactive rather than a proactive approach towards universal jurisdiction prosecutions: they do not reflect the gravity of the crimes committed, but rather the international mobility of people. It may indicate a shift from 'global enforcers of international human rights' concept to 'no safe havens for perpetrators of international crimes'.

Such a survey has identified some explanatory factors that favour the numerical expansion of universality. The first is the adoption of universal jurisdiction norms as part of the implementation process of the Rome Statute. The second one is the creation of specialised investigative units for international crimes within the office of the prosecutor and the police. Furthermore, we must consider 'institutional learning', that is the ability of institutions to 'learn about, adapt and change' their frameworks and operational strategies (Langer, Eason 2019, 792). In addition, technological improvements have reduced the difficulty in gathering evidence and conducting this type of proceedings even without *in situ* investigations. Finally, it is necessary to consider the high level of conflict-based migration that brings to universal jurisdiction States potential plaintiffs, witnesses, and defendants.

As regards the geographical expansion, the study indicated that the exercise of universal jurisdiction went beyond traditional prosecuting States in Western Europe and the developed Commonwealth to include Countries like Argentina, South Africa, and Senegal (Langer, Eason 2019). In this case, the explanatory factors partially overlap and partially differ from those mentioned above. In particular, non-Western States may wish to fill the gap left by the Western States endorsing a 'no safe haven' approach or respond to post-colonial stances.

Finally, a different yearly review on universal jurisdiction upheld that the COVID-19 pandemic, albeit having an impact on the proceedings, did not halt universality, proving the solidity of such progression.[28] However, it also contended that universal jurisdiction does not stand out from the

[28] Trial International, Universal Jurisdiction Annual Review 2021, A year like no other? The impact of coronavirus on universal jurisdiction.

general under-prosecution of conflict-related sexual and gender-based violence.[29]

4.4. The Relationship between Universal Jurisdiction and Refugee Flows

The above paragraph highlighted a significant trend that deserves a deeper examination. There is a relationship between the flows of asylum seekers arriving in the European States from conflict zones and the opening of cases based on universal jurisdiction.

On the one hand, this relationship involves the defendants in such proceedings. In fact, among the persons entering Europe are perpetrators of international crimes committed in the country of origin. In this case, the exclusion clauses enshrined in article 1F of the 1951 Convention relating to the Status of Refugee come into play as an obligation of States to deny protection to those who appear guilty of serious crimes. The crimes listed in the provision partially overlap with those representing the scope of application of universal jurisdiction. As a consequence, although the Refugee Convention does not impose any obligation on the State, the latter may prosecute the suspect under domestic legislation providing universal jurisdiction[30].

On the other hand, victims and witnesses of international crimes flee their home country and ask for international protection in the country of refuge. The difficulties in gathering evidence to support universal jurisdiction prosecutions make the latter the main probatory source.

As a result of both considerations, several countries have put in place coordination mechanisms between migration agencies, law enforcement departments, and prosecutorial offices[31] to share information on potential international crimes that migration offices may encounter during asylum procedures. Moreover, information to possible victims and witnesses regarding the option to report the crime is generally communicated through brochures available in different languages and accessible online or distributed by the migration authority.

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[29] Trial International, Universal Jurisdiction Annual Review 2022, Universal jurisdiction, an overlooked tool to fight conflict-related sexual violence.

[30] In any case, the extradition or return to the country of origin may be prevented by the non-refoulement rule.

[31] Human Rights Watch, "These are the Crimes we are Fleeing", Justice for Syria in Swedish and German Courts, 3 October 2017; FIDH, ECCHR, Redress, "Breaking down barriers, Access to justice in Europe for victims of international crimes", September 2020.

However, such systems do not prove generally efficient in making victims aware of their rights. They often lack directions on how to contact the specialised units for international crimes, how to file a formal complaint, and also on the reason they are questioned about international crimes during the status determination process. In addition, the brochures may not be translated into the language of the person or may not be explanatory enough of the national justice system. Also importantly, migrants may have concerns that by disclosing information about a crime this would affect the asylum procedure, let alone the risk of retaliation and re-victimisation.

The 2012 EU Directive on minimum standards for the rights, support and protection of victims of crime[32] offers a legal basis for proactive measures in this field. Although it primarily concerns victims of crimes committed within the European Union, it also applies to those committed outside, provided that criminal proceedings regarding international crimes take place within a Member State. The provisions of the Directive regard four main areas of interest: information, support, participation, and protection of victims.

The nature of universal jurisdiction as a victim-driven tool of international justice has been already conceptualised (Reydams 2004, 221; Megret 2015; Jalloh 2010, 17, 18, 25; Hovell 2018).[33] The body of the victim 'describes the "place" of crime much better than, say, the territory of a State', as it establishes an important connection between the crime and the prosecuting State, giving it entitlement to proceed (Megret 2015, 100).

4.5. Universal Civil Jurisdiction

The principle of universality can also operate on the civil dimension. To wit, the possibility to award damages to victims of heinous acts that do not have any nexus with the adjudicating court.

In the area of State practice, the United States stands out as it enacted the two major instruments on the matter, namely the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA). Since the 1980s, the application of the ATS increasingly focused on the responsibility of multinational enterprises. However, case law in this field showed an important

[32] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012

[33] Hovell also pointed out that, despite this role, 'legal framework is presently structured so that state interests not merely outweigh but trump the interests of victims of international crimes', at 450.

setback with the Kiobel case in 2013. Meanwhile, cases against natural persons are still ongoing.[34]

The European Court of Human Rights ruled on this subject in 2018 in the case Näit-Liman v. Switzerland, delivering a very severe judgement for universal civil jurisdiction, as it denied the existence of such an obligation under international law. The Court held that domestic courts enjoy a wide margin of appreciation in the application of their national legislation on jurisdiction (in that case, a forum of necessity norm) so that a restrictive reading does not entail a disproportionate restriction of the right of access to justice.

Notwithstanding the judicial challenges, universal civil jurisdiction seems to be facing a lively debate (Forlati, Franzina, 2020).

Conclusions

This article has attempted to draw the development of the universality principle according to its historical expansion. The debate around it has always been very active, moving from its very essence, its scope, its legitimacy, and its implementation. It appears as a concept under constant evolution. Here it is valued in its role as a tool of strategic litigation for international justice, whose limits must be taken into account.

The above-mentioned conception of a current 'no safe haven' tendency toward the use of universal jurisdiction is worthy of remark. It indicates the exercise of universality as a defensive, reactive tool rather than a proactive means of promoting human rights. Such a trend, if understood broadly and in connection with the general policies on fundamental freedoms, characterises also other fields, including the closed-doors policy of European States vis-à-vis migration flows from the Global South. In fact, a comparable defensive attitude can be seen in their efforts to make their frontiers inaccessible and externalise asylum procedures.

However, a different approach seems to have been undertaken by these same States towards Ukrainian citizens fleeing from the atrocities of war. Several States have already announced their willingness to prosecute crimes committed in that context under the principle of universal jurisdiction.

Such proactive commitments seem at odds with the self-restraint shown in other cases. This divergent reaction is one more reason to closely monitor the forthcoming unfolding of universal jurisdiction prosecutions.

[34] Trial International, Universal Jurisdiction Annual Review 2022.

In fact, it brings about both the opportunity to develop good practice in the prosecution of international crimes with an international cooperation system between prosecutors to be universalised; and the risk that such system would remained limited to the Ukrainian conflict, thus perpetuating the double standards criticism of this tool.

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Bringing Justice to War: Literature Review for a Comparative Study of Transitional Justice

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With the relevant participation of the international community, in 2016, the Colombian Government achieved a Peace Agreement to end more than fifty years of war with the Revolutionary Armed Forces of Colombia. This is the first peace negotiation in the world developed entirely under the continued preliminary examination of the International Criminal Court. The laying down of weapons by the oldest active guerrilla in the world demanded establishing an Integral System of Truth, Justice, Reparation, and Guarantees of non-Repetition, that should satisfy both internal tensions and an unprecedented International Legal Order. As the Colombian case outlines tensions between national peace, global justice, and human rights, it has been a focus of political, legal, and academic debate. This literature review presents the main discussions around Colombian Transitional Justice: The compatibility of the Final Agreement with the International Commitments in terms of Human Rights and Individual Criminal Responsibility; the role of the international community in the peace process; and evaluations of the reached implementation. This text affirms that there is a promising gap in terms of comparative studies and enunciates a comparison that would give lights on the way transitional justice has evolved since it emerged as a concept and it became a global manner of understanding transitions to democracy.

Keywords: Transitional Justice, International Legal Order, Colombian Final Agreement of Peace, Democratic Transitions.

Introduction

During the late 1980s and early 1990s, the notion of transitional justice emerged as a 'conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes' (Teitel 2003, 70). Before this period, 'the dominant approach in transitional contexts was that of forgiving and forgetting; its instruments par excellence were general and unconditional amnesty laws' (Uprimny, Sánchez and Sánchez 2014, 63).

From the 1980s onwards, the approach of blanked amnesties —where Law worked 'at the service' of what was politically agreed— started to be contested by the need to guarantee some minimum standards of justice as a condition to build a society respectful of human rights. It was argued that:

> Wherever the criminal justice response was politically unwise or simply impractical, other ways should be considered to respond to the predecessor regime's wrongdoing and repressive rule, and, moreover, that such alternatives could advance the rule of Law (Teitel 2014, xii).

With time, the unfolding of international criminal Law and the establishment of the International Criminal Court (ICC) strengthened the commitments of States in terms of individual criminal responsibility[1]. This turn of events transformed the dynamics of negotiating peace. 'With the creation of the ICC, subsequent peace processes were affected, positively, by the need to include standards from international human rights and the international criminal law' (Currea-Lugo 2021, 106).

Moreover, independently from the Rome Statute, States have a general duty to investigate, prosecute and punish, which limits the possibility of offering general amnesties as an incentive to armed groups to abandon weapons and play under the rules of democracy. Under new circumstances, 'the question for the ICC Prosecutor, but, most importantly, for a State Party to the Rome Statute, is how to achieve the requirements of justice under the Statute while securing lasting peace' (Stewart 2018, 2).

According to Teitel, the first notion of transitional justice expanded[2], and the world witnessed an 'increasing detachment of transitional justice

[1] Unlike its predecessors, the ICC emerged from the consensus of the international community on the creation of an international, independent, and permanent body for the eventual prosecution of those responsible for serious international crimes (Mora, Santiago and Betancourt 2019, 106).

[2] Nowadays, it is possible to talk about Transitional Justice also in situations of ongoing conflicts. Its principles can be claimed and implemented even in contexts where 'the transitional process cannot produce a radical transformation of the social and political

from local politics and its corresponding transformation into a form of global law and politics' (2014, 3). Therefore, 'the challenge in this context is to incentivize demobilization while fulfilling the accountability standards of criminal law' (Sánchez 2016, 172).

Crossed by these queries, in 2016, the Colombian Government achieved a Peace Agreement to end more than five decades of war[3] with the Revolutionary Armed Forces of Colombia (FARC-EP). This peace process 'has been the first developed entirely under the continued scrutiny of the International Criminal Court' (Arevalo and Höker 2018, 54). The Final Agreement had the support of the Office of the Prosecutor (OTP 2016) because it excluded amnesties for crimes recognized by the Rome Statute.

According to Sánchez (2016), the Colombian way stands that the State's duty to punish is not absolute and, during times of political transitions, its fulfilment can interfere with other duties and values (equally essential) such as peace, truth, and victim's rights. 'Thus, the Colombian Constitution upholds the idea that the duty to investigate must be weighed against other specific duties and is dependent on the specific context' (Sánchez 2016, 174).

To conciliate these tensions, the Agreement designed an Integral System for Truth, Justice, Reparation, and Guarantees of Non-Repetition (from now on: *The Integral System*) constituted of three institutions: A Truth Commission, a Missing Persons Search Unit, and a Special Jurisdiction for Peace (JEP, Spanish Acronym).

Although it is clear that 'Transitional Justice is always contextual, even if it is based on universal values' (Uprimny, Sánchez and Sánchez 2014, 25) it is also true that 'every peace process learns from developments elsewhere, [and] innovates to adjust to challenges present in the local context. Theses [Colombian] innovations can in turn become a reference for international peacebuilding processes' (Herbolzheimer 2016, 3)

Therefore, not without detractors and challenges, currently, 'the peace talks between the Colombian government and the FARC-EP have become a global reference for negotiated solutions to armed conflicts' (Nylander, Sandberg and Tvedt 2018, 8).

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order', leading to processes of transitional justice without transition (Uprimny, et al 2006, 13-14).

[3] There is no consensus on the date of starting of Colombian armed conflict, but it was considered the longest running-conflict of America and the third oldest active war in the world (Jiménez and González 2012, 10)

For these reasons the Colombian Peace Process has been at the centre of the academic, judicial and political debate. This text will show the main topics of discussion subject to analysis.

Ahead of this impressive attention, 'comparative studies contrasting the implementation of the peace agreement with the FARC-EP and other cases worldwide are one of the least explored aspects of the Colombian armed conflict' (Fernández-Osorio 2019, 104). This gap in comparative studies goes beyond the analysis of the implementation.

Although two texts comparing the peace talks between Turkey and the Kurdistan Workers' Party (PKK) with Colombian negotiations (Özkan 2018; Dilek and Baysal, 2021), there are not many works thinking the Colombian Peace Process in comparison with other transitions that took place before the signing of the Rome Statute or without ratifying it.

Therefore, this Ph.D. research aims to compare Nepal, the Balkans and Colombia, to see how the unfolding of international commitments in terms of international criminal responsibility has impacted the ways of negotiating peace?

The Balkan transition is proposed because it took place at the beginning of the emergence of transitional justice as a concept; its unfolding was crucial for determining the extension of the notion. The Nepal transition is chosen because it took place recently —after the establishment of the ICC but without ratifying the Rome Statute— and it is a peace process with a relatively low interest in the academic community that opens a potential window to develop unexplored analysis.

A triangulation of the cases would contribute to the debates that arise in situations of politically negotiated transitions as there is a 'relatively widespread consensus that a legitimate transition from war to peace must be based on an appropriate balance between achieving peace and the ethical and legal imperatives of fulfilling victims' rights' (Uprimny, Sánchez and Sánchez 2014, 15).

With this in mind, this text is divided into five parts. The first one shows the literature about the compatibility of the Colombian Agreement with international obligations in terms of criminal responsibility; the second exposes the analysis regarding the role of the international community in the peace conversations and its subsequent implementation; the third presents the texts that have evaluated the implementation of the Final Peace Agreement; the fourth goes further in key concepts that will orient the comparison; and the last one exposes some conclusions.

1. The compatibility of the Colombian Agreement with International Standards.

The question that guides the works quoted in this part of the literature review does not apply only to the Colombian transition: 'How should the legitimate interest in punishing perpetrators be balanced against the desire for national reconciliation in a society recently torn by conflict?' (Méndez 2001, 25). In this matter, the primary definition of Transitional Justice is quite enlightening. According to the former Deputy Prosecutor of the ICC:

The concept of 'transitional justice' embraces a full range of processes that societies employ to deal with the legacy of past human rights abuses and to achieve accountability, justice, and reconciliation. To fulfil these aims, transitional justice systems commonly include four measures: criminal justice, mechanisms for the establishment of the truth, reparations programs, and guarantees of non-recurrence (Stewart 2018, 4).

The Colombian Agreement established all these measures through *the Integral System*. However, there were doubts regarding the criminal justice issue. The matter was of particular importance as Colombia ratified the Rome Statute in 2002[4] and in 2004 the ICC opened a preliminary examination based on the alleged commission of crimes against humanity and war crimes, in the framework of the armed conflict, whose perpetrators are among government forces, paramilitary, and rebel armed groups (OTP, 2012).

The Peace Conversations with FARC-EP had severe implications in the unfolding of the ICC's examination. Its former Deputy Prosecutor expressly noted that 'how a peace agreement affects national proceedings will have an impact on the Office's assessment of the admissibility before the ICC of cases arising out of the situation in Colombia' (Stewart 2015, 8).

Although there were open expressions of support, there were also concerns about tensions with the international standards, particularly regarding how to unfold the JEP in the national jurisdiction.

In their *Amicus Curiae*, both the former ICC Prosecutor Fatou Bensouda (2017), Human Rights Watch (2018), and the European Centre for Constitutional and Human Rights (ECCHR 2017) expressed their concerns because the Colombian Law created legal space for senior commanders to avoid criminal responsibility. Specifically, the legal principle defined at

[4] Colombia was in the radar of the ICC from 1998, when former president Andrés Pastrana signed the Rome Statute. 'Pastrana, who had initiated other peace talks with members of the FARC, believed that the ratification of the Statute could act as deterrent for guerrillas and promote a commitment to the peace process' (Aksenova 2018, 259-260).

the national level for *command responsibility* did not meet the international criteria because it is too restricted: On the one hand, it totally avoids the standards of *should have known* and, on the other, it adds a condition of *effective control* to determine if high officials are held to be responsible.

Because of these disagreements, the possibility of the ICC moving forward to a formal investigation was place of academic disclosure (Sánchez 2016; Urueña 2017; Torres, Ardila, and Suarez 2019).

Moreover, as Colombia is also part of the Inter-American System for the protection of Human Rights[5], there were concerns about the Agreement's compatibility with the Inter-American Convention on Human Rights (Acosta-López 2016). On this matter, there was a direct precedent when the Inter-American Court expressed the need to find a balance between justice and peace that did not lead to impunity in a previous transition to disarm paramilitary groups in Colombia (Uprimny and Saffon 2008, 182).

In that opportunity the system designed alternative penalties from five to eight years of imprisonment under the Justice and Peace Law of 2005. The issue of proportionality also enters into consideration as 'the Inter-American Court of Human Rights have provided guidelines for States to ensure that punishment is proportional to crimes and that lenient sentencing does not transform into a manner of impunity' (Seils 2015, 3). However, 'International practice is not especially relevant for this case. For Colombia the most important indication comes from the OTP and its apparent acceptance of the eight-year threshold' (Seils 2015, 15) established by the above-mentioned Law of Justice and Peace to disarm the paramilitary.

To deal with the component of justice the *Integral System* lies on the JEP. The Special Tribunal has a hybrid regime of sanctions that combines retributive and restorative measures. To move between both approaches, the JEP (2020) has the competence to establish three types of sanctions:

a) *Ordinary sanctions*, ranging from 15 to 20 years in prison, which will be imposed on those who were admitted under the competence of the JEP, but do not provide truth or acknowledge responsibility for the crimes for which they are being tried.

b) *Alternative sanctions*, from 5 to 8 years, which contemplate the deprivation of liberty of those who acknowledge truth and responsibility.

c) *Proper sanctions*, which will also have a duration of 5 to 8 years but do not include deprivation of liberty. In turn, they contemplate a restriction of liberty. This type of sanctions will be imposed on those who acknowledge

[5] On this matter, the Inter-American Commission on Human Rights (2021) published a compendium with the standards in terms of justice, truth, reparation and guarantees of no repetition.

truth, responsibility and perform Works, Labours, and Actions with Restorative-Reparative content (TOAR, Spanish Acronym).

By being at the heart of the sanctions, the TOAR are an essential issue in achieving the goals of the JEP. According to the guidelines published (JEP, 2020), they must have five elements:

- Effective participation of victims.
- Addressing the damages caused.
- Not harming the rights of victims.
- Contribution to the reconstruction of social ties or to a transformation of society that allows overcoming the conflict.
- Suitability to achieve the reintegration of the perpetrator into society.

The sanctions are thought for the maximum responsible of massive human rights violations. This prioritization is accepted under the terms of the ICC (Stewart, 2018) and seems to fulfil the regional standards as 'this system of selection would be found to be in compliance with the American Convention on Human Rights under the conventionality control test as practiced by the Inter-American Court' (Acosta-López 2016, 178). Moreover, 'prosecuting everyone involved in the conflict is estimated to require 114 years. The only feasible solution is therefore prioritization of cases and choosing the most representative or "symbolic cases"' (Aksenova 2018, 276).

Beyond the 'symbolic cases', the Tribunal established criteria (JEP 2018) to create macro-cases that show patterns of macro criminality and representativity of the general dynamics that were present during the whole armed conflict.

In addition to these technical matters, there were also two key measures taken to safeguard the legality of the Agreement on the international level (Rojas, 2018): The first one was declaring it a Special Agreement under the terms of common Article 3 of the Geneva Conventions of 1949; the second was the formal presentation of the Final Agreement to the UN Security Council.

So far, the forms of facing the component of criminal justice designed by the Agreement and the developments of the JEP have been understood by the ICC as huge efforts to investigate and prosecute Rome Statute crimes at the national level. Based on the idea of positive complementarity, a Cooperation Agreement (the first of its kind) was signed between the Colombian Government and the ICC in October 2021.

The Cooperation Agreement agreed to close the preliminary investigation that the Tribunal had to examine the Colombian situation from 2004

on the condition that Colombia preserves the legal institutions that were created to guarantee the transition to peace by means that ensure justice. Nevertheless, if the OTP considers that these institutions are not respected, there are chances of reopening the examination and advancing to the formal investigation.

The legal innovations of the Colombian Transition are giving significant contributions to the criminal justice criteria as 'the compatibility of the restorative sentences with international standards has never been examined in the past' (Levy, 2021). Up to date, they seem to be fulfilling the international principles of criminal responsibility. The former Deputy Prosecutor of the ICC expressed that, beyond the tensions mentioned, 'the approach Colombia has taken to ensure accountability is innovative, complex and ambitious, and it must be sustained' (Stewart 2018, 21). For such reasons, the JEP 'is on its way to fulfilling its enormous responsibility, not only of contributing to Colombia's transition to peace, but also of setting a historical precedent of institutionalized restorative justice to face the legacy of war' (Levy, 2021).

2. Role of the International Community in the Peace Conversations and its Subsequent Implementation

The role of the international community is a whole topic of reflection because it played a fundamental role in the unfolding of the peace conversations even before they officially started, during the preliminary confidential talks between the parties during 2011-2012. Although national ownership was a vital component of the negotiations:

> The support and interaction of the international community, and in particular from the countries in the region, was important throughout the whole process. The designation of special envoys, such as from the U.S. and EU, also indicated a strong international commitment to the process (Nylander, Sandberg, and Tvedt 2018, 8).

According to Herbolzheimer (2016), the peace conversations had external support but were driven directly by the parties; Four countries were asked to participate formally in the peace talks: Cuba and Norway as *guarantor countries*, and Venezuela and Chile *accompanying countries*. Among other things, the guarantor countries contributed to build trust, offered logistics, and helped to solve problems in moments of crisis. Moreover, the involvement of international actors included the participation of observers, such as the Organization of American States (OAS) and special envoys

from the EU, the UN, and experts from many regions that contributed with their knowledge of previous experiences.

As mentioned before, being part of the Rome Statute played an important role in unfolding the commitments regarding the justice component. Following the text of Brubaker that aimed to determine the involvement of the UN Security Council in the process, 'the ICC "was always at the background" during the talks' (Brubaker 2020, 56).

Also, the delegations maintained constant communication with the ICC. This is why the work of Aksenova that analyses the involvement of the ICC in Colombia affirms that 'the interaction between the ICC and Colombian domestic actors can thus be described as a "dialogical model"' (Aksenova 2018, 261) with an active engagement from both sides to construct common means[6].

The 'breathing on the neck' of the ICC contributed significantly to remove the possibility of absolute amnesties from the negotiation table. However, their involvement went beyond the negotiations and was present in the implementation phase.

In 2018, when the Agreement implementation was in its initial steps, Iván Duque won the presidential election. He came from a political sector that was in open opposition to the Peace Agreement and affirmed that it would suffer changes during his term (Ustyanowski, 2018). Those modifications were mainly directed to the JEP. By vetoing some articles of the Law that created the Tribunal, he delayed the establishment of the JEP for two years and jeopardized its implementation.

These reforms were understood as attacks, and it was a topic of academic discussion if it was time for the ICC to act (Ambos and Aboueldahab, 2019). On that matter, the Cooperation Agreement between the OTP and the Government of Colombia, mentioned in the previous section of this text, appeared as a way to commit the president to respect the agreements in general and the JEP in particular. It also reinforced the Tribunal:

> If, during the strict monitoring that the JEP will carry out of the commitments signed between the Colombian State and the Office of the Prosecutor of the International Criminal Court, it observes the disregard of any of them, it will immediately make use of a direct and effective channel of communication created by the said Agreement, in order to alert the Prosecutor to these serious facts and request, if necessary, the expeditious exercise of its full powers of international criminal prosecution. (JEP, 2021)

[6] As her work shows, one of the most significant proves of these relations of mutual communication were the letters sent directly to the Constitutional Court of Colombia. To see more on this it is possible to see Uprimny (2013).

Beyond the ICC, the text of Piccone analyses the tensions between international organizations and the attempts of President Duque to harm the Peace Process in a '"death by a thousand cuts" tactic' (Piccone 2019, 22). His work shows the calls from the UN Secretary-General António Guterres on the Government to give the JEP guarantees to full functioning with independence and autonomy. Also, he mentioned the interventions of the head of the UN High Commissioner for Human Rights mission in Colombia, reminding him of the historical responsibilities of Duque to fully implement the accord.

It is worth noting that international participation was agreed in La Habana by consensus. Regarding the implementation and verification, it was agreed a Mission of Verification of the UN Security Council[7]. On this matter, the analysis of Brubaker concludes that:

> This case helps demonstrate the role the Security Council can play as a 'protector of existing peace agreements', especially when political turnover puts an existing accord under threat. In this case the Council had to strike a delicate balance between protecting an agreement and respecting Colombia's sovereignty (2020, 53)

In the same direction, the Inter-American Commission on Human Rights 'calls on the State to step up its efforts to implement this Agreement, in order to ensure compliance with it and to continue to promote the consolidation of peace in Colombia' (IACHR 2020).

From the other side of the Atlantic Ocean, 'currently, the EU supports the implementation of the peace accord in the framework of the European Trust Fund for Peace' (Amaya-Panche 2021, 5). According to Ioannides:

> Since the signature of the Colombian peace agreement, the EU has redoubled its support for the implementation of the stipulations in the peace deal, by setting up the EU Trust Fund for peace in Colombia and appointing a special envoy to give visibility to and monitor the peacebuilding process (2019, 53).

The challenges for the implementation and the consequences of the identified lack of political will to fully implement the Peace Agreement will be explored in more detail in the next section. Still, an interesting conclusion to this point is that 'the trend in the implementation process would

[7] The Mission in Colombia was established on 25 January of 2016, with the specific goal of 'verifying the laying down of arms and, as port of the tripartite mechanism, a definitive bilateral ceasefire and cessation of hostilities following the signing of the peace accord' (Brubaker 2020, 57). However, its mandate was extended. As it was though to be a brief mission, the parties requested a special condition of not naming it with an acronym, something usual for longstanding missions.

be more precarious without the support [and pressure] of the international community' (Estrada 2021, 300).

3. The Implementation of the Agreement

Signing the Final Agreement closed one of the stages. Afterwards came the more significant challenge of implementing the commitments in what was initially called the post-conflict scenario. However, as previous experiences suggest that armed conflicts do not necessarily finish after the signing of agreements, even during the phase of conversation, 'these discussions have led some people to suggest the use of the term "post-agreement" instead' (Herbolzheimer 2016, 6).

The Colombian armed conflict is one of the oldest and most complex in the world. As the FARC-EP was the guerrilla with the most significant presence in the territory, their laying down of weapons represented a huge milestone in terms of peacebuilding. Nonetheless, it did not mean an effective transition to a peaceful order. Among the most relevant armed actors are still paramilitary groups, FARC dissidents (who did not avail themselves of the Agreement), and the National Liberation Army guerrilla.

The transformation of the armed conflict is a direct consequence of the 'lack of readiness on the part of State agencies to fill the security vacuum as FARC units demobilized in 2017' (Piccone 2019, 7). Other armed groups started new violent processes to win or consolidate control over the left territories.

Based on these circumstances, the International Committee of the Red Cross (2022) identified six internal armed conflicts, including confrontations between the State and guerrillas, the State and paramilitary forces, paramilitaries and guerrillas, and guerrillas and guerrillas. The control of drug trafficking corridors is one of their significant engines. Despite the complexities, it is argued that:

The current situation is not comparable to that of the FARC-EP before the peace process; today they are three independent groups that have been dismantled - like splinters of a large trunk - and so far, do not represent an insurgent project, nor a scenario of war as before the peace agreement. What is happening today are less intense, focused conflicts, with recurrent actions in 14 departments and 74 municipalities; before the peace agreement, in 2011 the Ombudsman's Office reported a sustained presence in 31 departments and 249 municipalities (Indepaz 2021, 37)

Linked with the second section of this text, it is interesting to acknowledge the official establishment of the Barometer Initiative of the KROC Institute for International Peace Studies of the University of Notre Damme to formally monitor and verify the implementation of the Peace Agreement[8] through the Peace Accord Matrix (PAM) Program[9]. They also participated in the conversation process and their annual reports are of enormous relevance. Their fifth report remarks that five years after the signing of the Final Agreement, it is possible to discern three patterns.

First, the commitments that were urgent to consolidate the end of the conflict with FARC-EP —which means the abandonment of weapons and the displacement of former combatants from their zones of domain— 'were completed rapidly, without prejudice to some issues regarding security guarantees that are still pending' (KROC 2021, 8).

Second, it is possible to see that commitments that aimed to tackle the problem of illicit drugs and the *Integral System* that was designed to attend the victims' rights [10] are 'advancing and, if they continue at the same pace, should be completed on schedule' (KROC 2021, 8). However, there are difficulties with the rhythm of the Comprehensive National Programme for the Substitution of Illicitly Crops that existed before the Agreement but is linked with these goals.

Third, commitments in terms of the Integral Rural Reform[11] 'reported minimal progress at the current stage of implementation' (KROC 2021, 8). The same situation applies for the State pledges to guarantee an opening of the political participation.

From a general frame, an evaluation of the implementation shows that 'levels of violence in Colombia have decreased since the peace agreement was signed. However, violence against social leaders and demobilized ex-combatants and communities has increased significantly' (Amaya-Panche 2021, 1).

The security of the former guerrilleros is a matter of enormous gravity. According to the United Nations Verification Mission in Colombia, updated to March 28th of 2022, 'since the signing of the Final Agreement, a total of 315 former combatants (10 women) have been killed. In addition, 89 former combatants (6 women) have been victims of attempted homicide, while 27 are deemed as missing' (2022, 9). Moreover, there have been

[8] Section 6.3.2. of the Final Agreement.
[9] This Matrix was used for the work of Fernández-Osorio (2019), mentioned above.
[10] Points 4 and 5 of the Final Agreement.
[11] That was designed to face one of the main causes of the armed conflicts: the concentration of land and the inequality of the countryside

serious threats to the productive initiatives of the signers of peace, that are increasing the difficulties for their process of reintegration into society.

The systematic murdering of ex-guerrilleros in process of reintegration and their security threats were recognized by the Constitutional Court of Colombia in January of 2022[12], when it declared the State of Unconstitutional Things and ordered the State to increase the low level of implementation seen in the components of the Final Agreement related to guarantee the security of the signers of peace, their families and those who are members of the new political party created by former FARC-EP.

According to Currea-Lugo, 'the central problem of implementation is that its outcome depends, for many reasons, on touching part of the power structure and transform Colombian political and institutional culture' (2021, 115). Moreover, the difficulties to fulfil the commitments are also linked with financial challenges. The work of Rodríguez and Martínez, argues that 'the fiscal structure of the Colombian State was not adapted to the needs arising from the Final Peace Agreement' (2022, 13).

Also, there are serious challenges that must be clarified in terms of the justice component, particularly to clarify the victims' participation in the definition of the restorative sanctions that the JEP must establish. So far, the guidelines of the Tribunal do not explain in detail the link between the restorative initiatives, the damaged caused and the victims that are consulted in the process of determining the sanctions. Because of these ambiguities 'it may be the case that *respondents*[13] carry out reparation activities in places where their victims do not reside, or in regions where they have not committed any acts of victimisation' (Sandoval et al 2021, 24).

In addition to these queries, the work of Vargas and others (2021) shows claims from victims that have participated in the formulation of the JEP's sanctions. As many of them are still in conditions of economic vulnerability[14], the issue of reparations to solve their material situation appears as a need of victims that might not be met; because the Tribunal prioritizises collective reparations over individual.

Furtheremore, although many victims value their participation in the public audiences of the JEP, there are concerns about the methodology used to develop the versions that perpetrators offer: Some victims con-

[12] Sentence SU020-22

[13] Translation of the Spanish word 'comparecientes', a soft way found to name the perpetrators.

[14] Which in many cases was an structural factor to suffer the victimizing event.

sider that court representatives have limited possibilities to deeply investigate matters that are interesting for them and their communities, and above all 'they observe that *respondents* do not contribute sufficiently to the truth in these spaces' (Vargas et al 2021, 5).

Even if the Colombian Agreement was globally applauded by innovations related to the incorporation of a gender focus, 'achievements in terms of gender continue to be marginal in respect to the peace objectives and the enactment of victims' rights' (Gómez and Montealegre 2021, 457). This is a situation shared with the ethnic approach.

4. Key Concepts to Guide the Comparison

According to Matanock and García-Sánchez (2017), even if it has particularities, the Colombian conflict belong to the most common type of civil war: An asymmetric conflict; for them its unfolding reflects a common pattern of current wars in terms of the different levels of confrontation seen. 'While a complex and important case in its own right, Colombia is also very similar to other civil conflicts, despite having one of the longest-running insurgencies in the world' (Matanock and García-Sánchez 2017, 153).

For such circumstances the Colombian peace process with FARC-EP can be object of comparative analysis. This section offers categories from the Peace and Conflict Studies pointed out by Jarstad (2008). Her analysis affirms that every transition from war to democracy must deal with at least four dilemmas: Horizontal, vertical, systemic, and temporal.

The *Horizontal dilemma* refers to the tension that appear by opening the democratic space to armed groups that are negotiating peace and leaving weapons under the condition of being able to participate in the Government. Opening the democratic space to parties that used violence as a way of doing politics 'may have negative effects on democratization. Such inclusion can be seen as a reward for violence and thereby contradict the democratic principle of non-violence' (Jarstad 2008, 22).

The *Vertical dilemma* 'entails the difficult choice between efficacy and legitimacy. It pertains the relation between elite and mass politics' (Jarstad 2008, 23). This dilemma focuses on the mechanisms of communication concerning representatives of the parties in the negotiation table and the queries and perceptions of persons in the grassroots.

The *Temporal dilemma* 'regards trade-offs concerning short-term versus long-term effects on democratization and peacebuilding' (Jarstad 2008, 25), it addresses the measures that should be taken to guarantee a lasting

peace and the tensions that appear with decisions needed in the present to agreed ceasefires or actually be able to negotiate.

Finally, the *Systemic dilemma* considers the issue of ownership and deals with the tensions that might arise between local engagement and international control of participation in the peacebuilding process.

Each dilemma serves as a variable of analysis to that could guide the proposed comparison. The dilemmas offer a framework to study how the separate cases dealt with each specific part of the transition and get to conclusions by analysing their differences and similarities.

Conclusions

The Colombian peace process with FARC-EP and the transitional justice established to guarantee the transition of the former guerrilla to play under the rules of democracy, was an object of study for many analysts. Due to all its complexities and innovations, Christine Bell affirmed that independently of its implementation 'reaching a final accord as Colombia did, whatever happened thereafter, remains a significant achievement' (Bell 2016, 166).

There is a vast bibliography that goes from policy briefs and human rights reports to academic analysis. The Colombian transition was centre of legal, political and scholar debates that paid attention to three main topics: The compatibility of the Final Agreement with the established standards in terms of individual criminal responsibility; the role of the international community in the peace process —during the phase of negotiations and afterwards in the post-agreement stage—, and the evaluation and monitoring of the implementation of the commitments achieved.

Despite the difficulties to put into practice what was agreed in La Habana, by the way found to tackle the challenges regarding the component of criminal justice, 'Colombia has broken the false dichotomy between peace and justice. There is no peace without human rights and there are no human rights without peace' (Herbolzheimer 2016, 5).

Nevertheless, the field of comparative studies is full of potentialities and unexplored paths. Compare the Colombian transition with the ones of Nepal and the Balkans would give lights on the way transitional justice has evolved from its emergence as a concept, to a global manner of understanding transitions in a way that satisfy the international obligations of States in terms of truth, justice, reparation and guarantees of no repetition.

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Religion in Society: New Paradigm and New Challenges

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***Abstract*:** In the early decades of the XX century, religion, as a social fact, was considered a dying agent. Social scientists had settled for the upcoming death of religion and the gradual secularization of society and individual minds. In the late decades of the same century, though, a radical shift shook that paradigm: field observation showed religion was still present within society and individual minds, it was only hiding behind new patterns and principles that social sciences' mindset of the time could not grasp:. It was becoming more individual an experience, less rigid, more spiritual, and relegating religious institutions and prominent religious figures to a very limited and narrow dimension of social life. In short: it is individual religious experience, as a lived reality, that mutated. This mutation drove with it new issues and challenges for social scientists to explore—especially lawyers, sociologists and political scientists—and warrants new interdisciplinary approaches for scholarship in the domain.

Keywords: *Religion*, *Spirituality*, *Society*, *Pluralism*, *Religious Freedom*, *Social Sciences*.

Introduction

Religion has always been at the centre of social dynamics. From the incipient beginnings of human societies to present times, it has been a constant and structural factor. The most powerful of Universe's eroding forces—that is, Time—has carried religions along the History of Mankind, driving them through an ascending cycle of emergence, prosperity, acme, before subjecting them to decline and finally disappearance. It carried religions through life and death, from Babylon and before to modern times,

but has never been able to erase religion as a social fact or substitute something else to it.

Religion is indeed deeply connected to society. In fact, it is connected to the very living experience of individuals. If religions change and replace each other through the passing of time, religion as a social fact seems to be a constant in the existence. Yet, as intuitive as it may be, it remains quite a complex reality that bears many definitions. According to E. Durkheim, religion is a common system of beliefs and practices which unify all those who share them into a community (Durkheim 1991, 108-109). According to R. Otto—a theologian—it is rather the complex result to which yields the human disposition or inclination towards knowing the sacred (Otto 1949, 230-231). F. Nietzsche defines it as the representation of 'another-world (behind, below, above)' which gives its meaning to the material world (Nietzsche 1974, 196). And according to psychologist W. James, it is, in turn, the set of feelings, acts, and experiences of individuals in relation to what they consider the divine (James 1985, p. 34).

Studying religion, thus, is a complex endeavor that has animated and fascinated scholars all over history. In addition, due to its complexity as a reality, religion has taken many forms and aspects, had many ways of manifesting in society and was therefore at the heart of social dynamics. Scholars tend to agree that religion was indeed central in the life of individuals until the second half of the XXI century. From then, academics and social scientists have put into light a decrease of religiosity, at both the individual and social level. They advocated that religion was gradually evacuating social spaces, was progressively disappearing from individual minds. A gradual process they named 'secularization'.

But recently, a shift occurred in that paradigm, and a total change of perspective followed. P. Berger for example, one of the leading scholars of religion and secularization, has even gone as far as stating that the theory of secularization was 'false' (Berger 1999, p. 2). Religion, therefore, regained its status of non-movable social force, but not following the same patterns.

Analyzing existing work on religion—in the three main social sciences dwelling on the subject, that is, law, sociology and political sciences—tends indeed to show new patterns in today's religiosity. More precisely, this contribution will focus on prominent works on religion issued from the end of the XX century to present times, as conducted in the three aforementioned disciplines. But while the works considered date back to the last decades of the XX century, a greater focus will be operated on those carried out during the 2010 decade. Focusing on the most recent

works would indeed bring forth the most faithful and up to date picture of how religion integrates society in present times. And a crossed analysis of all three disciplines adds a further dimension to the picture drawn by each discipline individually considered. Decentralizing and allying each one'sone's views allows to, it allows to better grasp the issues at stake and materialize new dimensions that fail to be foreseen by each discipline individually considered.

Religious scholarship describes indeed a new configuration of religion's presence in society. It brings forth new patterns in religion's presence, in the way religion interacts with society, which contrasts with traditional religiosity as observed during the previous centuries. For the change is that of religiosity, that of the very religious experience taking place at the individual level, which became something of a spiritual nature. A movement which appears to be tridimensional: spirituality being its essence (1), individualism its driver (2), and the fragmentation of the religious landscapes in domestic realms its immediate impact on society (3).

Such a reconfiguration of the presence of religion in society materializes new challenges for the latter, and opens new research areas for the three disciplines involved in religious scholarship.

1. Spirituality as the New Religiosity

In the past centuries, especially before the Enlightenment that has set the first and perhaps the most powerful movement of distanciation from religion, religious beliefs were the ultimate reference for almost every individual. The grasp of religions and clerics upon individuals' minds was powerful. The impact of their doctrines was quite high. And everyone was subject to them, from the highest layers of society to their bottom ones: the farmer and the Sovereign were both, from their distinct positions, equally accountable before transcendency.

This grasp started eroding progressively, though, under the Enlightenment's dynamic of 'rationalisation', which came later to couple with Modernity's dynamics of 'socialization' and 'differentiation' that narrowed the 'significance' (Sandberg 2014, 63) of religion in all aspects of social life.

More precisely, 'rationalization', according to Russel Sandberg, is the process by which Reason has progressively taken the primacy as the source of fixing and defining the objects of believing (Sandberg 2014, 63). It has therefore caused the 'weakening plausibility of religious beliefs and (…) their replacement "by considerations of objective performance and practical ex-

pedience"' (Ibid.). In other words, it is the spread of Reason, throughout the social ambit, as the core engine for intellectual thought, which narrowed first the scope of religion as a belief provider[1]. The later development of science and technology (Sandberg 2014, 63) only catalyzed this process, fertilizing the field for an increasing specialization of meaning, thus differentiating both the social institutions providing meaning and their roles. All of which reduced even more the global social ambit of religion, both as a doctrine and an institution[2].

In addition, these two processes were taking place in a particular context of a growing national diversity that has a direct impact on them. First, the reference jurisdiction of social life has evolved from the deep localities to nation States. For 'life has come to be lived less in the context of a close-knit community and more through the context of society as a whole', (Sandberg, 2014, 66) any issue of a social relevance is dealt with at the wider level of the nation State. The immediate impact of this 'widening of jurisdiction' is that religious institutions, which have historically drawn their strength from the local communities, have been gradually losing their capacity to intervene in the latter (Ibid.). In other words, by affecting the source of the belief itself and redefining the global context in which this redefinition takes place, a greater distance has taken way between religious institutions and society—thus narrowing the scope of the meaning

[1] Seen from this angle, the roots of the process go well beyond the advent and rise of technology, as Russel Sandberg argues (Sandberg 2014, 68). With its focus on Reason as the sole legitimate source for human action, the Enlightenment was the first movement to set this rationalization on march. The movement was even the first agent to cause religion to lose its grip on society, to cause a heavy and public distanciation from religion and, above everything, the Church. For, indeed, before proceeding to any political act or enacting bills and laws depriving Churches and religious institutions from some of what they considered as their rights—such as to have a state status, to perceive state taxes, to be granted privileges of all sorts in the state system—, it is necessary to have a context for these acts to be carried out, for these bills and laws to be implemented and executed. More simply put: in order for something to be performed, it has first to be thought of as feasible. This seems precisely to be the effect that Enlightenment has had on religion and the Church. It affirmed, through its emphasis on Reason, the possibility—in fact the need—to take distance from religion, to refuse membership in any religion, and even to criticize religions, clergymen, religious concepts and institutions. It set the mental framework for this distanciation, and laid the philosophical principles for it to be achieved. Hence it seems to be, historically, the first step that started the decrease of the religious grasp on societies. In fact, it is even the first spark of the transformation of the religious presence in society, the process that has long been referred to 'as secularization'.

[2] A process known as 'differentiation': the 'process by which specialist institutions develop, which take on functions which were previously carried out by one institution. Rather than one specific institution discharging a plethora of functions, a plethora of institutions now discharge specific functions' (*see* Sandberg 2014, p. 64).

the former provide, and weakening their capacity to deliver them to society. society.

Alongside these social dynamics, there is also an individual stance that strengthens the distanciation. With today's growing migratory streams, believers have to constantly adapt to new social contexts that challenge their acquired beliefs and visions of the world, while, at the same time, religions have to adapt their concepts to better fit said contexts and their novelties (Giordan & Pace 2012, 1-12, 15-29). As Giuseppe Giordan argues, in 'a more globalized and pluralistic world, from the confrontation with other beliefs and other modalities of believing, the way for one to relate to one's proper beliefs and religious practice changes' [munofficial translation] (Giordan 2004, para. 29). The result being that beliefs and practices be constantly subject to discussion, re-discussion, redefinition, and the way to refer to the sacred constantly in movement (ibid.). In fact, it is the very link termed 'belief' that is in a constant movement of redefinition, and from both ends: that of the individual, who embraces the belief and participates to elaborating it, and that of religious institutions that elaborate and communicate it[3] (Ibid., para. 30).

All these macro-dynamics seem to have at least two observable consequences at the micro-level—that of the individual. First, narrowing the scope of religious beliefs and institutions drives with it resorting to other sources for constructing beliefs. The latter seem indeed to be a human necessity, if not a human fatality[4]. And, therefore, beleiving is not necessarily limited to adopting beliefs of a religious nature. From an existantial perspective, to have opinions on society and its dynamics, embracing principles of action and ethics, believing in the concepts that organize or should organize the society and the individual existence for the better seems to

[3] For a concrete example of a religion adapting to new ideas, *see* McBride *et al.* 2021: in which the authors study health practices in a population of Seventh-day Adventists that go beyond the traditional teachings of the Church. The same comments could be made about the Catholic Church's Vatican II council, the Reformist School in Islamic jurisprudence…

[4] Leaving aside the psychological constructs and findings of neurosciences which explain that Reality is a set of facts that are perceived by individuals through their senses and cognition, before being interpreted by their intellectual categories, thus turning it, as a lived experience, into something more of an elaboration than an objective Reality; leaving aside the philosophical theories and contentions about Truth, from Arthur Schopenhauer's *The World as Will and Representation* to Jean Baudrillard's concept of hyperreality; leaving aside these considerations to focus exclusively on 'living' as an experience, it appears that knowledge, on both levels of Science and individual existence, is limited by human capacities, perceptions, Reason and rationality. Beyond what can be known and experienced, at the individual and the social dimensions, a field of unknown seems to persist. That field, that—scientific—knowledge has not yet reached, is subject to individual beliefs however they be elaborated. It is this wide meaning that the term 'belief' holds in this context.

be a human necessity. To take as trivial an example as it could be, to have democracy as a political ideal stems from the belief that democratic regimes are better or do better in organizing society. In other words, for such principles as peace, equality and freedom are believed to supersede those principles as security and ethnic purity, political regimes such as democracy are believed to be better regimes than despotism and theocracy—or rather the worst of all regimes, following W. Churchill's word, excepting all the others.

Henceforth, in order to build opinions, convictions, and beliefs, individuals tend to resort to a diverse set of sources, of which religion is only one. Science, for example, seems to be one of the utmost sources thereof. Consequently, what this means is that individuals take distance with religious beliefs and institutions, and most primarily with the rigid concepts that appear not to be completely en phase with scientific findings. Once again, it does not mean that individuals do not adhere to religious beliefs anymore, that they reject them, or even that the latter lose completely their significance for individual life (Possamai 2012, 91). It rather means that such religious beliefs are relocated to a more specific area, where they fulfill a more specific need[5].

In parallel, such relocation paves the way for the individual composition of the beliefs to embrace and the practices to fulfill them (Giordan 2006, 81-82), all of which transforms the 'religious' beliefs into a composite of diverse beliefs extracted from diverse sources and directed towards an individually diverse set of objectives grouped under the label of 'self-realization' (Barker 2008, 31). In other words, the beliefs come to be composed by the individuals on a sort of ad hoc basis, meaning on a basis that suits their individual characteristics. They seem thus to be gravitating around the individuals: they are elaborated by them for themselves, in order to pursue their own utmost objective of self-realization (as they intend it themselves)[6]. Consequently, the link between the beliefs and the individuals embracing them also changes in its nature. It moves from being purely religious to something more of a spiritual nature. To be said shortly, the relocation of religious beliefs has growingly lead individuals to elaborate, on an individual basis, the beliefs and practices organizing their life, whose utmost objective gradually moved from Salvation to self-realization. That

[5] It is in this sense that Russel Sandberg intends the loss of '*significance*' of religion (Sandberg 2014, 63).

[6] As E. Barker argues, modern individualism has intruded even the individual religiosity, causing its absorption by the 'ultra-modern quest for self-realization (…) which has overrun common notions about the autonomy of the subject' (Barker 2008, 31).

is why current sociological observations bring forth a change of nature in the link between the belief and the individual: the movement from strict religiosity to spirituality.

Spirituality and religion are two intertwined concepts. They share common features, some patterns, and convey, in many cases, the same imaginary. They may even sound identical for whoever does not delve into their deeper meanings, and the reality they entail. The differences in between the two concepts are indeed those of nuances. But these nuances, once put forward, materialize the structural differences they embody at their very heart.

'Religion', despite the numerous definitions it was historically endowed with[7], bears in its heart a ritualistic dimension, a formalized set of beliefs, and even an institutional affiliation in certain cases (Selvam 2013, 133). It seems indeed that all world religions share these features, despite differences in their doctrines and practices. 'Spirituality', on the other hand, is rather related to 'a search for meaning, for unity, for connectedness, for transcendence, and for the highest of human potential' (Ibid.). It bears within itself an emotional dimension connecting the beliefs and the believer as a being, that often translates into concrete practices.

In other words, spirituality is a tridimensional concept: it is, at the same time, the 'exceeding meanings and senses produced by individuals in the socio-religious environment' (Giordan & Swatos 2012, 24) and the mental stance of commitment to the latter that translates into—more or less specific—practices in daily life. More precisely, it is the state of mind that commits to a belief system and translates it—or abides by it—in the acts of daily life. Being so, it can entail a ritualistic dimension as religions do, and the belief system by which it is structured can be more or less formalized as the belief systems and doctrines of a religious nature appear to be. The major difference with religion, though, lies in the absence of institutional affiliation, the non-systematic character of the rituals—if its practice can be conceived as such—, and the looseness[8] of the beliefs upon which it rests. In other words, whereas religion rests on an official doctrine elaborated by a religious structure putting forward rituals for believers to go by, spiritual-

[7] *See supra*, Introduction.

[8] The spiritual beliefs, as it has been described, are the elaboration of the individuals. They are relevant only for the individuals embracing them, that is, to put it simply, they do not pretend to set any holistic and absolute truths about existence, life, and death. Therefore they appear to be less rigid than official doctrines of religious institutions or dogmas and fundamental beliefs and principles upon which religion rest, which are by definition universal, holistic and absolute.

ity rests on a set of beliefs elaborated by the individuals themselves and put in practice—if so—as they view it suitable themselves.

Spirituality, therefore, is less rigid than religion. At the heart of it lie the individual freedom to elaborating beliefs and practices, and the freedom to follow them independently (Giordan 2009, 229, 231). It is detached from any organization or institution: the individuals who embrace it are its sole centers of gravity. They are both the ones who elaborate it and the ones who act by it. Unlike religion, spirituality has the individual as its alpha and its omega.

'Spiritualization', etymologically, refers to a process of transformation into something of a spiritual nature. The term describes therefore the transformation of the religious experience—religiosity—into one of a spiritual nature. It is the phenomenon by which there is a shift in religiosity, which moves it towards a greater detachment from the settled religious institutions, their doctrines and dogmas and conceptualizations of the world. It is a movement by which individuals cease to belong to exclusively one established religion, following its proper doctrine exclusively, to rather embrace beliefs and practices they elaborate themselves. Of course, said elaboration can be—largely or not, mainly or not, partially or sporadically—carried out using the settled or traditional religious doctrines such as those of the Catholic Apostolic Roman Church for example. In that case, however, said doctrines do not have a monopoly over the mind of the believer; the latter builds their beliefs using any doctrine that matches their prior beliefs, line of thought, life objectives. And, therefore, said elaboration can include any belief source—the doctrines of settled religious institutions, those of traditional religions, those of other sources such such as science, other religions, one's own lived experiences… (Possamai 2012, 91). The beliefs elaborated are of a religious nature for the believer who embraces them, in that they fulfill the same parts as those beliefs and doctrines produced by settled or traditional religions. Only, these new beliefs proceed from different sources and are composed of different materials that diversify their content at the very individual level.

One example that makes this abstract transformational process quite concrete may be that of yoga and meditation. Originally religious practices amounting to Asian religions, such as Buddhism and Hinduism, these practices have spread all over world societies and cultures and have been embraced by a wide variety of individuals (Giordan 2009, 233)[9]. Because

[9] The author argues that the practice of yoga has been developing even in such a context as a '*catholic monopoly*'. As A. Amarasingam explains, even figures such as 'Sam Harris—a hard

spirituality, at the intellectual level, is a 'modality of referring to the sacred that is legitimized no longer by obedience to the external authority of a religious institution, but rather the subject himself/herself, by the free expression of his/her creativity' (Giordan 2009, 231), the very process at work seems to be that of enriching one's beliefs and visions of the world—be them of a religious nature—with other ideas and experiences—including those emanating from other religions.

In conclusion, the dynamics of religious social change, the reconfiguration of religious institutions' social spaces, and the increase of Modernity's and Post-Modernity's dynamics seem to have increasingly put individuals in that stance of facing reality individually, and then set their choices for living it individually. As P. Berger states, 'modernization is a movement from fate to choice, from a world of iron necessity to one of dizzying possibilities' (Berger 1992, 121). This individualization of the individual relationship with religion and religious beliefs seems to have driven with it an individualization of the very belief systems, whose elaboration come to follow complex approaches allying ideas and intellection with the concrete daily experience and its emotional and bodily dimensions. A process that yields in a 'religiosité à la carte' (Hervieu-Léger 1993), in which the ultimate aim is no longer the Salvation of the being but its realization.

2. Religiosity *à la Carte*

As described supra, spirituality gravitates around the individual. The latter is its centre of gravity, its beginning and its end simultaneously, since individuals are able to choose the beliefs that make up their belief systems and then the practices in which the latter translate. As W. James states in his Varieties of Religious Experience, religion is the set of feelings, acts, and experiences of individuals in relation to what they consider the divine (James 1985, 34). Spirituality is therefore the expression of individualism in relation to the religious experience. In that, it seems to be the expression of the same dynamic of individualization transcending contemporary societies as they move from traditional to modern and post-modern settings[10].

liner, and one of the so-called four horsemen of the New Atheism—has come out in defense of the positive aspects and usefulness of meditation as well' (Amarasingam 2010, p. 98).

[10] Structured by Progress, Reason, Science, and then individuality, the processes leading to modernity and postmodernity yield to the emergence, as N. Aubert terms it, of an '*individuals free from any restriction*' [unofficial translation] (Aubert 2006, 14-16; Tapia 2012, 15-18). A process that P. Berger describes as '*a great liberation*' (Berger 1992, 68).

Also, it seems to somewhat contradict E. Durkheim's assertion that the religious experience is essentially social and collective, whose purpose is to cause, maintain, or reshape the mental settings of the group (Durkheim 1991, 52-53) it ultimately unify into a moral community named 'Church' (Ibid., 108-109).

The elaboration of belief being individualized, the sources for building beliefs being sparse and diversified, the process of building one's own belief system appears, for the external observer, as a sort of personal composition. First, indeed, the redefinition of the social spaces eschewed to religious institutions, along with the spread of knowledge and the most diverse religious ideas around the world, has put all scientific knowledge and all the heritage of historical religious traditions 'at the disposal of individuals, who come to use it through the logic of "do for you" or that of the bricolage' [unofficial translation] (Giordan 2006, 81-82). All the process is therefore subject to the sensitivities of the individuals, to their intellectual and emotional affinities. In other words, individuals come to embrace whatever belief their cognition, sensation and intellection allows for, without further control than that of their consciousness—meaning 'the rules considered to be appropriate by society' [unoficial translation] (Ibid.).

Some traditional religions have been subject, in recent history, to some adjustments due to the new cultural contexts in which they came to evolve. Buddhism, for instance, has been subject to a 'westernization' process when entering western societies (Possamai 2009, 133-134). The same can be said of Islam, which, as a decentralized religion[11], has seen a growth in its Reformist school of thought seeking to reinterpret Islamic sources in the light of the cultural and post-modern settings of the West. Within Christianity, there seems to be a growing tendency, especially since Vatican II council, of newly created Christian churches based on the idea of living religion in a different and more suited way to the post-modern era, sometimes even making adjustments to the existing Christian doctrines (Possamai 2009, 148-150)[12].

The important element with this evolution in traditional religions, as A. Possamai puts it, is the fact that it is nowadays the individual that chooses a tradition and adapts it to their personal needs rather than a religious

[11] Indeed, at least in its Sunni branch, Islam does not have any equivalent for Christian churches. It is an *ortho-praxis* that relies on the individual application of principles and commandments as laid in the holy texts and interpreted by scholars.

[12] The author qualifies these churches who seek to somewhat re-elaborate the existing doctrines as the 'Post-Evangelical Emergents': churches, says the author, 'where both methodology and theology, form and content, have been adapted to today's concerns' (Possamai 2009, 148-150).

institution that imposes itself on them (Ibid., 134). To further illustrate this dynamic, roughly and briefly, it can be said that the Christian Church has evolved from trying Galileo Galilei to enacting the final acts of Vatican II, that paved the way for new churches and individuals to compose and recompose elements of doctrine and practice by themselves and for themselves[13].

Another example of this global tendency, this time outside the sphere of traditional religions, is that of the hyperreal religions (Possamai 2012). As defined by A. Possamai, a hyperreal religion is 'a simulacrum of a religion created out of, or in symbiosis with, commodified popular culture which provides inspiration at a metaphorical level and/or is a source of belief for everyday life' (Ibid., p. 20). In other words, hyperreal religions are religions whose belief systems are elaborated out of cultural popular products such as literature and cinema productions. For instance, two of the major cinematographic successes of the late XX and early years of the XXI century, The Matrix and Star Wars, serve as the primary material for such religions. Their discourse about the essence of existence, their philosophical propositions, and the ideas they develop about 'living' as an experience, are the basis for two newly emerged religions: Matrixism and Jediism (Ibid., 111-198, 165-184). And the same can be said of J. R. R. Tolkien's universe, which comprises and goes well beyond what may be his major success—The Lord of the Rings—; of Dan Brown's The Da Vinci Code, J. K. Rowling's Harry Potter… (Possamai 2012).

Eventually, to take an example outside the religious sphere stricto sensu, the movement of New Atheism, which rejects all forms of religion whatever they be, is also an illustration of the spiritualization and individualization of belief. Despite rejecting all forms of religion, indeed, it nevertheless advocates for moral settings and ethical behavior, considering Science as the unique material for elaborating the latter (Harris 2010). Furthermore, it is also endowed with rituals and some practices of a spiritual or esoteric character (Amarasingam 2010, 90-91): its followers tend to celebrate Darwin day as Christians celebrate Christmas (Ibid., 96), practice of mindfulness and meditation is highly recommended (Ibid., 98), etc. All of which

[13] The tendency in itself appears to be taking place in all religions, and in the more varied sociocultural contexts: it also takes place within such a decentralized religion as Islam, in societies where religion is a strong social factor. (Van Nieuwkerk 2021). In her study on unveiling Egyptian women, K. Van Nieuwkerk argues that there is a tendency in veiled women population to develop an individual, personal notion of spirituality which leads them to conceive that the veil keeps a distance between themselves and God, father causing them to unveil—against societal judgement, against peer pressure, and against an official religious discourse (Van Nieuwkerk 2021, p. 14).

materialize a certain way of living, deeply connected to a (scientific) belief system that translates into ethics, spiritual practices and moral behavior. Otherwise put, New Atheism, as a movement, looks like a scientific — anti-religious — spirituality[14].

All the tendencies described, from traditional religions to newly created ones, thus convey, and are structured by, a consistent system of ideas regarding life, death, the living experience and how to relate to all these in the practical meaning of the term. Only, these systems of belief and the practices they entail appear to be more individualized, and more of a spiritual nature. It has to be added also, as the above examples show, that neither of the individualization nor the spiritualization of beliefs do mean isolation of believers. That is, that each person constructs their belief system independently of any other does not preclude from sharing it, or some of its aspects, with other individuals who embrace the same kind of constructs or conceptions[15]. In fact, building one's own belief system does not prevent groups and communities from setting-up. The above examples tend to show quite the reverse, for the spread of information and dialogue between people sharing some beliefs has been made more efficient by new technologies (Possamai 2012, 199).

Despite the cultural, social, political and technological differences parting the world into very diverse societies, the tendency of spiritualization by individualization of beliefs seems to be a constant. In fact, the differences that could be observed, from this point of view, are differences of degrees, which depend on the state of the society considered. It seems, indeed, that the societies which are subject to modernity and post-modernity are the ones in which the degree of spiritualization of religion is the highest (Possamai 2009, 151-152). In other words, the more post-modern a society is, the more spiritualized religiosity appears to be. The results being the multiplication of religions, of beliefs, of religious practices, of claims regarding the latter; the multiplication of New Religious Movements, of political is-

[14] When referring to the New Atheism 'in his posthumously published book, *Religion Without God*, Ronald Dworkin argues that there should be a new category which he calls the "religious atheists"' (Amarasingam 2010, 2).

[15] In the example of hyperreal religions, D. Kirby argues that '[t]he relationship between popular culture artefacts and idiosyncratic alternative religiosity is most emphatically not a unidirectional flow, but rather a field of engagement where audiences are also performers, viewers become authors, and the spirit seeker may simultaneously be an artistic creator. Thirdly, in some cases the mechanism of engagement with popular culture can be in itself a spiritual act'. In other words, at the same time as they share some beliefs, they contribute individually to each other with some elaborations of their own. A 'bricolage', as the author says, that strengthens and enriches their core beliefs, their belief systems, and the community ties linking them (Possamai 2012, 55).

sues regarding their organization and practices, of legal hurdles regarding their regulation and the configuration to endow religious freedom. In short, the blanket image of societies evolves towards more diversity. Their religious landscape is more colorful.

3. The Religious *Mosaïque*

As stated earlier, the flow of transportation and communication, which carries with it information and ideas, is continuously accelerating with the passing of time. The world is more connected, more interconnected, and more reachable for both people and ideas. Henceforth, as much as individuals do, ideas, concepts, cultures, religions and ways of life travel—in both ways. They are imported, meaning embraced by people living in the geographical areas where they did not exist or very little did; they are exported, either by migrating people or through the information ties linking the most diverse parts of the world (Liogier 2020, 557-559, 562-563).

Through the same canals as for ideas and cultures and ways of life, religions travel around the world and come to be increasingly present in the parts where they would be only marginal[16]. The presence of traditional religions—such as Islam, different branches of Christianity, and Hinduism and Confucianism—in parts of the world where they once did not exist or very little existed is increasing. The global religious landscape, within societies, sees its part of traditional religions augmenting with time.

In addition to this grow in traditional religions, new religious movements come to existence. As explained supra, the spiritualization of religious belief leads to an individualization of the religious experience but not to isolating the believers. Building a belief system by one's own, selecting its composing elements in terms of ideas and practices, does not mean keeping it for one's self. All the contrary, studies tend to show that people share their belief systems, especially when the core driver of the latter is a product of popular culture (Possamai 2012, 55). This natural human tendency towards socialization ends up building communities of belief, of practices; it ends up constructing groups of a spiritual—or religious

[16] In Latin America, the process is qualified as '*religious pluralization from within*', in so far as it appears to be more detached from migration than in Europe and North America (Morello *et al.* 2017, 318). The same pluralization is observed in post-communist Prague (Avlíček and Klingorová 2017, 806-808), in North America (Beaman 2017, 260); Australia seems to be subject to an important rise in nones and other religions throughout the century (Bouma and Halafoff 2017, 131-133), etc. The dynamics of the city of Melbourne, precisely, seems to be that of a '*diversity of diversities*' (Bouma *et al.* 2021). Eventually, For an input on Chinese society, *see* Yang 2012, 93-95, 103-105.

—nature. As a consequence, on the global social scale, all these religious movements, however small they be, appear as newly constituted religious groups religious groups in augmentation.

In both cases, societies seem to go through an increase in the number of religious movements, whether they be traditional or newly formed. The religious landscape of today's societies seems to advance towards more diversity, despite the differences in the degrees of the latter and the religious movements composing it. In fact, these landscapes appear today as colorful mosaïques, once mainly painted in one single color.

As societies seem to be turning into mosaïques of religious movements in constant evolution, they also seem to be subject to some new dynamics that, in light of their evolution, raise new sets of issues and situations to explore for social sciences.

Concluding Remarks

The transformation of religious experience into something more individual, in terms of both lived experience and doctrinal elaboration, has reversed the scholarly perspective on religion in society. It seems to have moved from a top-down approach, considering religious institutions as the cornerstones of religious experience, to a more bottom-up approach taking individuals as points of departure. Its focus moved from traditional religious doctrines, institutionally elaborated, to individual belief elaborations as primary study material. In fact, it moved from a global approach to a more individualized approach, with concrete individual experience and ideas being the basis of what is considered as religious presence in society.

Also, along with the explained individualization of religious experience, comes a constantly growing level of religious diversity in society. In other words, the individualization of religious experience, at the micro level, drives with it a diversification of the latter at the macro level.

For religious scholarship, these elements set a new context of research which materializes new issues, questionings and challenges, or simply operates a reconfiguration of ancient issues faced by scholars in the field. In the legal realm, for example, the central issue is that of configuring religious freedom in a way that allows the maximum liberty for every individual to hold and manifest their beliefs. In light of this new diversity context, said issue comes to have two branches. First, how to make sure all believers, within such a diversity, be equally protected through one unique legal provision guaranteeing religious freedom? Second, what kind of relation-

ships does this diversity entail regarding the relations between States and religions or the institutions embodying them? In other words, diversity as a state of fact re-questions the contours of the individual right to religious freedom—its conceptualization, limits and regime—as much as the kind of relations to be maintained, according to international human rights law, between religious institutions and the State (Temperman 2010).

Sociology, on the other hand, in its effort to laying the most faithful image of society, dwells on what individuals tend to do when behaving religiously. It tries to explore the agents and core processes involved in the construction of the religious experience, which leads to exploring religiosity on four main dimensions. First, its perception by the variety of agents composing society (Breskaya and Giordan 2019; Breskaya et al. 2021). Then its perception and treatment by State institutions specifically, with an emphasis on those involved in configuring religious freedom such as the Judiciary (Richardson 2021; Richardson and Lee 2014; Richardson 2015; Maryl and Venny 2021). It also requires understanding the role played by religious institutions and congregations representing believers (Fox and Finke 2021), and also the new religious movements and new religious practices stemming from this new religious context[17].

Eventually, as a discipline analyzing State policies, political science dwells on actions taken by the State regarding religion, whether before or after regulation, in relation to individuals or religious groups and communities (Grim and Finke 2011). It explores the outcome thereof on the macro level (Jelen 2002; Yang 2012) considering the ideological treatment of religion, the way political entities composing the State relate to religion as a social fact, religious treatment in media, and the international projection of all these elements (Haynes 2020). All issues which seem to be subject to a revival, due to the new configuration of the presence of religion in society.

All three disciplines seem to be witnessing a renewal in their field of research regarding religion. It appears that the change in the religious experience, at the micro level of the individual, has caused a mutation at the macro level of society, thus resulting in renewing scholarship on religion in social sciences. And, despite the distinctiveness of their questionings and researches, the three disciplines seem to spin around two main centres: religious freedom and pluralism. In other words, despite distinct approaches and points of focus; despite different research paths and methodologies, all the questions faced by the three disciplines merge into these two as-

[17] In this vein, for example, G. Giordan proposes to explore the evolution of prayer in as much traditional as christian religions in the west (*see* Giordan and Swatos 2012, 77-88).

pects of religion: elaborating religious freedom on the one hand, and managing pluralism on the other hand. Which could be an indication of how important multi-disciplinary researches on the subject may be.

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Sea Level Rise and Small Island States – Issues at the Crossroads between Human Rights, Statehood and International Responsibility

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Abstract: Interaction between climate change and human rights is a multi-faceted phenomenon. One particular aspect of it can be found within the situation of small island states faced with sea level rise, which will eventually render their territory submerged and populations resettled. This article aims at presenting key issues of how sea level rise indeed shapes international (human rights) law in regard of small island states and different players' responsibilities in providing legal responses to situations of states being at risk of losing their territory and populations being in need to relocate, which will have lasting effect on many of their rights. In doing so, the article first conceptualizes the phenomenon of sea level rise and legal effects of it on small island states. Next, it analyses positions of different players in creating legal responses to this natural, but anthropogenic phenomenon. Namely, those are small island states, populations and big polluters.

Keywords: sea level rise, small island states, climate change, climate migration, statehood, responsibility for climate change

Introduction

Being a consequence of climate change, sea level rise has profound legal effects, some of which touch upon the core of some legal principles and institutes, especially in the field of international law and human rights law. These are issues of statehood of states whose territory might be submerged, those of fate of the peoples that will be relocated due to sea level

rise, their legal status and how this will affect different groups of rights of them, and also the question of responsibility for what is happening. All these questions require answers that, in turn, require adaptations and, possibly even, redefining of some well-established legal concepts of international and human rights law. Before that, it is important to note, based on literature and reports of different relevant authors and institutions, two specific issues that in many ways define legal consequences of sea level rise. Frist of these is the anthropogenic nature of climate change, which is a concept that relates human and state activity with consequences of climate change and, therefore, serves as a basis for conceptualizations of legal and moral responsibility. Second one is naming and defining players whose interests and rights are at stake. This text, as a part of a larger work on a PhD project, will try to do exactly that.

1. Sea Level Rise as an Anthropogenic Phenomenon

It is not an easy task to define climate change, especially in legal terms, where definitions have to be precise and clear in order to be of practical value in application of the law. United Nations Framework Convention on Climate Change, concluded back in 1992, gave a sort of over-encompassing, broad definition of climate change being 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods'. Although this definition does not resolve all the issues of determining which phenomena might and which might not be regarded as 'climate change', it does clearly define climate change as a set of processes that can be directly or indirectly attributed to human activity, which clearly defines them as anthropogenic.

Conceptualizing climate change as an anthropogenic phenomenon that will redefine many aspects of human life is not new. Back in the seventies and eighties in literature,[1] and on the scene of international relations,[2] the issue of climate change has been thoroughly discussed as a

[1] In the context of emerging discussions about the relations between human activity and changes in the environment during the seventies, it is interesting to mention how human rights perspective emerged very early and was consistently considered as one of those that should be a key to finding a common interest in promoting international cooperation. Good overview of these processes' can be found in: Gormley 1976, 6-18.

[2] Recognizing climate change as a serious and important problem that should be discussed on the highest levels of international relations was a gradual process. As an important moment in it, especially in the context of this chapter, it should be mentioned that UN General Assembly adopted Resolution A/43/53 in which it, using rather strong and direct

phenomenon that is not induced solely by nature, but that human activity has a strong impact on what is happening and how global warming effects changes in climate across the world. Resorting back to the meaning of the notion 'anthropogenic', it can be observed that this means that something, some consequence, is humanly induced (Lerche and Glaesser 2006, 1-20). Therefore, anthropogenic is opposite to something that is induced by the nature without the impact of human activities. This meaning of the word is generally accepted, but what is not accepted universally is the link between climate change and human activities.

Anthropogenic nature of climate change, and sea level rise as a part of it, is one of the key elements of legal understanding and dealing with these processes. Law reacts to both the natural and humanly induced phenomena. But reactions are overly different. If something is anthropogenic, it means that it has causes in human activity, and that there is, generally speaking, room for constructing responsibility to react to these circumstances by those who caused it. The notion of anthropogenic nature of climate change so becomes one of the crucial factors in understanding legal paths of dealing with it and its effects, one of which is the sea level rise.

Intergovernmental Panel for Climate Change (hereinafter IPCC) has, especially during the course of the 21st century, made itself into one of the primary points of reference for climate change data assessment for various scientific researchers, governmental and non-governmental institutions[3]. Main task given by the General Assembly to the IPCC when it was established was to provide member states with the information about the state of knowledge of the science of climate change, social and economic impacts of climate change and global warming and to provide scientific assessment and basis for possible response strategies to delay, limit or mitigate the impact of adverse climate change, to identify and possibly strengthen existing legal instruments in this field, and, finally, to propose elements for inclusion into progressive development of international law in this field[4]. In doing this, especially concerning the providing scientific assessment of climate change and its effects, IPCC is producing periodical reports on variety of issues connected to climate change. One of these

language climate change as a 'common concern of mankind' and endorsed the establishment of the IPCC.

[3] Instructive overview of the most important structural and procedural characteristics of the IPCC, that remained basically unchanged, can be found in: Agrawala 1998, 621-642.

[4] This is explicitly mentioned in the Resolution A/43/53 of the United Nations General Assembly when stating that one of the tasks of the IPCC should be to provide 'comprehensive review and recommendations with respect to (…) Elements for inclusion in a possible future international convention on climate.'

is the sea level rise, an issue that is on agenda of the IPCC from the very beginning of its work[5].

Special Report on the Ocean and Cryosphere in a Changing Climate, approved by the IPCC on its 51st Session in Monaco in 2019 and afterwards published, is a vast document touching upon many issues of the effects of climate change and ocean development. Chapter 4 of this Report is entirely devoted to implications of sea level rise on communities, hence its title 'Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities'. In this part of the Report, projections are given for the course of sea level rise during the 21st Century. The authors admit that there is a lot of uncertainty about the actual sea level rise projections and that they can vary significantly due to a vast variety of factors, from the physical geography of different parts of the world to, of course, the actual number of various contributions to the overall climate change processes by the states and non-state actors across the world (Oppenheimer et al. 2019, 323 et seq.). Although with the aforementioned reservations, the authors conclude that there it is very likely that sea level rise will steadily continue to happen on an accelerated rate of yearly rise, which will create difficulties in many coastal and low-lying regions across the world. Sea level rise is a phenomenon that has many consequences, one of the most important being melting down of glaciers, but also other factors, like thermal expansion, are observed that play a significant part in sea level rise. Incitement of all of these is, with high certainty, according to the IPCC, attributed to human activity, what makes them, in line with the aforementioned definition, anthropogenic. Numbers given suggest that general mean sea level will, by 2100, rise between 0.43 m and 0.84 m, with significant regional variations. These numbers can also be found in the Executive summary to policymakers, a supplement document to the Report which summarizes most important points for policymakers, those who will direct practice of states in constructing answers to the problems of sea level rise. Some projections give figures that are slightly different, for example, the Fifth Assessment Report of the IPCC projected 0.26 to 0.98 m, but both projections show a steady and clear trend of constant sea level rise (Stocker et al. 2013, 1182 et seq.). This rise will have serious effects in different regions and parts of

[5] Sea level rise has been one of the impacts of climate change discussed from the very First Assessment Report, produced back in 1990, which served as one of the key documents in drafting process for the UN Framework Convention on Climate Change. For example, the Summary, prepared for policymakers concurrently with the First (and every subsequent) assessment report clearly states that 'The projected global warming will cause sea-level rise…', and gives assessments regarding the progress of it. See: Policymaker Summary of Working Group II (Potential Impacts of Climate Change), IPCC, 1990.

the world, one of which that is especially mentioned and to which specific measures for possible adaptation are addressed are urban atolls. Small island states, due to their geographical configuration, fall into this category. Due to the extremely low elevation, and relatively high population density (although the absolute numbers of population inhabiting these islands is rather small), risks connected to them are of special relevance, especially taking into account that their basic habitability will be at risk, which is a clear and imminent danger to which the Report is pointing to[6].

The Report also devotes a comprehensive chapter to possible reaction and adaptation strategies for mitigating the effects of sea level rise. Before that, there is a thoughtful identification of likely risks and effects to different ecological factors, from agriculture to social cohesion and indigenous identity and transgenerational pass of knowledge. It is envisaged how not only physical submergence of territory, as the immediate consequence of sea level rise is at stake, but that also many parts of the life that is interconnected with this exact territory will and can be affected. For example, traditional fisheries or agriculture, that provide for a significant part of identity of small island nations[7]. Also, social cohesion and capital of different endangered groups is defined as one of the endangered values, especially taking into account underdeveloped nations and communities[8]. All this clearly points out to a very large, over-encompassing societal risks connected to the sea level rise. In legal terms, many of these risks point to human rights concepts that are made to protect them, but some also to other parts of international law that might have to be reconsidered or, in some cases, even adapted if international community wants to properly deal with effects of sea level rise.

Moreover, the IPCC has, in many of its documents apart from the one cited above that is entirely and specifically devoted to ocean development (including sea level rise), mentioned and discussed these issues and adaptation to sea level rise risks connected to climate change. The primary body of work of the IPCC are the so-called Assessment Reports, that are periodically published (the last Assessment Report was published in the 2021-2022 assessment cycle, and the previous had been published in assessment cycle 2013-2014). In these reports sea level rise is listed

[6] One whole chapter of the cited part of the Report (in note 8), titled Exposure, Vulnerability, Impacts and Risk Related to Sea Level Rise (chapter 4.3) is devoted to it.

[7] Report identifies this risk as loss of indigenous knowledge and local knowledge and devotes specific subparagraph to it, see subparagraph 4.3.4.2.2.

[8] Similarly, risk of losing social capital is identified as a specific risk arising from effects of sea level rise on small island communities and their way of life, see subparagraph 4.3.4.2.3.

and discussed, among other threats to nature and human life connected to climate change. Sixth cycle of the assessment procedure of the IPCC, that will finish with a Report that is due to be published in 2022 has already approved outlines for various chapters of the Report. Regarding this, it can be observed that the guidance points to the chapters for the part of the Assessment Report that will be prepared by the Working Group II contains sea level rise as one of the challenges that will affect regions across the world. Moreover, wording under which sea level rise is mentioned also contains observing how it will affect development, which might serve as an important notice to how sea level rise is not viewed only as a physical phenomenon, but also a societal one. This shows how the IPCC is giving continuous attention to the problem of sea level rise in assessment and responding to the challenges connected to climate change.

The newest Assessment Report, that of the Sixth cycle, is due to be finalized in 2022.

Similarly, previous Assessment Report, that was published in 2014 as a concluding document of the fifth cycle, also dealt with the issues connected to the sea level rise. Part A, Chapter 5 of the part of the Report prepared by the Working Group II specifically addressed sea level rise and possible response and adaptation strategies. In this Part, there are, apart from the estimations of mean sea level rise, a list of anthropogenic factors that significantly contribute to this process. The first and foremost, by far most important anthropogenic factor contributing to the sea level rise is global warming induced by the greenhouse gasses emissions. Therefore, the whole Chapter is structured accordingly, with different projections given regarding situations in which there is a low, medium or high level of these emissions. As far as other anthropogenic factors contributing to the sea level rise are concerned, it is acknowledged that they vary across regions and parts of the world, but the link between sea level rise and human activity is clearly and definitely established.

In framing climate change effects into the legal language one of the more comprehensive works is that of the World Bank. Concerned with how climate change interacts with human rights and economic development, the World Bank produced a report titled Human Rights and Climate Change: A Review of the International Legal Dimensions. This report, prepared and published back in 2011 and principally authored by Siobhan McInernay-Lankford, Mac Darrow and Lavanya Ramajani, is structured quite differently from the documents produced by the IPCC, although it concerns the same topics, at least some of them. First and foremost, it is framed as a document that aims to link relevant body of law in the field of

international human rights protection and threats stemming from climate change that are, basically, the same ones detected by the IPCC. In doing this, again, sea level rise cannot be overlooked[9].

In the report, problem of sea level rise, which is detected as one of the challenges to human rights protection that comes as a part of climate change complex, is mentioned three times (excluding footnotes), every time in different context. Two of these are especially worth mentioning in depth, because they directly involve interactions between sea level rise, small island states and human rights. First one is, actually, imbedded into a quote from Report on the Right to Adequate Housing, by the Office of the High Commissioner for Refugees, published in 2009 that, in turn, in itself builds upon observations of the IPCC and United Nations Development Programme. Therefore, mentioning of the sea level rise as a concrete threat to a concrete human right is done through raising the question of ensuring the right to adequate housing and going as far as discussing the possibility of a new legal instrument that should specifically tackle the problem of the human rights law reaction to the sea level rise displacement. What is more important and original in this mention is the context in which it is placed. Unlike the IPCC reports, that primarily function as a neutral, scientific fact-presenting reports that are not dealing with legal aspects of climate change, the World Bank Report does exactly that, integrating natural sciences, social dimensions and legal issues.

There is, as the whole body of work of the IPCC clearly states, already, at the beginning of the chapter, mentioned, anthropogenic nature of climate change processes. As it was already mentioned at the beginning of this chapter, the whole body of work of the IPCC clearly establishes anthropogenic nature of climate change processes. From this stem the basic objective of human rights law, and that is to respect the dignity of a human person. Climate change is, as it is already mentioned, and will be explained further, a threat to this basic value in different aspects. Moreover, climate change processes, sea level rise among them, are induced, or at least facilitated, by human activities, primarily those in economic sphere. Therefore, human rights, which were, at its foundation, conceived as a tool for

[9] The Report, finalized in 2011, is a comprehensive document, covering many of the aspects of anthropogenic climate change effects on human rights. It is especially worth mentioning in this chapter because it links data and expertise from many scientific areas, including natural sciences and sociology with a sound legal approach framed through relevant human rights body of law and legal concepts, therefore being a particularly useful tool and source.

prevention of anthropogenic harms to human dignity (albeit of different nature)[10] should address its impacts (Woods 2010, 26-33).

But before going in depth to different facets of the legal problems that sea level rise as a part of the anthropogenic climate change complex causes, different players in this field must be identified.

2. Different Players Primarily Concerned with Sea Level Rise

Identifying different players that, on the one hand, are responsible and should react to sea level rise, and on the other, will be most vulnerable and affected by its consequences, is not an easy task. Climate change, and sea level rise as one of its visible consequences, have far more different ways in how they might redefine human life(style) than one might think at the first sight. Therefore, this article is focusing only on the small island states, which will be affected in many ways, two of them being profoundly redefining towards both their basic continuation as states and way of living and rights of every single individual comprising populations of these states. Therefore, first of the players that will be identified and explained are the small island states. After them, the interest will turn to the other side of the climate change induced relations, and that is to big polluters – big developed states and transnational companies. Finally, an important role in linking those groups of stakeholders is usually given to international organizations, and their position will be looked into as well.

2.1. Small Island States

The International Law Commission in the Report of its Working Group that is working on legal solutions for various problems that sea level rise will produce (and is already producing), is simply using the notion 'island states', without further qualifications, primarily to distinguish them from other states that will be tackled by the sea level rise, but are not at risk of being completely flooded and submerged (Aurescu et al. 2018, 329 et seq.). As the issue is of constant interest for the International Law Comission, it has been also included in the Report of the Seventy-second Ses-

[10] The driving theoretical and practical motivation behind conceptualizing human rights, to put it very briefly, can be found in preventing what have been historically some of the worst activities of humans against humans, which makes these harms (wars, crimes, degrading treatment of various kinds), also anthropogenic in nature, but it also somewhat overlooks processes that are induced by humans, but not directly inflicted from humans on other human beings. More about this, in the specific context of sea level rise, will be discussed *infra*.

sion of the International Law Comission in 2021. However, the discussion mainly resolved around issues connected to the international law of the sea and regulation of baselines. Again, as the work is in progress and the ILC has not yet produced the draft articles or other such document that could serve as a basis for possible codification efforts, there is no straight definition given, or, at least, there is no definition declared as such. But, by looking more closely into the Report, a working definition can be found, specifically in the part that is considering the issues of statehood in relation to sea level rise. Part of the sentence in which the concerned part can be found, although not formed, even grammatically, as a definition is the following: '(...) the territory of island States is completely covered by the sea or becomes uninhabitable' (Aurescu et al. 2018, 329). The cited words might seem obvious, but become very important when trying to distinguish between (small) island state that are affected, at least from a legal point of view, much worse by the sea level rise than other states that will also experience intensive harms due to sea level rise, but whose statehood is not in danger.

From the previously mentioned documents, it can be observed that the first major player in an effort to analyse new reality that sea level rise brings to some of the key institutes of general international law and international law of human rights have to be small island states. To determine what is a small island state and which states can actually be classified in this category a handful of criteria can be identified based on what has previously been mentioned. Those criteria are quite simple and can be summarized in two points: 1) the entity is a state in the sense of international law[11]; 2) the state' s entire territory is so low-lying that it is in a real danger of being completely submerged due to sea level rise.

Going from legal language, that has to be, at least to some extent, abstract in form and shape, to the empirics, there are just a few, handful states in the contemporary world that fulfil the set criteria. These are: Kiribati, Tuvalu and Marshall Islands in the Pacific Ocean and the Maldives

[11] It is well established in the customary international law that three basic elements that an entity has to have in order to be considered a state are: 1) territory, 2) population, 3) independent government. This was codified by the Montevideo Convention on the Rights and Duties of States, which added another element to these three, the capacity to enter into relations with other states. In the context of effects of sea level rise, these traditional elements of statehood are one of the primary points at which convergence between traditional international law and reality might occur, which is one of the topics that concerns both small island states and international community, but also, as it will be shown *infra*, might have profound effects on rights of populations. For explanations on traditional elements of statehood see many classical systems of international law, for example: Andrassy *et al.* 2010, 81-82; Oppenheim 1957, 118; Rousseau 1974, 18 *et seq.*

in the Indian Ocean, which are also the largest of the group. Both Jenny Grote Stoutenburg in her book Disappearing Island States in International Law, which is more concerned with issues of statehood, and Jane McAdam, whose monograph Climate Change, Forced Migration and International Law deals primarily with, as title clearly points out, aspects of migrations and human rights of populations, list these states as most likely to experience total loss of territory due to sea level rise (Grote Stoutenburg 2015, 1-3; McAdam 2012, 36-37).

Before proceeding to the overview of how small island states define and see themselves in the international community, one notice regarding the terminology. Terminology can sometimes, especially when inconsistently applied and used, form many misunderstandings and even outright confusion. Often broad and inconsistently applied categories like 'small islands', 'developing islands', 'small developing islands' are found in different documents that tackle the issues of specific problems that this category of states is facing. In the early stages of recognizing specific developmental issues that small island states face due to effects of climate change, they were often referred to as 'developing small islands/states'. For example, this is the case in the Report of the Sixth Committee of the Third conference of the UNCTAD from 1973. This name, of course, is in accordance with the general aims of the UNCTAD, but it, in a way, is a restricting one, because of its emphasis on economic problem of development, which is only one of the aspects of problems that small island states are facing. Indeed, in the early decades of recognizing peculiarities of problems of small island states they encountered many definitional problems (Hein 2004, 1-20). Later on, different names were used, most neutral being 'small states', as the co-signatories call themselves in the text of the Declaration on Global Warming and Sea Level Rise, better known as Malé Declaration after the capital of Maldives in which it was signed. This name is too general in its scope, covering not only small island states, but also different states that could be classified as 'small states', which is, of course, a very uncertain and unclear category. 'Small islands' is the first of the names used by the International Law Commission when referring to the states in question and is, in turn, a completely neutral name (Aurescu et al. 2018, 329). Second one, 'small island developing states' is also used by the same body in the 2021 Report cited above. Another name, 'disappearing island states' is sometimes used in literature,[12] but it seems here that this might be too strong to be

[12] 'Disappearing island states' is used by Grote Stotenburg, who also points out to other authors previously using it.

completely accepted as a name for a category, because 'disappearance' of states due to sea level rise has many alternatives. Similarly, 'deterritorialized states' is sometimes used (Rayfuse 2009, 9), but it suffers from the same problem, because there are plans to preserve territory of small island states. Moreover, notion of 'deterritorialized state' is in itself somewhat of an oxymoron, because, as already mentioned, territory is one of the key elements in international law that define an entity as a state.

To further the understanding and try to find a way how to make a deeper insight into how this group of players (small island state) are working on an international scale to make their problems connected to sea level rise visible, it might be the best to make a deeper look into the very states that self-define themselves as small island states. In doing that, their documents and international cooperation that is going on between them can be of much help. This was especially done after the United Nations General Assembly, back in 1988, adopted the now famous Resolution A/43/53, which tackled upon the issues of global warming and climate change, calling them 'a common concern of the mankind'. After that, small island states, seeing that issues of climate change and sea level rise are more and more becoming part of the international discourse, started to organize themselves and produced the first document that tried to articulate their positions regarding the effects that global warming and sea level rise will have on them. This is the Malé Declaration, that will be analysed later in this chapter.

But, before looking into the self-articulation of small island states and bringing their problems to the eyes of the international community, it should be mentioned, following the chronological approach, the first international document to specifically address the issue. This happened back in 1972 under auspices of the United Nations Conference on Trade and Development. In the Report of the Sixth Committee of the Third conference of the UNCTAD, the phrase 'developing small island' was coined to specifically address the economic struggles of small island nations that were, at the time, recently decolonized and were facing significant economic hardships. Although not in the context of addressing sea level rise or climate change at all, and even more as a part of a document that can only be considered as having characteristics of a soft law instrument, the Report raised an idea and pointed out to the international community that 'developing small islands' have 'natural handicaps to development that were rather different from the socio-economic problems often discussed, but which nevertheless deserved the special attention of the international community'. Finally, following the 1972 Conference that set the example,

the notion of 'developing small islands' and their problems was addressed on and off during the seventies and eighties. This was done through numerous studies and resulted in the United Nations General Assembly deciding to adopt five resolutions that delt with the issues of economic development of developing island states. These are the following resolutions of the General Assembly: Resolution A/31/156 of 21st December 1976, Resolution A/32/185 of 19 December 1977, Resolution A/34/205 of 19th December 1979, Resolution A/35/61 of 5th December 1980 and Resolution A/37/206 of 20 December 1982.

Eventually, the actual raising of the interconnection and understanding of the international community of the specific problems that these states are facing with the ongoing sea level rise had to wait until the end of the ninth decade of the twentieth century.

It finally occurred in concordance with the overall global awareness-raising processes regarding the effects of global warming and climate change.

This came with the convoking of the Small State Conference on Sea Level Rise that happened in November of the year 1989 in Malé, the capital city of the Republic of Maldives. The most important and, arguably, also the famous product of the proceedings of this conference was the so-called Malé Declaration, or, as it is officially titled, the 'Declaration on Global Warming and Sea Level Rise'[13]. Again, just as it is the case with the previous example the declaration is merely a soft law document, but one representing a strong statement of the very states concerned. Functioning as somewhat of a programme for action of small island states, the Declaration gives important information about how the very small island states define and see themselves in the context of threats that sea level rise is imposing onto them.

The states that signed the Declaration call themselves 'small states' in its text. By looking into the proceedings of the Malé Conference, it can be observed that participation amounted to fourteen different states, and not all of them are in the same position regarding the negative effects of sea level rise[14]. Therefore, neither the Declaration (which includes no defini-

[13] Malé Declaration of 1989 begins with a comprehensive introduction in which signatory states are expressing their concern about the effects of climate change, especially pointing out the paradoxical situation of effects being mostly caused by developed states, but affecting underdeveloped. Next, there are eleven points that make the core of the text of the Declaration.

[14] As it can be seen from the list of participants and signatories of the Declaration, states participating in the Malé Conference and co-signatories of the Declaration were small states, but many of them are not critically endangered by the sea level rise in sense that their whole territory might be submerged. For the explanations about characteristic of

tion or categorisation of the states that signed it) nor other documents of the Conference can give a definitive or conclusive answer to the problem of self-defining which states are those that can be regarded as small island states in the context of this work, being those whose very physical existence is endangered and population in need for relocation because their homes and living environment will be submerged.

Following the Conference of 1989 and Malé Declaration as its most well-known result, but also as a part of overall process of bringing climate change related problems into the focus of international community, the interest for specific problems of small island states flourished especially in scientific field (including the legal science), but also somewhat gained a momentum in different international forums. Crucial moment in this was not only that the United Nations General Assembly backed the signatory states by its resolution which called for inclusion of the topics in the, then forthcoming, negotiations leading to the UN Framework Convention on Climate Change, but also the Establishment of the Alliance of Small Island States (known also under the acronym AOSIS), an intergovernmental organization of small island states that functions as an advocacy group for their cause and has ever since regularly, apart from its awareness raising and lobbying tasks, been a crucial point of reference for specific problems of small island states, including sea level rise, on international stage.

The first conference specifically devoted to, as it was termed at the time 'sustainable development of small island states' was held in Barbados in 1994, and produced a plan for action (named Report of the Global Conference on the Sustainable Development of Small Island Developing States) that specifically addressed the issues of small island states development, and was in its structure similar to the more general and well-known Agenda 21 that was developed around the same time addressing the general climate change and global warming mitigation strategies and action plans. After Barbados, and specifically after the overall surge of scientific, political and legal interest in effects of climate change, the conferences that specifically address the small island states and their problems are periodically held. List of the events and conferences specifically devoted to small island (developing) states can be found at the webpage of the Office of Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States. From the output of recent conferences, it should be, especially bearing in mind the connec-

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participating states of the Malé Conference, see: Report of the Small States Conference on Sea Level Rise, Malé, 1989.

tion between human rights and specific problems of small island states, to mention the Malé Declaration on the Human Dimension of Global Climate Change, signed by the representatives of small island states in 2007. None of these conferences or periodical meetings so far, at least officially, has not produced a definition, not even one that would enter a soft law document, even the less the one that might have pretence to serve as an introduction to the procedure that would lead to an international agreement defining and specifically addressing sea level rise induced problems small island states are facing. This is logical when taking into account what was the proclaimed aim and purpose of these state-expert meetings, which are more aimed at awareness raising and policy making than giving overall definitions or even limiting themselves to a strictly defined category. Nevertheless, they can be useful in steering the light of international community towards small island states and their activity, which clearly makes them as a primary player in the debate about legal effects of sea level rise that primarily affects them.

2.2. Big Polluters

This brings the focus to another group of states that are, conditionally speaking, on the other side of the debate. Of course, these are big, developed states that are important for, at least, two groups of reasons. First and foremost, the reason for conceptualizing this group and possibly identifying states that are part of it, is their responsibility for different factors that contribute to the global climate change, which is, as shown supra by citing the reports of the IPCC, the primary cause of sea level rise.

Notwithstanding political and para-legal realities becoming factual relations that shape legal relations, especially in international law as a horizontally structured legal system, positioning of big, developed states as a separate category is supported by some of the most recognizable and important documents that shaped responses of international community and, consequently, international law as its creation (Limon 2009, 473). From the Stockholm Declaration, main output of the first Conference on Human Environment held in Stockholm in 1972, there is a clear distinction between developed and developing countries, recognizing special responsibilities for the former and special position of the latter due to their vulnerability. This was seconded and only furthered by the sustainable development concepts after the Rio de Janeiro Conference in 1992, and its many follow-ups, which continuously reaffirmed the doctrine of 'common but differentiated responsibilities' as framed for the first time in the Principle

7 of the Rio Declaration on Environment and Development. Good overview of the 'common but differentiated responsibilities' doctrine is given by Tuula Honkonen in the paper The Common but Differentiated Responsibilities Principle in Multilateral Environmental Agreements (Honkonen 2009, 69-74). Similarly to mentioned soft law documents, some of which, could be argued, reflect international customary law, same distinction can be found also in some of the best-known treaties in this particular field of international law. In them, the distinction is even more explicit. United Nations Framework Convention on Climate Change makes this completely clear through imposing different, higher burden of obligation on developed states than on developing ones and going as far as to listing developed states in the Annex I of the treaty. Similar approach has been followed by the subsequent treaties that further developed international law in regard of imposing obligations to mitigate climate change and global warming, such as the famous Kyoto Protocol and, more recently, Paris Agreement of 2015. The core of proper understanding of all these legal technicalities that divide states lays in comprehending differences that actually exist between states in their development in economic, social, cultural and other related fields.

Moreover, understanding this division as a reality that profoundly affects creation of legal relations in international law is not in any case peculiar to international law pertaining to sustainable development or climate change. In the human rights law, legal obligation regarding the economic social and cultural rights is subject to well-known doctrine of progressive realization, contained in Article 2 of the International Covenant on Economic, Social and Cultural Rights (Trubek 1989, 213-219). Subjecting the obligations arising from the Covenant to the concept of progressive realization is a direct appreciation of different levels of development of different states across the world. In the context of this chapter, this only furthers already solid reasons to include big developed states as a separate category of players, although abstract and comprehensive definition of this category is a highly difficult task.

2.3. Populations

As already explained, small island states, and consequently their populations, are in a peculiar position because they do not have 'reserve' territories, parts of their own territory that are not in dangerous position due to sea level rise. Complex issues of climate change-induced migrations create a whole new momentum to how international law treats migrations and

raises many doubts about how useful existing legal solutions and instruments that contain them can be (McAdam 2012, 49-50, Williams 2008, 502-529).

In international human rights law, displacement for various reasons is an old and well-established topic, but with climate change, a new layer is added to it (McAdam 2012, 42-44). Throughout the history, reasons for displacement were various, from wars to natural catastrophes, but only some of these reasons were regarded as those that deserve their place in international legal instruments. A question of how to relate peoples relocating because of climate change to international refugee law is a highly contested matter, and as such subject to a prolonged academic debate. Peoples of small island states forced to relocate due to sea level rise are definitely a part of this complex question, because their possible migrations from their homelands to other parts of the world is, at least directly, induced by deterritorialization as a direct consequence of sea level rise. This question than leads to others, some of which are connected to most vital interests of peoples such as nationality, self-determination or preserving cultural identity, not to mention other economic, social and cultural rights.

Of course, it is at this place hard to avoid a peculiar question of legal personality of peoples in international law, another highly contested and difficult matter that is subject to an, it might seem, ever-going academic debate. Development of human rights law gave it a whole new momentum, but the debate about legal personality of peoples and human in international law is pre-dating it. For an example of an early discussion representative is the work of Dionisio Anzilotti (Anzilotti 1929, 132-136 and literature listed there). Sea level rise makes this position quite peculiar, because of a situation in which, as it has been observed, continuation of state that these peoples are (were) nationals comes into question and risks either disappearance or profound change. When this is combined with the problem that arises from still incoherent treatment of climate change induced migration in the overall picture of international law and, even more, state practice governing migrations, inclusion of peoples as a separate, special category becomes even more evident. At this point, it is interesting to note how some authors point out that in more recent times, international community also began to request respect for human rights as a prerequisite for recognition of states (Casesse 2001, 50).

Moreover, it should be mentioned that overall numbers of people that fall into this category is not very large and therefore are, just as states of which they are nationals or in which they live, in risk to be overlooked. As

already pointed out, overall, combined population of all four small island states does not exceed one million, which is a rather very small number that could be easily overlooked. However, unlike with states, most of the problems that populations of small island states are facing are not unique to them, but shared with other peoples around the world that live in low-lying areas vulnerable to sea level rise, but there are some peculiarities, like already mentioned continuation of nationality or problems of preserving identity specific to islanders.

Concluding Remarks

By affirming anthropogenic nature of sea level rise, and defining small island states, populations and big polluters as players effects of sea level rise can be identified as profound issues that only international law can give answers to. Not only that sea level rise as a fact is connected to many legal problems, but also it is clearly visible that there are no simple and, sometimes, not even present answers in the current international law and law of human rights. Moreover, sea level rise, especially when considering statehood and other issues of continuation of existence of small island states, can be easily overlooked as a problem. At the same time, it causes immense issues within the existing human rights law, what makes peoples and their rights very vulnerable, not only those of small island states (which will be specially affected) but also peoples around the globe living in low-lying areas.

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