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# Prefazione

Nicola Lirussi
*Direttore*

Nuovamente – in un contesto ancora fortemente inciso dall'ondata pandemica che negli ultimi mesi ha stravolto la nostra quotidianità – il *Board* della Rivista ha lavorato intensamente e caparbiamente per portare a termine i lavori di pubblicazione del presente Volume, nel suo Numero 2, ormai la quinta pubblicazione ufficiale nella storia della Rivista.

Sono passati infatti quasi tre anni dalla stampa del c.d. Volume Zero, nel gennaio 2018, composto dai contributi delle nostre Professoresse e dei nostri Professori dell'Università di Trento, introdotti dalla Prefazione del Professor Rodolfo Sacco. Da allora, la rivista è stata visitata in homepage oltre 12.000 volte, con la visualizzazione di più di 3.000 articoli e il *download* di ben 1.200 di questi[1]. Gli accessi provengono da 93 diversi Paesi di ogni continente, a conferma del carattere internazionale e comparatistico che definisce e anima la nostra realtà editoriale e la nostra Facoltà. Inoltre, in quest'anno sociale, la Rivista ha ricevuto più di 70 proposte di pubblicazione, a cui ha lavorato un *board* di 30 editor e collaboratori con il potenziale ausilio di oltre 50 revisori scientifici esterni.

Dietro questi importanti numeri, si cela l'impegno e la passione di tutte e tutti noi per un progetto ambizioso ed impegnativo, ma ricco di potenzialità e soddisfazioni. L'attenzione per il valore scientifico e la qualità della pubblicazione ci ha permesso di ottenere recentemente l'accredito in DOAJ, in attesa che la progressiva – ma costante – diffusione della rivista ci apra le porte a ulteriori indicizzazioni. La varietà dei temi trattati, spesso relativi a nuove tecnologie e al mondo IT, ci ha permesso di affermarci come realtà dinamica e all'avanguardia nel panorama delle giovani *law review* internazionali. Infine, la continuità

1. Dati estratti dal sito OJS della Rivista (01/01/2018-22/11/2020).

redazionale garantita durante questi mesi difficili ci ha permesso di dimostrare la solidità del nostro progetto, l'impegno e la passione che animano questo gruppo che cambia costantemente composizione senza mai perdere le sue qualità, anzi integrandole ed accrescendole. Vogliamo fortemente proseguire su questa strada, orgogliosi di quanto finora insieme raggiunto e consapevoli che molto e sempre più è da costruire.

Nel proseguire questo percorso, speriamo anche di poter tornare presto – in quella che era la normale quotidianità – a vivere la Facoltà e l'Università, nostra casa comune, per aver ancor maggior occasione di incontro e confronto con i nostri colleghi, con il Corpo Docente e con tutti coloro che la vivono. Desideriamo realmente dare un valido contributo a creare una comunità coesa, dinamica e inclusiva che faccia della sua attività una missione, ancor prima che una professione.

Ciò auspicando e in conclusione, non posso che ringraziare – per lo straordinario impegno profuso nei lavori – tutto il *Board* della rivista e in particolare i miei collaboratori più stretti, Maria Grazia Torresi e Matteo Maurizi Enrici, che sono certo sapranno portare la Rivista – insieme con tutti i nostri Editor – ad ancor maggiori e più alti traguardi. *Ad maiora*!

# Preface

Nicola Lirussi
*Editor-in-Chief*

In a context still strongly affected by the pandemic wave that in recent months has disrupted our daily lives – the Board of the Review has worked hard and persistently to complete the publication of this Volume, Vol. No. 2, which is now the fifth official publication in the history of the Journal.

In fact, almost three years have passed since, with the contribution of our Professors at the University of Trento, was printed in January 2018 the so-called "Volume Zero" with a preface written by Professor Rodolfo Sacco. Since then, the journal has been visited on the homepage more than 12,000 times, displaying more than 3,000 articles and 1,200 downloads1. The site has been accessed from 93 different countries of every continent, confirming the international and comparative character that defines and animates our editorial reality and our Faculty. Moreover, this social year, the journal has received more than 70 proposals for publication, which a board of 30 editors and collaborators have worked on with the potential auxilium of more than 50 external scientific reviewers.

These growing numbers reflect our passion and commitment for this ambitious and challenging, but also satisfactory project. The attention to the scientific value and the quality of the publications has allowed us to recently obtain the accreditation in DOAJ, permitting us to progressively expand the reach of the review and therefore opening us doors to further indexing. The variety of the topics covered in the issues, which are often related to new technologies and the IT world, made it possible to establish ourselves as one of the leading and cutting-edge young international law reviews. Finally, the editorial continuity during these difficult months demonstrated the solidity of

1. Data extracted from the OJS website of the Review (01/01/2018-22/11/2020).

our project as well as the commitment and passion of the Review's members. We are proud of what we have achieved up to this point but at the same time we are very aware of the fact that even more is to be achieved in the future.

As we continue along this path, we also hope to be able to return soon to life at the university, so we have even more opportunities to meet and exchange ideas with our colleagues and the teaching staff. We really want to make a valid contribution to creating a cohesive, dynamic and inclusive academic community that makes its activities a mission, even before they become a profession.

Finally, I can only thank the entire Board of the Review and in particular my closest collaborators, Maria Grazia Torresi and Matteo Maurizi Enrici, for their extraordinary efforts. I am sure they will help the Review – together with all our editors – to achieve even greater goals. *Ad maiora*!

# The Notion of Defectiveness Applied to Autonomous Vehicles: The Need for New Liability Bases for Artificial Intelligence

Irina Carnat*

*Abstract*: Both the US and the EU product liability regimes are based on the notion of defectiveness of the product. However, in the case of damages caused by autonomous vehicles, such notion proves to be profoundly inadequate for consumer protection. In fact, from the European perspective, the defectiveness of a product is assessed through the so-called consumer expectation test, according to which a product is defective when it does not provide the safety a person is entitled to expect. However, such approach is inadequate in the context of autonomous vehicles as it leads to unreasonably high safety expectations. By contrast, the US product liability doctrine adopts the so-called risk-utility test, according to which a product is defective if the foreseeable risks of harm could have been reduced or avoided by the adoption of a reasonable alternative design. Such approach is nonetheless undesirable as it links safety to market forces. This article aims at analyzing in comparative perspective the current legislation concerning damages caused by autonomous systems, with a view to devising new possible solutions and alternative approaches to product liability for Artificial Intelligence.

*Keywords*: Product liability; Artificial intelligence; Autonomous vehicles; defectiveness; Safety standards.

## 1. *Introduction*

"How can Artificial Intelligence be defective?"[1]. The question was raised after a series of crashes, involving Tesla vehicles, occurred in the United States, some of which resulted in fatal casualties[2]. Since then, the uncertainty over the liability regime applicable to autonomous vehicles has tackled the full deployment of such technology[3], while the debate around the adequacy of the traditional liability rules is still far from reaching a unanimous conclusion[4]. In fact, the US Department of Transportation has been ever since enquiring into the safety-related issues of autonomous driving technology[5]. On the same wavelength, the European Commission has appointed in 2018 a group of experts to assess whether the current Directive 374/85 concerning liability for defective products (hereinafter the Product Liability Directive) is still fit-for-purpose in the new digital era[6]. Pending the

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1. See Jean-Sébastien Borghetti, *How Can Artificial Intelligence Be Defective?* in Sebastian Lohsse, Reiner Schulze and Dirk Staudenmayer (ed.), *Liability for Artificial Intelligence and the Internet of Things: Münster Colloquia on EU Law and the Digital Economy IV* (Hart Publishing 2019).

2. See European Commission, *Commission Staff Working Document Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Maximising the Benefits of Articificial Intelligence for Europe* (2018) SWD/2018/137 final at 14.

3. See European Parliament, *Resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics*, 2015/2103 (INL).

4. See Paulius Cerka, Jurgita Grigiene and Gintare Sirbikyte, *Liability for Damages Caused by Artificial Intelligence*, 31 Computer Law and Security Review 376, 383 (2015).

5. See National Highway Traffic Safety Administration, *Federal Automated Vehicle Policy: Accelerating the Next Revolution in Roadway Safety* (United States Department of Transportation, September 2016), available at https://www.hsdl.org/?abstract&did=795644 (last visited August 30, 2020). See also National Highway Traffic Safety Administration, *Automated Vehicles for Safety* (United States Department of Transportation, 2018), available at https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety (last visited August 30, 2020).

6. See *Expert Group on liability and new technologies (E03592)* (March 9, 2018), available at https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.

issuance of the final report including the guidelines for the adaptation of applicable rules to the new technological development, this article aims at outlining some preliminary considerations regarding the safety of autonomous vehicles.

Going back to the opening question, autonomous vehicles will represent an important employment of Artificial Intelligence *latu sensu* available for consumer use. Therefore, it is important to understand why – beyond benefits in term of overall increased safety[7] – an intrinsic risk of crashes and damages may remain. Needless to delve at this point into the strictly technical functioning of an AI-embedded product, it suffices to say that the features of autonomy and machine-learning may lead to unpredictable behaviours that have not been anticipated in the software programme, thus causing accidents or damages[8]. This is due to the fact that autonomous driving technology relies on machine-learning capabilities, which – by definition – do not run on if-then programming rules but change their behavior according to their experience or, in other words, the processed data taken from the environment[9].

Therefore, given the nature of AI algorithms that adapt to new situations, autonomous vehicles raise important questions in terms of foreseeability and reliability[10], possibly challenging the very core of the

groupDetail&groupID=3592 (last visited August 30, 2020).

7. European Commission, *Commission Staff Working Document* SWD/2018/137 final at 14 (cited in note 2). On the environmental benefits of autonomous driving, see also Peng Liu, Yanijao Ma and Yaqing Zuo, *Self-Driving Vehicles: Are People Willing to Trade Risks for Environmental Benefits?,* 125 Transportation Research Part A: Policy and Practice 139 (2019).

8. See Esther Engelhard and Roeland de Bruin, *Liability for Damage Caused by Autonomous Vehicles* at 5 (Eleven International Publishing, Utrecht, 2018). See also T.S., *Why Uber's Self-Driving Car Killed a Pedestrian – The Economist Explains* (The Economist, May 29, 2018), available at https://www.economist.com/the-economist-explains/2018/05/29/why-ubers-self-driving-car-killed-a-pedestrian (last visited August 30, 2020).

9. On the functioning of autonomous vehicles, see Alexander Hars, *Top Misconceptions of Autonomous Cars and Self Driving Vehicles* (Driverless Car Market Watch, June 24, 2015), available at https://www.driverless-future.com/?page_id=774 (last visited August 30, 2020). See also Kevin Funkhouser, *Paving the Road Ahead: Autonomous Vehicles, Products Liability, and the Need for a New Approach*, 1 Utah L Rev 437 (2013).

10. See Borghetti, *How Can Artificial Intelligence Be Defective?* at 67 (cited in note 1).

product liability regime in the event of a crash[11]. Consumers, thus, may face great challenges when required to prove that the vehicle was defective, which may jeopardize their right to receive a compensation[12].

In order to address such issue more thoroughly, this article adopts a comparative approach between the EU Product Liability Directive and the equivalent US Restatement (Third) of Torts[13], on the ground that the US and the EU face similar concerns related to autonomous vehicles within the frame of strict liability for defective products. A comparative analysis of the notion of defectiveness shall provide a two-tier perspective on the issue of applying traditional liability rules to autonomous vehicles. While the European legislation relies on the so-called consumer-expectation test, the US regime adopts a more market-related risk-utility test. The final goal of this article is to assess the adequacy of both approaches to product liability in the new context of Artificial Intelligence.

Since the current liability regimes will prove their shortcoming when applied to fully autonomous vehicles, it will be conclusively argued that new legal bases are needed for the future of Artificial Intelligence. In order to inquire into new alternative and complementary solutions to the notion of defectiveness, this article will first analyze the role of harmonised technical standards in identifying the legitimate, i.e., objective, safety expectations. Such preliminary approach shall lead to increased social acceptance of products incorporated with machine-learning capabilities and, gradually shifting from the current state-of-the-art of autonomous driving technology, shall pave the way for further deployment of fully autonomous vehicles.

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11. See Daily Wuyts, *The Product Liability Directive – More than Two Decades of Defective Products in Europe*, 5 Journal of European Tort Law 1, 10 (2014).

12. European Commission, *Commission Staff Working Document Evaluation of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products*, accompanying the document *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC)*, SWD/2018/157 at 3.

13. See, for example, Geraint Howells and Mark Mildred, *Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability*, 65 Tenn L Rev 985 (1998).

## 2. *Product Liability in Comparative Perspective*

From the European perspective, the wording of Article 6 of the Product Liability Directive links the notion of defectiveness to the notion of safety: "a product is defective when it does not provide the safety which a person is entitled to expect". The Directive, therefore, opts for the so-called consumer-expectation test, according to which the product is defective when it breaches the legitimate safety expectations of the public at large[14]. The degree of safety is therefore a matter of social acceptance[15].

The legitimacy of safety expectations, however, is assessed on a case-by-case basis and it entails a certain degree of judicial discretion[16]. It is the judge's *nobile officium* to establish which degree of safety the consumers are entitled to expect[17], although in accordance with the circumstances listed at Article 6 of the Directive (namely, the presentation of the product, the use to which it could reasonably be expected to be put, and the time it was put into circulation). Needless to say, the vagueness of such circumstances, which are expected to establish the standard of safety[18], reflect a certain lack of objectivity[19] that may lead to excessive judicial discretion[20].

By contrast, US doctrine introduces different standards of defectiveness in relation to different types of defects, namely manufacturing, design and warning defects[21]. For the sake of simplification, it may be anticipated that, within the tripartite distinction of possible

14. See Geraint Howells, *Defect in English Law – Lessons for the Harmonisation of European Product Liability* in Duncan Fairgreve (ed.), *Product Liability in Comparative Perspective* 141 (Cambridge University Press, 2005).

15. See Hans Claudius Taschner, *Product Liability: Basic Problems in a Comparative Law Perspective* in Fairgrieve (ed.), *Product Liability in Comparative Perspective* 159 (cited in note 14).

16. Duncan Fairgrieve, Geraint Howells and Marcus Pilgerstorfer, *The Product Liability Directive: Time to Get Soft?*, 4 Journal of European Tort Law 1, 6 (2013).

17. See Taschner, *Product Liability* at 159 (cited in note 15).

18. See Geraint Howells, *Comparative Product Liability* 36 (Dartmouth Publishing Company 1993).

19. See Taschner, *Product Liability* at 159 (cited in note 15).

20. See Cristina Amato, *Product Liability and Product Security: Present and Future*, in Lohsse, Schulze and Staudenmayer (ed.), *Liability for Artificial Intelligence and the Internet of Things* 78 (cited in note 1).

21. Restatement (Third) of Torts: Products Liability §2 (1998).

defects[22], manufacturing defects are the least likely to pose problems in relation to autonomous cars, since such defects usually concern hardware components, the defectiveness of which is usually caused by quality-control problems[23]. Therefore, since manufacturing defects in most cases do not implicate the software and the algorithm that execute the driving tasks, there is plausibly almost no legal uncertainty as to the allocation of liability.

For the scope and purpose of this article, therefore, only design defects are concerned, in relation to which the safety of the product is analyzed through the so-called risk-utility test: a product is defective if the foreseeable risks of harm could have been reduced or avoided by the adoption of a reasonable alternative design, without unduly impairing its utility[24]. In other words, a product is considered defective if the cost of eliminating a particular hazard is less than the resulting safety benefits[25].

The two approaches differ in the sense that, while the EU's concept of risk is entirely associated with the safety of the product, from the US perspective the risk is balanced with the product utility, as well as the probability of damage and the economic capacity of the producer to avoid damages without incurring into overly burdensome costs[26]. However, it has been rightly pointed out that whether the producer possesses sufficient financial resources for an alternative safer design should not be relevant while assessing the defectiveness of a product[27].

On the contrary, the Product Liability Directive does not require proof of fault. This is confirmed by Article 4 of the Product Liability Directive, which only requires three elements to establish liability: damage, defect and causation. Moreover, in assessing the defect of the product, Article 6 of the Directive refers only to safety, whereas the

22. Namely, manufacturing, design and warning defect according to Restatement Third of Torts. See Giulio Ponzanelli, *Antologia Sull'American Tort Law* (ETS Editrice 1992).

23. See Mark A. Geistfeld, *A Roadmap for Autonomous Vehicles: State Tort Liability, Automobile Insurance, and Federal Safety Regulation*, 105 Cal L Rev 1611, 1636 (2017).

24. See *A and Others v. National Blood Authority and another*, EWHC QB 446 (2001).

25. Fairgrieve, Howells and Pilgerstorfer, *The Product Liability Directive* at 7 (cited in note 16).

26. See Taschner, *Product Liability* at 159 (cited in note 15).

27. See *id.* at 160.

possibility that the damage could be foreseen and avoided, taken into consideration by the risk-utility analysis, is entirely irrelevant since the qualification of the properties of the product hinge upon the safety expectations of the public at large and not upon the design adopted by the manufacturer[28]. Thus, the safety standard is not absolute, but rather linked to the risks the society as a whole is willing to accept[29].

Nonetheless, it is worth noting that judges, while carrying out the delicate task of establishing which safety expectations are *legitimate*, inevitably experience an overlap between product liability and product safety legislation: the former specifically concerns compensation for damages caused by defective products, whereas the latter refers to the kinds of products which should be (safely) put on the market[30]. As some scholars have pointed out: "the primary function of product liability is to compensate for any damage, and its influence on the level of safety is indirect and incomplete"[31]. Thus, European and national courts should pay heed and draw a demarcation line between product liability and product safety in order to reduce judicial discretion[32].

Ultimately, it must be pointed out that in an age of increasing technicality and complexity, courtrooms may not be an appropriate venue to decide whether the safety expectations of the public at large are legitimate or not. This holds true particularly with regard to AI, where proving the defect entails high costs of expert evidence, information asymmetry and a considerable degree of IT expertise[33]. In fact, judges may lack the appropriate skills and knowledge to address issues arising from new technologies, and furthermore they are more concerned with the individual facts of the case at hand rather than the systemic consequences of their decisions[34]. Therefore, it is questionable whether the courts are a proper body to take product safety decisions for the society as a whole.

28. See Taschner, *Product Liability* at 160-161 (cited in note 15).

29. An example of harmful products, the risks of which are nonetheless accepted by the public, therefore considered non defective, are tobacco products and alcoholic beverages.

30. See Howells, *Comparative Product Liability* at 6 (cited in note 18).

31. See Christian Jeorges, *Product Safety, Product Safety Policy and Product Safety Law*, 6 Hanse Law Review 117, 132 (2010).

32. See Amato, *Product Liability and Product Security* at 79 (cited in note 20).

33. See *ibid.*

34. See Howells, *Comparative Product Liability* at 6 (cited in note 18).

## 3. *The Notion of Defectiveness Applied to Autonomous Vehicles*

### 3.1. *Five Levels of Vehicle Autonomy*

There are multiple levels of vehicle autonomy, based on the reliance of the vehicle on the human driver's intervention in specific situations, and *vice versa* the degree to which the human driver relies on the so-called Driver-Assistance Systems (DAS). The following paragraph briefly describes the six levels of a progressive autonomous driving, as identified by the Society of Automotive Engineers (SAE)[35].

Level zero simply consists in conventional vehicles without any computer driving assistance whatsoever[36]. The first and second levels entail partial automation of certain functions, like acceleration and automatic emergency braking systems, introduced around the 2000s[37]. The third level – the one currently available for consumers – allows the automated system to both conduct some of the driving tasks and monitor the driving environment, e.g., cruise control and lane keeping. At this stage, however, the human driver must be ready to take back control, if necessary; therefore, it can be regarded as the *autopilot mode* [38]. Vehicles with this stage of autonomy can be regarded

35. See *SAE International Releases Updated Visual Chart for Its "Levels of Driving Automation" Standard for Self-Driving Vehicles*, (SAE International, December 11, 2018), available at https://www.sae.org/news/press-room/2018/12/sae-international-releases-updated-visual-chart-for-its-"levels-of-driving-automation"-standard-for-self-driving-vehicles (last visited August 30, 2020).

36. The first level of autonomy was incorporated in conventional vehicles around the 1970s and it was meant to help drivers perform certain driving tasks in order to increase safety: cruise control, antilock braking systems (ABS), stability control and parking-assistance systems are a few examples. See Klaus Bengler, et al., *Three Decades of Driver Assistance Systems: Review and Future Perspectives*, 6 IEEE Intelligent Transportation Systems Magazine 6, 8 (2014).

37. The automated system can actually perform some driving tasks, while the human driver continues to monitor the driving environment and performs the remaining driving tasks.

38. See David C. Viadeck, *Machines without Principals: Liability Rules and Artificial Intelligence*, 89 Wash L Rev 117, 121 (2014) stating: "Autopilot devices perform a relatively simple set of tasks. For instance, autopilots keep the plane or vessel on a course determined by the pilots by controlling for minor variations in winds and currents, but generally without reference to other traffic. For that reason, pilots have a duty to remain vigilant-while the machine may have the controls, the pilots are responsible for monitoring other traffic and ensuring that the autopilot is working correctly".

as *semi-autonomous*, according to some scholars[39]. It is worth mentioning that a possibility to switch from the automated driving mode to the conventional one and *vice versa* may pose new safety problems based on the possible over-reliance of the driver on the DAS[40].

The fourth level consists in the ability to perform all driving tasks, without need for the human driver to take control. However, this kind of autonomous system can operate only in certain environments and under certain conditions, depending, for example, on the weather, lighting, time of the day or traffic conditions. These limitations are precisely what distinguishes this level from the following, the fifth, at which the vehicle reaches full autonomy without any human intervention. The fourth level is currently the state of art of the *driverless cars technology* and it is being tested in relatively safe contexts such as shuttles in college campuses[41].

The depiction of the five levels above helps us draw a distinction between levels 1-2 of DAS, at which the human driver is primarily responsible for monitoring the external environment, and levels 3-5, at which such task is performed, although with different degrees of autonomy, by the system itself. In the latter case, the system can be regarded as a *highly automated vehicle* (HAV)[42]. The higher degree of autonomy is a result of a combination of hardware and software, both

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39. See Thierry Bellet, et al., *From Semi to Fully Autonomous Vehicles: New Emerging Risks and Ethico-Legal Challenges for Human-Machine Interactions*, 63 Transportation Research Part F: Traffic Psychology and Behaviour, 153 (2019).

40. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1625 (cited in note 23). Level 3 of automation according to SAE creates an interface between the automated driving mode and the conventional one, allowing the human driver to switch from one mode to the other. The risk associated with the use of this technology is the possible over-reliance of the user on the autopilot mode. Such a case is reported to have caused the death of a Tesla-owner. See also Rachel Abrams and Annalyn Kurtz, *Joshua Brown, Who Died in Self-Driving Accident, Tested Limits of His Tesla* (The New York Times, July 1, 2016), available at https://www.nytimes.com/2016/07/02/business/joshua-brown-technology-enthusiast-tested-the-limits-of-his-tesla.html (last visited April, 18 2020).

41. See MET Staff, *Local Motors Debuts Autonomous Shuttle on California Campus Metro Magazine* (Metro Magazine March 4, 2019), available at https://www.metro-magazine.com/mobility/news/733255/local-motors-debuts-autonomous-shuttle-on-california-campus (last visited August 30, 2020).

42. See National Highway Traffic Safety Administration, *Federal Automated Vehicles Policy: Accelerating the Next Revolution In Roadway Safety* at 10 (cited in note 5).

remote and on-board, that perform the driving tasks and monitor the external environment. Being an implementation of the Internet of Things for transportation, autonomous vehicles rely on the same technology, i.e., a wide range of sensors, actuators, embedded computers with machine learning[43] capabilities and communicating technologies to enable a better perception of the external conditions and facilitate independent decision making[44]. Furthermore, specifically concerning HAVs, that is covering levels 3-5, an important step towards a fully autonomous driving experience will be the creation of an interconnected autonomous fleet of vehicles[45].

At this point, it is safe to say that Artificial Intelligence and more specifically machine learning play a major role in determining the degree of autonomy of a driverless car. It is clear that what differentiates conventional vehicles from autonomous vehicles is the decision-making process. In the former, human drivers monitor the environment and determine how the vehicle responds to it by performing the necessary driving tasks, whereas in the latter the computer makes its decisions based on data collected by its sensors[46]. Therefore, here the

43. Machine learning is a data-driven form of Artificial Intelligence that enables the systems to continuously adapt or change the algorithm based on newly acquired information in order to perform the tasks in the most efficient and safe way. See Hars, *Top Misconceptions of Autonomous Cars and Self Driving Vehicles* (cited in note 9).

44. It is important to understand the functioning of an autonomous vehicle, which can be briefly explained using the concept of 'module' or 'unit' to describe the computer system. In an oversimplified description, taking as an example a Google driverless car, the first is the perception module, which collects information from the sensors and identifies objects in the surroundings. An essential component of this module is the so-called rotating Light Detection and Ranging (LiDar), located on the roof. In conjunction with cameras that spot features such as lane markings, road signs and traffic lights, and radars that measure the speed of nearby objects, the LiDar detects the surroundings of the car and creates a three-dimensional schematic. Wheels are equipped with position estimators to locate the vehicle within the surroundings. The second is the prediction module: a sophisticated computer processes real-time data to forecast how the surrounding objects will behave in the following seconds, while the third module analyzes these predictions to determine how the vehicle should respond and safely interact with the environment. See Kevin Funkhouser, *Paving the Road Ahead: Autonomous Vehicles, Products Liability, and the Need for a New Approach*, 1 Utah L Rev 437 (2013).

45. See Klaus Bengler, et al., *Three Decades of Driver Assistance Systems* at 20 (cited in note 36).

46. *See ibid.*

central role is played by the algorithm that allows the vehicle to adapt to rapidly changing and unpredictable road conditions.

The autonomous DAS technologies reduce risk either by providing additional information to a human driver or by assuming temporary control of the vehicle[47]. This will become possible because of machine learning algorithms that analyze examples of safe driving and automatically generate core patterns that translate to effective driving[48].

While lower levels of DAS do not pose particular problems to the allocation of liability, the question is different in the case of HAVs: a higher degree of automation determines a shift in the role of the user, who increasingly relies on the operations performed by the system itself, albeit with some variations in the case of semi-autonomous and fully autonomous vehicles. This is where traditional rules of liability are truly challenged.

### 3.2. *The Inadequacy of both the Consumer-Expectation and the Risk-utility Test When Applied to Autonomous Vehicles*

#### 3.2.1. *Consumer–Expectation Test*

When it comes to autonomous vehicles, both the consumer-expectations and the risk-utility tests have their shortcomings. A starting point would be analyzing the "reasonable safety expectations" of consumers towards the so-called driverless cars: consumers often expect a higher level of safety and reliability from this new driving technology. A whole different issue, however, is the reasonableness of such safety expectations.

From the logical premise that an ordinary consumer does not expect a product to malfunction, any situation in which an autonomous vehicle, although used in reasonably foreseeable circumstances[49], crashes, frustrates such expectations and consequently triggers

47. See *id*. at 154 (cited in note 36).

48. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1644 (cited in note 23). For this reason, Waymo, Google's self-driving car, has driven millions of kilometres on public roads with test drivers in order to collect data and *learn* from different traffic situations.

49. See Borghetti, *How Can Artificial Intelligence Be Defective?* at 67 (cited in note 1).

manufacturer's liability for any product malfunction. This is the so-called *malfunction doctrine* under the US tort law[50].

However, as autonomous vehicles increasingly become available to the public and their machine-learning capacities make them more protected from risk[51], the safety expectations of consumers will change accordingly[52]. In fact, the promise of increased safety in the performance of autonomous vehicles will generate exceptionally demanding expectations of safety. This will eventually result in the manufacturer being held liable for virtually *all* crashes[53], which creates excessive liability costs that will plausibly obstruct the full deployment of this potentially life-saving technology[54].

In order to prevent the risk of holding the manufacturer liable for any possible cause of crash, the safety expectations of the public must be leveled to the associated acceptable risk of the deployment of such technology, to the extent that the latter represent a benchmark for the assessment of new risks[55]. Hence, the manufacturer can avoid liability for crashes under the malfunction doctrine by fulfilling the duty to warn the consumer about the inherent and foreseeable risks of crashes[56]. As a matter of fact, warnings do shape consumers' safety expectations[57]. This holds particularly true for semi-autonomous vehicles, i.e.,

50. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1639 (cited in note 23).

51. See Cadie Thompson, *Why Driverless Cars Will Be Safer Than Human Drivers* (Business Insider November 21, 2016), available at https://it.businessinsider.com/why-driverless-cars-will-be-safer-than-human-drivers-2016-11/?r=US&IR=T (last visited August 30, 2020).

52. On how difficult is to shape consumer expectations with regard to complex products, such as automobiles, see Funkhouser, *Paving the Road Ahead* at 450 (cited in note 9).

53. See Geistfeld, *A Roadmap for Autonomous Vehicle* at 1639 (cited in note 23).

54. See Lora Kolodny and Katie Schoolov, *Self-driving cars were supposed to be here already — here's why they aren't and when they should arrive* (CNBC November 30, 2019), available at https://www.cnbc.com/2019/11/30/self-driving-cars-were-supposed-to-be-here-already-heres-whats-next.html (last visited August 30, 2020).

55. See Herbert Zech, *Liability for Autonomous Systems: Tackling Specific Risks of Modern IT*, in Lohsse, Schulze and Staudenmayer (ed), *Liability for Artificial Intelligence and the Internet of Things* 193, 194 (cited in note 1).

56. *See ibid.*

57. See Bernhard A. Koch, *Product Liability 2.0 – Mere Update or New Version?*, in Lohsse, Schulze and Staudenmayer (ed.), *Liability for Artificial Intelligence and the Internet of Things* 108 (cited in note 1).

level 3 of autonomy according to SAE, where manufacturer's liability certainly depends on the adequacy of instructions and warnings about the risks associated with the use of this technology[58].

Although such warnings and instructions may contribute to the reasonableness of the safety expectations under the consumer-expectation test, they do not necessarily eliminate or mitigate the risk of harm. Due to the fact that "instructions and warnings may be ineffective because users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings", the manufacturer has also the duty to adopt a reasonably safe and fault-tolerant design[59]. Failing to do so will subject the manufacturer to tort liability in the case of physical harm resulting from the use of the product[60].

However, in the gradual development from semi-autonomy to higher degrees of autonomy[61], the main technologically – as well as legally – disruptive feature is the shift in control from the user to the operational system of the vehicle[62]: fully autonomous vehicles are not controlled by a human driver but by an algorithm developed and installed into the vehicle by its manufacturer[63]. In this sense, the user will be regarded as a passenger who has no control over its functioning: therefore, it is regarded by some that the *behavior* of the car is in the hands of the manufacturer[64].

In this context, warnings only help establish consumers' minimum safety expectations of the actual performance of the product, which is

58. For instance, the manufacturer must clearly point out that the autopilot mode is an assist feature that requires the driver to keep his hands on the steering wheel or that in certain conditions such as rain or fog, when the system operates less safely than a human driver, the driver is required to take over. See also Ryan Abbott, *The Reasonable Computer: Disrupting the Paradigm of Tort Liability*, 86 Geo Wash L Rev 1, 27 (2018). See also Chris Ziegler, *Tesla's own Autopilot warnings outlined deadly crash scenario*, (The Verge June 30, 2016), at https://www.theverge.com/2016/6/30/12073240/tesla-autopilot-warnings-fatal-crash (last visited August 30, 2020).

59. Restatement (Third) of Torts: Products Liability §2 (1998).

60. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1627 (cited in note 23).

61. Levels 4 and 5 according to SAE.

62. See Cerka, Grigiene and Sirbikyte, *Liability for Damages Caused* at 381 (cited in note 4).

63. See Gerhart Wagner, *Robot Liability*, in Lohsse, Schulze and Staudenmayer (eds), *Liability for Artificial Intelligence and the Internet of Things* 38 (cited in note 1).

64. See *ibid.*

different from the more demanding expectation of how the product should otherwise perform[65]: this is an assessment of a risk-utility nature over unreasonable unsafety of the design at hand and on whether an alternative design would provide higher safety levels.

### 3.2.1. *Risk–Utility Test*

Under the risk-utility test, as anticipated, the product is defective if it is possible to identify an alternative design that would have avoided the accident in question, provided that the accident costs – that would have been averted by the added safety feature – exceed the added costs of the alternative design[66]. From such a premise, a possible consequence of rigidly applying the risk-utility test to the rules that guide the machine-learning of an autonomous vehicle is that the manufacturer will almost always be held liable in the cost-benefit argument, in the aftermath of an accident, there will almost be a safer alternative design.[67]

Furthermore, in the case of fully autonomous vehicles, the risk-utility assessment must be carried out with respect to the algorithm that operates the vehicle. Machine-learning capabilities have in fact critical implications for how the risk-utility test applies to the design or programming of an algorithm that operates a driverless car[68]. This is mainly due to a misconception regarding how operating algorithms are programmed. Self-driving cars functioning, in fact, is not based on a series of pre-defined if-then rules as conventional software, but rather uses machine-learning algorithms that are *trained* to drive through analysis of safe- driving examples[69]. Relying on previous driving experience, an autonomous vehicle adapts its own algorithm to new situations in order to optimise the performance of the driving

65. See *id.* at 1641-1642 (for instance, the warning that a car does not have an airbag will not defeat the reasonable expectation of safety. Therefore, the plaintiff can allege the frustration of the ordinary consumer's expectations by proving that the omission of the airbag constitutes an unreasonably unsafe design).

66. See Wagner, *Liability for Artificial Intelligence and the Internet of Things* at 43 (cited in note 63).

67. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1644 (cited in note 23).

68. See *id.* at 1645.

69. See Hars, *Driverless Car Market Watch* (cited in note 9).

task, whereas the risk-utility test sees coding simply as a set of rules that constrain or guide machine learning[70].

Hence, the way of applying such risk-utility analysis to autonomous vehicles still leaves much room for debate[71] and it certainly entails an inquiry into software programming and the recourse to technical experts[72]. One way is to compare a product's risks with the benefits associated with its deployment. However conceptually logical it may sound, such an interpretation suffers from an over simplistic view that risks and benefits of autonomous driving are of the same nature, and therefore measurable and comparable[73].

Another way to do this is comparing other existing products of the same nature in order to assess their respective performance: the terms for comparison may regard an actual pre-existing or a hypothetical product, using the well-known alternative design test[74]. The comparison between performances of different algorithms, as well as between the algorithm and a human driver, although theoretically conceivable, will most likely lead to flawed and unfair conclusions.

For instance, the first logically suggested comparison is between the outcome of the algorithm on the one hand, and a reasonable human driver on the other hand. Despite the fact that autonomous driving is expected to decrease the number of road accidents by eliminating human error, collisions will happen regardless. Nonetheless, the critical point is that the pool of accidents that an autonomous vehicle may cause will be not the same as the pool of accidents a reasonable human driver is unable to avoid[75]. Therefore, not only is this *reasonable human driver test* fundamentally pointless[76], but it is also misleading in the sense that whenever the driverless car causes an accident, which a

70. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1645 (cited in note 23).

71. See Borghetti, *How Can Artificial Intelligence Be Defective?* at 68 (cited in note 1).

72. See Wagner, *Liability for Artificial Intelligence and the Internet of Things* at 43 (cited in note 63).

73. See Borghetti, *How Can Artificial Intelligence De Defective?* at 68 (cited in note 1).

74. *See ibid.*

75. See Wagner, *Liability for Artificial Intelligence and the Internet of Things* at 44 (cited in note 63).

76. See Borghetti, *How Can Artificial Intelligence Be Defective*? at 69 (cited in note 1).

reasonable human driver would have been able to avoid, the algorithm would be found defective[77].

Secondly, two algorithms might be compared with one another. As though one assesses the existence of human fault or negligence, one could compare the performance of an algorithm with the performance of another algorithm in the same circumstances[78]. This approach is also conceptually flawed, because, besides the fact that driving algorithms do not follow the same reasoning as human beings, in order to assess the defectiveness of an algorithm, the comparison between two algorithms has to take into account not the performance in a specific situation but the overall results of the two algorithms[79]. In other words, as the machine-learning process involves the analysis and processing of sets of data provided not by the single vehicle, but rather by the whole fleet of vehicles, designed by the same manufacturer, the assessment of the performance of the algorithm is system-oriented[80]: one must address the issue of the design defect with respect to the entire system of vehicle operated by the same algorithm[81].

However, this *optimal algorithm test* still poses difficulties in identifying an alternative safer design by comparing the algorithm under evaluation to other algorithms of different manufacturers: the algorithm that caused the accident will always be found defective whenever there is another algorithm on the market that would have avoided that particular accident[82]. Moreover, even by assessing the overall performance of any fleet of autonomous vehicles operated by the same algorithm, this test will lead to the unfair result that only the safest algorithm on the market is not found defective: needless to delve into the consequences that such a conclusion may cause on the competitiveness on the market between manufacturers of autonomous vehicles[83].

77. See Wagner, *Liability for Artificial Intelligence and the Internet of Things* at 44 (cited in note 63).

78. See Borghetti, *How Can Artificial Intelligence Be Defective?* at 69 (cited in note 1).

79. See *ibid.*

80. See Wagner, *Liability for Artificial Intelligence and the Internet of Things* at 44 (cited in note 63).

81. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1645 (cited in note 23).

82. See Wagner, *Liability for Artificial Intelligence and the Internet of Things* at 45 (cited in note 63).

83. See *ibid.*

In conclusion, it can be stated that the central point of both the consumer-expectation test and the risk-utility test is the safety of an autonomous vehicle. At this point, it is clear that this parameter mainly depends on the adequacy of pre-market testing, i.e., the amount of driving experience that the driverless car has gained prior to its introduction to the market, rather than the set of rules that constrain or guide the machine-learning process itself[84]. The requisite amount of pre-market testing is not only an empirical question[85], but has also policy implications: it may pave the way for the adoption of safety standards of autonomous vehicles.

The above considerations allow to conclude that neither the consumer-expectation test nor the risk-utility test provide a convincing answer on how an algorithm should be found defective if such approaches are not specifically addressed to autonomous vehicles, which leads to the ultimate question whether the concept of defectiveness, which is regarded as the core of the product liability, is fundamentally inadequate to be applied to Artificial Intelligence[86].

### 4. *The role of Harmonised Technical Standards in Identifying the Legitimate Safety Expectations*

Having analyzed the shortcomings of the consumer-expectation test[87], lest there be a doubt, a risk-utility approach is nonetheless undesirable and does not provide a more satisfactory answer as it ties safety implications to market forces[88]. Although markets can bring about an optimum allocation of resources, such result can be achieved only under certain circumstances and conditions that are difficult to be guaranteed in practice: it is particularly true in the case of rational

84. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1646 (cited in note 23).

85. See *ibid*.

86. See Borghetti, *How Can Artificial Intelligence Be Defective?* at 71 (cited in note 1).

87. See Howells, *Comparative Product Liability* at 11 (cited in note 18) (consumers, as it is argued, do not have the data with which to form accurate expectations. This is especially true where the product involves complex technology about which the consumer can have little or no detailed understanding).

88. See Jeorges, *Product Safety, Product Safety Policy* at 125 (cited in note 31).

consumers' safety expectations, which would require perfect information symmetry for an economically rational decision[89].

It has also been remarked that a more effective and rational way to develop product liability is to separate the claims for compensation and product safety requirements[90], the latter being more properly established by legislative tools, so that it becomes a matter of public policy through either State authorities or independent agencies[91]. Otherwise, as long as the manufacturer does not have to comply with a specific safety level, while consumers may be responsible for the definition of their own safety interests, the safety standard will remain a function of supply and demand decisions[92]. Since product safety is a matter of social protection, it cannot be unilaterally determined by manufacturers or judges[93], making legislative intervention more appropriate.

There is a need for objective safety standards which represent the state-of-the-art of mass production so that the social expectations are reduced to a sustainable and shared notion of safety[94]. Such objective standards of safety, in the light of the aforementioned considerations, can be achieved through harmonised technical standards.

For instance, in the EU, products manufactured in conformity with harmonised technical standards are presumed to conform to the essential requirements established by the Directives[95]. This constitutes an important link between product safety and product liability: in particular, Article 7(d) of the Product Liability Directive exempts the manufacturer from liability if "the defect is due to compliance of the product with mandatory regulations issued by the public authorities".

However, it is important to remind that compliance with such requirements is not mandatory: it means that the producers have free choice whether to manufacture in conformity with the standards or

89. See Roksana Moore, *Standardisation: A Tool for Addressing Market Failure within the Software Industry*, 29 Computer Law and Security Review 413, 417 (2013).

90. See Howells, *Comparative Product Liability* at 6 (cited in note 18).

91. See Jeorges, *Product Safety, Product Safety Policy and Product Safety Law* at 125 (cited in note 31).

92. See *ibid.*

93. See Amato, *Product Liability and Product Security* at 89 (cited in note 20).

94. See *id.* at 91.

95. Annex II of Council Resolution of 7 May 1985.

not, but in this event, they must prove that their products conform to the essential requirements of the relevant Directive. Therefore, it is of the key importance to establish the relationship between compliance with technical standards and assessment of the defectiveness of the product in the light of Article 7(d) of the Product Liability Directive. It would also have meaningful consequences on the burden of proof imposed on the consumer, since the use of presumptions is allowed as long as they are based on elements that are serious, specific and consistent[96].

At this point, two scenarios can be envisaged. First, non-compliance with harmonised technical standards, even though there is compliance with general and special mandatory rules, excludes the presumption of conformity with the essential requirements of the General Product Safety Directive, therefore the product is presumed to be defective[97]; thus, the burden of proving compliance or other causes of harm, for instance misuse or unavoidable risk, lies on the producer[98].

In this case, the presumption of defectiveness operates in the way that the producer cannot rely on Article 7(d) of the Product Liability Directive. However, judges maintain their discretionary power to deem the product as reasonably safe, taking into account all the circumstances listed in Article 6 of the Directive[99], but their discretionary power does not eventuate into an arbitrary judgement as a legitimate safety expectation of the public at large converges into the objective harmonised technical standards.

Second, the diametrically opposed situation is compliance with harmonised technical standards that accounts for the presumption of conformity with essential requirements. Thus, the producer may trigger the defence of Article 7(d) to exclude liability. However, it is worth pointing out that harmonised technical standards represent the minimum safety requirements. Hence, it is conceivable that the victim may rebut the presumption of conformity by proving the defectiveness of

96. See C-621/15, *N. W and Others v Sanofi Pasteur MSD SNC and Others,* para 28-29.

97. European Commission, *Commission Notice The 'Blue Guide' on the implementation of EU products rules 2016,* C/2016/1958 at 40.

98. See Amato, *Product Liability and Product Security* at 90 (cited in note 20).

99. See *id.* at 91.

the product in the specific circumstances when the damage occurred. Therefore, judges may employ their discretionary power to assess the higher social expectations of safety or other technical standards beyond the minimum standard the product has been compliant with[100].

From the analysis above, it is clear that compliance (or even non-compliance) with harmonized technical standards allows for a more objective and less discretionary assessment of the defectiveness of a product carried out by the judiciary. By coordinating product liability with product safety rules, judges are able to objectivize the safety expectations of the public at large, ranging from a minimum level of harmonized technical standardization to the actual level to be expected in the particular situation when a damage occurs[101]. The overall result is that safer products are placed on the market[102].

In the context of modern technology, where the burden of proof is deemed problematic for consumers, particularly with regard to AI[103], it is conceivable that adopting harmonized technical standard for AI offers a great deal of certainty[104]. Although it is not within the scope of this research to enquire into possible methods of the adoption of harmonized technical standards for AI[105] – which is no easy task due to machine-learning capacities and autonomous behavior – it is nonetheless possible to identify certain principles underlying safety standards for algorithms.

The first step is the identification of (known) risks associated with AI: it is necessary to identify which risks are unavoidable, which must be eliminated at all costs and which must be reduced through design

100. See *id.* at 92.

101. See, for example, Christian Jeorges and Hans-W. Micklitz, *The Need to Supplement the New Approach to Technical Harmonization and Standards by a Coherent European Product Safety Policy*, 6 Hanse Law Review 351 (2010).

102. See Lori A. Weber, *Bad Bytes: The Application of Strict Products Liability to Computer Software*, 66 St. John's L. Rev 469, 485 (1992).

103. See Jan-Peter Kleinhans, *Internet of Insecure Things* 14 (Stiftung Neue Verantwortung, December 2017), available at https://www.stiftung-nv.de/sites/default/files/internet_of_insecure_things.pdf (last visited November 11, 2020).

104. See Zech, *Liability for Autonomous Systems* at 192 (cited in note 55).

105. European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Artificial Intelligence for Europe*, COM/2018/237 final at 237.

requirements. This way, as some scholars point out "[t]he alignment of corresponding decisions to technical standards specifying general safety duties is equivalent to setting a threshold value establishing the extent of permissible risks in general terms"[106]. Secondly, technical safety legislation must provide for an allocation of responsibilities matching the complexity of the normative assessment of hazards[107].

For the practical implementation of such method, as far as autonomous vehicles are concerned, one may consider testing the algorithm of a driverless vehicle in order to identify risks and behavioral response to the environment[108]. The algorithm's efficiency can be tested through a test harness which consists also of the data used to train the autonomous system[109]. Without delving into the technicalities of this operation, the result of the test will show how algorithms perform and learn in various circumstances. It gives an indication of the adequacy of the programming and of the data provided and sets the safety expectations related to the performance of the autonomous system[110].

Moreover, it can be stated that harmonized standards will mostly depend on the amount of pre-market testing, i.e. the distance expressed in total amount of kilometers the vehicle has covered before being put on the market. On the same line, the US NHTSA regulations confirmed the need for regulatory action in order to design and implement new standards based on rigorous testing[111]. Besides uncovering programming errors and bugs that may cause the vehicle to malfunction, extensive pre-market testing improves the safety performance

106. See Jeorges, *Product Safety, Product Safety Policy and Product Safety Law* at 129 (cited in note 31).

107. See *id.* at 130.

108. See *ibid*.

109. See Woodrow Barfield, *Liability for Autonomous and Artificially Intelligent Robots,* 9 Paladyn Journal of Behavioral Robotics 194, 201 (2018), claiming that in software testing, a test harness or automated test framework is a collection of software and test data configured to test a program unit by running it under varying conditions and monitoring its behavior and outputs. The goal of the test harness is to be able to quickly and consistently test algorithms against a fair representation of the problem being solved.

110. See Tom Michael Gasser, *Legal Issues of Driver Assistance Systems and Autonomous Driving,* in Azim Eskandarian (ed) *Handbook of Intelligent Vehicles* 1519, 1528 (Springer, 2012).

111. National Highway Traffic Safety Administration, *Federal Automated Vehicles Policy* (cited in note 5).

of the vehicle through machine-learning[112]. Certainly, errors cannot be entirely avoided even in the ordinary machine world, therefore a low-enough margin of error may be sufficient to establish that the autonomous system is reasonably safe[113].

Although certain risks may not be initially discovered and may become evident after the product had been put into circulation, standardization bodies and authorities may impose follow-up actions once the product already enters the market[114]. Follow-up market controls serve two important redistributive purposes[115]: which t result in both assuring the possibility to withdraw unsafe products and also to impose on the producer the obligation to release periodical updates and patches so that the product maintains its compliance with the essential safety requirements[116].

However, the criticism against the harmonized standards derives from the slowness of their development and adoption, which allegedly does not keep pace with technological development[117]. Nonetheless, their role in establishing the standard of safety is undeniable and must be interpreted along with strict liability rules. Injured parties still have legal grounds under product liability law for their claims.

In conclusion, an extensive product liability regime for new technologies should entail the adoption of harmonized technical standards as means for establishing the state-of-the-art of mass production[118]. The convergence between product liability and product safety shall lead to an objective (minimum) safety standard that reflects the expectations of the public at large. As a consequence, the discretionary power of the judiciary will not result in arbitrary decisions over the defectiveness of the product since the judicial assessment is based

112. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1678 (cited in note 23).

113. See Zech, *Liability for Autonomous Systems* at 192 (cited in note 55).

114. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1681 (cited in note 23).

115. See Jeorges, *Product Safety, Product Safety Policy and Product Safety Law* at 132 (cited in note 31).

116. See *ibid*. See also Alan Butler, *Products Liability and the Internet of (Insecure) Things: Should Manufacturers Be Liable for Damage Caused by Hacked Devices?*, 50 U Mich J L Ref 913, 928 (2017).

117. See Gerald Spindler, *User Liability and Strict Liability in the Internet of Things and for Robots*, in Lohsse., Schulze and Staudenmayer (eds.), *Liability for Artificial Intelligence and the Internet of Things* 136 (cited in note 1)

118. See Amato, *Product Liability and Product Security* at 91 (cited in note 20).

on the presumption of conformity (or non-conformity) with the essential safety requirements set by regulatory powers.

## 5. *Conclusion*

In the case of fully autonomous AI-enabled products, the Product Liability Directive may however not be sufficient. As the control over the driving performance shifts entirely from the driver to the algorithm of the vehicle [119], so does liability towards the manufacturer of the vehicle: the liability of manufacturers will increase in size and importance, while the users' behavior will proportionately decrease in relevance[120].

Further analysis will be needed to assess the impact of such provisions on the initial rollout of AI-enabled vehicles. The results of such analysis will also determine the best strategies to lead the process, from social acceptance to the initial stage of regulation of AI. As for this moment, some tentative considerations are nonetheless possible.

In the previous subsections, the important role of harmonized technical standards has been described with respect to the fundamental link between product liability and product safety. Thus, it is safe to argue that certification bodies, pre-market testing of algorithms, classification according to risks will maintain their relevance with regard to the future deployment of fully autonomous systems. However, it can also be argued that technical harmonization tools will have to keep the pace with technological progress. Although it exceeds the scope of this research, it can be argued that the use of Blockchain[121] will have a significant impact on the transparency of and reliance on AI[122]. Data acquired through the Blockchain could be used by judges for making liability decisions and may be crucial to insurance companies to attribute liability[123].

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119. See Wagner, *Liability for Artificial Intelligence* at 38 (cited in note 63).

120. See Cerka, Grigiene and Sirbikyte, *Liability for Damages Caused* at 383 (cited in note 4).

121. See Scott Ruoti et al., *Blockchain Technology: What Is It Good For?*, 63 Communications of the ACM 46 (2019).

122. See *ibid.*

123. See *ibid.*

In conclusion, the legal debate around the applicability of the Product Liability Directive to fully autonomous systems proves that the road ahead is far from certain, and it will most likely entail a profound revision of the current product liability rules in order to meet the specific technical features of this ground-breaking technology. Notwithstanding the difficulties in outlining a comprehensive liability regime, AI is a transformative technology that may bring significant benefits in terms of overall increased safety. As such, at least during the initial deployment of AI-enabled products, a certain degree of legal uncertainty is inexorable, therefore this rollout must be encouraged through regulatory and legislative tools, able to create social acceptance[124].

Surely enough, from the lessons taught by currently employed semi-autonomous vehicles, mandatory insurance will play a central role, as it guarantees that victims are compensated[125]. The increasing liability of manufacturers of autonomous vehicles will result in an increased demand of insurance coverage in order to prevent insolvency[126]. Although, it is vital that insurance is supported by a clear liability regime, otherwise the costs of uncertain liability will result in increased insurance premiums[127].

In the remote case there is no insurance coverage for certain situations or there are limitations imposed on liability, compensation funds that fill the gaps of compulsory insurance systems can be a viable solution[128]. Financial contributions to compensation funds may derive from manufacturers, programmers, owners or users of automatic

124. See European Parliament, *Resolution of 16 February 2017* (cited in note 3).

125. See Maurice Schellekens, *Self-Driving Cars and the Chilling Effect of Liability Law,* 31 Computer Law and Security Review 506 (2015).

126. See Georg Borges, *New Liability Concepts: the Potential of Insurance and Compensation Funds* in Lohsse, Schulze and Staudenmayer (eds), *Liability for Artificial Intelligence and the Internet of Things* 156 (2018).

127. See Geistfeld, *A Roadmap for Autonomous Vehicles* at 1618 (cited in note 23) (however, it is doubtful that "requiring disclosure of the annual, risk-adjusted insurance premium would give manufacturers a sufficient incentive to further improve the vehicle's safety performance in order to reduce the premium and enhance the vehicle's competitiveness within the market" as stated in *id.* at 1683. Such an assumption derives from an economic analysis of liability law. On the contrary, insurance premium may not be specifically matched to risks). See also Jeorges, *Product Safety, Product Safety Policy and Product Safety Law* at 129 (cited in note 31).

128. See European Parliament, *Commission on Civil Law Rules on Robotics* (cited in note 3).

vehicles who, in exchange for the contribution, benefit from limited liability. Accordingly, compensation funds have great potential in the transformation process as they may both close liability gaps[129] and increase social acceptance of AI[130].

129. See Funkhouser, *Driverless Car Market Watch* at 461 (cited in note 9).

130. See Borges, *New Liability Concepts* at 160 (cited in note 126) (this accounts for the fact that the transformation costs are not certain due to unpredictable amount of damages caused by the introduction of fully autonomous systems. "However, the necessity to avoid chilling effects whilst not burdening injured parties with the cost of the transformation process" can be addressed through the "introduction of limits on liability in order [to] facilitate insurance and avoid chilling effects. Compensation funds could be use in such situations to close gaps in liability").

# Juvenile Justice Converges on Principles Leading to the International Harmonization of the Juvenile Justice System

Brittany R. Wescott*

*Abstract:* In November 1989, the General Assembly of the United Nations adopted the Convention on the Rights of the Child. This Convention expected member countries to harmonize their juvenile justice systems in the direction of making the best interest of the child the main focus of their justice administration, guaranteeing the respect of human rights and fundamental freedoms of children. South Africa and the United States are examples of how member countries abided by the Convention. On one hand, South Africa ratified the Convention and gave children a unique position in its juvenile justice system, whereas, on the other hand, the United States has signed the instrument but has not fully eradicated the typical punitive traits of its system; nonetheless, both countries still move in the direction of the shared international values. In particular, in the United States, individual States – such as Massachusetts – are showing how it is possible to successfully implement the international values shared in the Convention moving to a rehabilitation model.

*Keywords:* Juvenile Justice; Convention on the rights of the Child; South Africa; United States; Massachusetts.

## 1. *Introduction*

Since juveniles under the age of 18[1] are typically considered psychologically immature persons[2], it is appropriate to support that they deserve a special treatment when they commit an offense, and this also demonstrated by the criminal justice system which sees fit to treat them differently than adults[3]. Another reason relies on the fact that children are subject to two different types of offenses: adult crimes, which are simply crimes regardless of the age of the offender, and status offenses, which are crimes not considered criminal had an adult committed them[4]. However, special safeguards for children in conflict with the law are limited in time and expire after the child reaches the age of majority[5].

Children, as a significantly large population[6], are inherently different from adults, therefore it is legitimate to enact a system of

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1. G A Res 44/25, *Convention on the Rights of the Child*, art. 1 (November 20, 1989).

2. See *Juvenile*, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/juvenile (last visited November 22, 2020).

3. See *IJJO Glossary*, International Juvenile Justice Observatory, available at https://www.oijj.org/en/docs/glossary?letter=J (last visited November 22, 2020).

4. See United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (Sept. 2015), available at https://www.ojjdp.gov/mpg/litreviews/Status_Offenders.pdf (last visited November 22, 2020).

5. See Julia Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law*, 1, S Afr J on Hum Rts at 401, 411 (1995).

6. See Katharine Hall and Winnie Sambu, *Demography of South Africa's Children*, Children's Inst, University of Cape Town at 106 (2016), available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/2006/Child_Gauge_2016-children_count_demography_of_sa_children.pdf (last visited November 22, 2020) (South Africa's child population, in 2014, was approximately 18.5 million of the total 53.7 million citizens; this means roughly 34% of the population is under the age of 18. The United States' child population – those under the age of 17 – in 2018 was approximately 73.4 million). See also *Pop1 Child Population: Number of Children (in Millions) Ages 0-17 in the United States by Age, 1950-2018 and Projected 2019-2050*, Child stats.gov, available at https://www.childstats.gov/americaschildren/tables/pop1.asp (last visited November 22, 2020).

different standards for their treatment. The perspective that a child deserves different treatment in the criminal justice system generated the movement of most countries to enact a separate Juvenile Justice System of laws, policies, guidelines, and customary norms that are specifically applicable to children and reflect the countries' respective cultural values[7].

Around 1945, 26 countries founded the United Nations to maintain international peace and to harmonize the actions of nations in the attainment of common goals[8]. United States and South Africa were two of the countries joining the United Nations[9]. In particular, as members, they proclaimed to stand by the principles of the United Nations Charter: United Nations sought to establish a "formal international legal recognition of the human rights of children"[10], by calling for the international community to make a pledge to cooperate in the improvement of the living conditions of children through administrative systems[11]. In November 1989, the Convention on the Rights of the Child was adopted to address the administration of juvenile justice[12]. Specifically, it states:

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7. See Hall and Sambu, *Demography of South Africa's Children* (cited in note 6). See also G A Res, art. 40 (cited in note 1) (in the Preamble of the Convention on the Rights of the Child, it is proclaimed that children are entitled to special care. The concept that a child deserves special treatment is well embraced in the international community having been cited in the Geneva Declaration of the Rights of the Child of 1924, the Declaration of the Rights of the Child adopted by the General Assembly in 1959, the Universal Declaration of Human Rights, among various others).

8. UN Charter, art. 1, §§ 1, 4.

9. See *Member States*, United Nations, available at https://www.un.org/en/member-states/index.html (last visited November 22, 2020).

10. See Cynthia Price Cohen, *Introductory Note* at 28, Int'l Legal Materials 1448 (1989).

11. See *id.*

12. See *id.* See also G A Res, art. 40(3) (cited in note 1) (four international instruments are generally thought of to have a direct bearing on the rights of children, including the United Nations Convention on the Rights of the Child 1989; the United Nations Guidelines for the Prevention of Juvenile Delinquency – Riyadh Guidelines; the United Nations Standard of Minimum Rules for the Administration of Juvenile Justice – Beijing Rules; and the United Nations Rules for Protection of Juveniles Deprived of their Liberty). Compare Ann Skelton and Boyan Tshehla, *International Instruments Pertaining to Child Justice*, *Child Justice in South Africa* 15 (Sept 2008), available at https://www.files.ethz.ch/isn/103622/MONO150FULL.pdf (last visited November 22, 2020).

> State parties recognize the right of every child alleged as, accused of or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, which take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society[13].

Member countries are free to create their own juvenile justice models[14], but in order to abide by the Convention, these systems needed to focus on the best interests of the child while administering juvenile justice[15]. This concept can be found in the Declaration of the Rights of the Child: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"[16]. In addition, the Convention also emphasizes the importance of diverting children out of the mainstream criminal justice system, and away from adults[17]. This Convention is not self-executing; therefore, members need to ratify the Convention for it to be binding[18]. However, signing members are

13. G A Res, art. 40(1) (cited in note 1).

14. See G A Res, art. 40(3), (4) (cited in note 1) ("State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children [particularly] the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law [and] measures for dealing with such children without resorting to judicial proceedings. [C]are, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes [sic] and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence").

15. See Cynthia Price Cohen, *Introductory Note* (cited in note 10). See also G.A. Res., Art. 3 (cited in note 1). Compare Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 405, 408 (cited in note 5).

16. G A Res, at Preamble (cited in note 1).

17. G A Res, art. 37 (cited in note 1).

18. See Skelton and Tshehla, *International Instruments Pertaining to Child Justice*, *Child Justice in South Africa* at 16 (cited in note 12). See also Ann Skelton and R. Morgan Courtenay, *South Africa's New Child Justice System*, in Juvenile Justice International Perspectives, Models and Trends at 321, 325 (John A. Winterdyk ed., 2015).

expected to implement the Convention in good faith, including establishing laws, procedures, authorities, and institutions dealing exclusively with a child in conflict with the law, regardless of ratification[19]. On the one hand, South Africa ratified the Convention[20], whereas, on the other hand, as of 2015, the United States has only signed the instrument; nonetheless, both still move in the direction of the shared international values[21].

This article will explore the similarities and the differences between two countries, South Africa and the United States, specifically Massachusetts, in relation to their integration of the international principles found in the Convention.

The next section lays out the development of the South African system and the United States' system, illustrating the various principles each values the most and how specific laws implement the principles of the Convention. In South Africa it is clear that the legislation is driven by a cultural emphasis on restorative justice rather than punishment, which gives children a unique position in the juvenile justice system, whereas the United States has signed the instrument but has not fully eradicated the typical punitive traits of its system. Nonetheless both countries are still move in the direction of the shared international values.

The final section of this article will look specifically at the international community's value of setting a minimum age of criminal responsibility, which both South Africa and the United States have embraced. The acknowledgment that a minimum age of criminal responsibility should exist forces countries to incorporate diversion programs into their juvenile justice systems, because it involves that the ordinary criminal justice system does not have the proper means

19. See Skelton and Tshehla, *International Instruments Pertaining to Child Justice* at 15, 17 (cited in note 12). See also Skelton and Courtenay, *South Africa's New Child Justice System* (cited in note 18).

20. See Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 403 (cited in note 5).

21. See Gene Griffin and Paula Wolff, *The Convergence of U.S. Juvenile Justice Policies and the U.N. Convention on the Rights of the Child,* B.U. Int'L. J. 1 (Oct. 29, 2015), available at http://www.bu.edu/ilj/2015/10/29/the-convergence-of-u-s-juvenile-justice-policies-and-the-u-n-convention-on-the-rights-of-the-child/ (last visited November 22, 2020) (South Sudan ratified the Convention on the Rights of the Child and left the United States as the only country to decide not to ratify the Convention).

to handle juvenile offenders. Further, this section will address the types of crimes children offenders can be charged with, and why addressing these crimes differently will ensure that minors are provided with the tools they need to break the cycle of crime in which they may find themselves later in life. The limitations on the sentencing portion of this article help to illustrate that, while both South Africa and the United States have enacted diversion programs or alternate courts to deal with child offenders, the death penalty and life imprisonment are two sentences that are prohibited from being assigned to children, in line with the direct embracement of the international community's emphasis on imprisonment as a last resort.

Finally, the article will discuss the handling of juveniles in and out of the courtroom with a specific focus on placing children in restraints and providing proper due process rights.

## 2. *The Development of the Juvenile Justice System in South Africa and in the United States*

In November 1989, the General Assembly of the United Nations adopted the Convention on the Rights of the Child. This Convention expected member countries to harmonize their juvenile justice systems in the direction of making the best interest of the child the main focus of their justice administration, guaranteeing the respect of human rights and fundamental freedoms of children. South Africa and the United States are examples of how member countries abided by the Convention, each following its own historical development and a unique harmonization pattern.

In particular, in South Africa the legislation focused on restorative justice rather than on punishment, which allowed for a seamless integration of the international values found in the Convention. Since the 1900s, South Africa began to emphasize children's individuality and their need of a different treatment when it comes about justice, especially when committing offenses. This country has made education of the juvenile offenders a priority, as it can promote self-discipline and reintegration of the minor, which is why most of the legislation enacted hinges on the best interest of the minor.

Otherwise, the United States has signed the Convention but has not fully eradicated the typical punitive traits of its system. The country has had a long history of intermingling children with adult offenders and made slow progress to adopting the view of the best interests of the minor. It was not until 1968 that diversion was seen as a viable option for child offenders. United States' case law clearly illustrates the slow implementation of the international values of protecting child offenders and guaranteeing a different treatment.

### 2.1. *South Africa and the Historical Influences on its Juvenile System*

South Africa's treatment of juveniles has evolved from a different cultural need from the United States' one, that is because many children in South Africa do not live in the traditional western home, following the nuclear model of parents and children living together[22]. Instead, African families embrace an extended family model in which children experience different caregivers through reciprocal relationships between parents, siblings, grandparents, aunts, uncles, cousins, and others, resulting in the possibility of living in households away from their biological family[23].

However, similarities can be found between South Africa and the United States for what concerns those children in the poorest of households, who are typically least likely to live with both biological parents and to experience a deprivation of parental care[24]. Unfortunately, as of 2014, there were about 3 million orphans, children under the age of 18 without living biological parents[25]. In addition, there are a significant number of child-only households in South Africa, in which all members are younger than 18 years old[26]. This is significant

22. See Marcia Carteret, *Cultural Differences in Family Dynamics, Dimensions of Culture* (2010), available at https://www.dimensionsofculture.com/2010/11/culture-and-family-dynamics/ (last visited November 22, 2020).

23. See Carteret, *Cultural Differences in Family Dynamics* (cited in note 12). See also Hall and Sambu, *Demography of South Africa's Children* at 106-07 (cited in note 6).

24. See Hall and Sambu, *Demography of South Africa's Children* at 106-07 (cited in note 6).

25. See *id.* at 108.

26. See *id.* at 109. See also *Situation Analysis of Children in South Africa* (The Presidency Republic of South Africa, April 2009), available at https://www.streetchildren.org/wp-content/uploads/2016/11/SAF_resources_sitan-UNICEF.pdf (last visited

because the juvenile justice system is tasked with providing for those children in need of care, which are children who have not necessarily committed a crime. Since 2003, the number of children detained and awaiting trial has decreased from 4,144 to 2,061 in 2007[27].

South Africa's legal system has evolved in large part due to the various influences on the country: the legal system is mixed with elements from Dutch, British, and Indigenous customary law[28]. In particular, the latter focuses on reconciling the parties and restoring ruptured relationships rather than punishment, moreover the pre-colonization traditions emphasizes the important role of the community within the decision of punishment for all offenders[29].

Due to the long history of violence in South Africa, specifically in regard to children, juveniles have experienced a unique journey to the establishment of their rights. In the South African Act of 1909, the first Prime Minister introduced formal segregation which contributed to raise tension between the *white government* and the Native communities[30]. The tension between the democratic movement and the apartheid[31] state intensified the violence and directly contributed to the deterioration of the family, a contributor to child violence[32]. For instance, the Group Areas Act contributed to the dislocation of

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November 22, 2020) (as of 2014, there were approximately 54,000 children living in a total of 45,000 child-only households. Ideally this situation is temporary, but in most cases it could be contributing to delinquent behavior in South Africa).

27. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 109 (cited in note 26).

28. See generally Julena Jumbe Gabagambi, *A Comparative Analysis of Restorative Justice Practices in Africa*, Hauser Global L. Sch. Program (2018), available at https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html#_3.2._South_Africa. (last visited November 22, 2020).

29. See *id.*

30. This was the beginning of the apartheid state in South Africa. See *South Africa in the 1900s (1900-1917)*, South African History Online (2017), available at https://www.sahistory.org.za/article/south-africa-1900s-1900-1917#:~:targetText=Increased%20European%20encroachment%20ultimately%20led,South%20Africa%20by%20the%20Dutch.&targetText=The%20Cape%20Colony%20remained%20under,to%20British%20occupation%20in%201806 (last visited November 22, 2020).

31. This means a policy of segregation and political or economic discrimination. See generally *Apartheid*, MERRIAM-WEBSTER available at https://www.merriam-webster.com/dictionary/apartheid (last visited November 22, 2020).

32. See generally Admassu Tadesse, *Reforming Juvenile Justice Legislation and Administration in South Africa: A Case Study*, Unicef (1997), available at https://www.

children by separating them from mothers who were hostel residents or live-in domestics[33].

Through the 1970s[34] and the 1980s there was a rise of children in political detentions without trial or in violation of their due process rights. Only in 1994, the neo-elected President Nelson Mandela declared children prisons be emptied[35]. It can be stated that, at this point, South Africa recognized the power of a governmental entity, like a magistrate, to place a juvenile under guardianship; a concept not different from the United States' use of the State as a surrogate parent (*parens patriae*)[36].

The recognition of children's rights in South Africa did not hit its peak until the 1980s, when the State became very active in several matters including the rights of children and women[37]. Historically, South Africa would subject children who committed offenses to the same treatment as adults[38], but the ratification of the Convention and the newfound recognition of child rights spurred new legislation, promoting the international values of the treatment of children in conflict with the law.

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unicef-irc.org/portfolios/documents/489_south-africa.htm (last visited November 22, 2020).

33. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 26 (cited in note 26).

34. After the 1976 Soweto Uprising children were in a traumatic state; the Truth and Reconciliation Commission concluded that many children lost their capacity to be children in a 1998 report (this uprising affected South African children in that they defied oppression, were arrested, imprisoned, kept in custody, maimed and killed).

35. See generally Tadesse, *Reforming Juvenile Justice Legislation and Administration in South Africa: A Case Study* (cited in note 32).

36. See Herman Conradie, *The Republic of South Africa*, International Handbook on Juvenile Justice 286, 287 (Donald J. Shoemaker ed. 1996). See also Clemens Bartollas, *United States*, International Handbook on Juvenile Justice 301, 303 (Donald J. Shoemaker ed. 1996). See also Nat'l. Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Report*, OJJDP Gov 84, 89 (2014), available at https://www.ncjfcj.org/publications/juvenile-offenders-and-victims-2014-national-report/ (last visited November 22, 2020).

37. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 26 (cited in note 26) (many women and children were increasingly becoming victims to violence to a point where some believed they were "socialized into a cycle of violence"). See also Tadesse, *Reforming Juvenile Justice Legislation and Administration in South Africa: A Case Study* (cited in note 32).

38. See Conradie, *The Republic of South Africa* (cited in note 36).

2.1.1. *South Africa's Governing Law*

South African juvenile law is regulated by several instruments.

First, South Africa's Constitution specifically speaks about the rights of children[39]. The Constitution contains a Bill of Rights section as does the United States' Constitution. However, the South African Bill of Rights and Section 28 of the general Constitutional provisions outline generic principles, pertaining to children, that the international community sought to implement[40]. In fact, when South Africa established its Constitution in 1996, the instrument included provisions that seemed to be taken directly from the Convention. For example, The South African Constitution imbues children with rights ranging from personality, protection, well-being, having age accounted for, and being subject to detainment as a measure of last resort[41]. The best interest standard is also incorporated into general provisions[42].

Second, South Africa recognizes and is governed by international law, such as the Convention. As a ratifying State, South Africa has an obligation to abide by the guidelines established in it[43]. It makes sense that South Africa ratified the Convention[44] because its past has shown a preference toward restorative justice in which wrong doers are restored to a status which enables them to value others[45]. In addition, the South African Courts recognize international law and use it to justify their rulings with an eye toward conformity[46].

39. S Afr Const 1996, § 28.

40. See *id.*

41. See *id*. See also The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 108 (cited in note 26).

42. See Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 417 (cited in note 5).

43. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 30 (cited in note 26).

44. See Skelton and Tshehla, *International Instruments Pertaining to Child Justice* at 17 (cited in note 12). See also Skelton and Courtenay, *South Africa's New Child Justice System* (cited in note 18). See also *Minimum Ages of Criminal Responsibility in Africa*, Child Rts Int'L Network (2019), available at https://archive.crin.org/en/home/ages/Africa.html (last visited November 22, 2020).

45. See generally Gabagambi, *A Comparative Analysis of Restorative Justice Practices in Africa* (cited in note 28).

46. See Skelton and Tshehla, *International Instruments Pertaining to Child Justice* at 15 (cited in note 12). See also Skelton and Courtenay, *South Africa's New Child Justice*

Third, Parliament, the legislative authority in South Africa, is tasked with ensuring conformity to the international instruments and the Constitution when making laws[47]. South Africa's Parliament functions similar to the United States' Congress. Throughout its history, South Africa has enacted numerous pieces of legislation pertaining to children. Among these Acts are the Child Protection Act of 1911, the Children's Act of 1960, the Criminal Procedures Act of 1977, and the Child Care Act of 1983.

The early 1900s spurred a movement of reformation in which the Child Protection Act was enacted to provide guidance on implementing educational principles in the treatment of children who have committed offences[48]. The Children's Act of 1960, one of the governing Acts, incorporates some of the Child Protection Act dispositions and it also establishes the Children's Court[49], which exist exclusively for the benefit of children in need of care and not for the adjudication of justice[50]. Such children falling under the jurisdiction of this court are orphaned, cannot be controlled, are habitually truant, associated with immoral or vicious persons *et similia*[51]. The largest difference between these courts and the juvenile courts is that they are civil courts, not criminal ones[52]. Parliament again passed the Act in 2007 to conform with the Constitution and international law[53].

The Criminal Procedure Act, which regulates the age of juvenile offenders to under 18 and enacts penalties and procedures for juvenile hearings and trials[54], was amended to limit children under the

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*System* (cited in note 18).

47. Ultimately, the Constitution of this country is the supreme law. See *National Legislature (Parliament)*, S Afr Gov't S (2019), available at https://www.gov.za/about-government/government-system/national-legislature-parliament (last visited November 22, 2020).

48. See Conradie, *The Republic of South Africa* (cited in note 36).

49. See *id.* at 292.

50. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 113, 114 (cited in note 26) (this court has extended powers over the family to ensure participation with the youthful offender's rehabilitation).

51. See Conradie, *The Republic of South Africa* at 292 (cited in note 36).

52. See Conradie, *The Republic of South Africa* at 293 (cited in note 36).

53. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 111 (cited in note 26).

54. See Conradie, *The Republic of South Africa* at 289-90 (cited in note 36).

age of 14 from being held longer than 24-hours, and those under 18 longer than 48-hours[55]. Children who are required to stand trial are entitled to have legal representation, as well as assistance by a parent or a guardian, during proceedings[56]. The criminal trials of juveniles are to be held in camera, a private hearing, which restricts who may attend; but when a child is found to be in need of care, rather than found to be committing criminal acts, the court may transfer the case to the Children's Court[57]. The trials are intended to be wholistic, taking into account various factors of the child's circumstances[58], an effort to take into account the Convention's emphasis on the well-being of children as well as the proportionality of their crimes. South Africa also pulls from the Prisons Act of 1959 to reinforce that juveniles may not be detained in a prison cell, unless there is no other viable option for custody[59]. Prisons are a common practice despite the fact that most of the South African instruments call for the separation of children and adults[60].

South African courts offer several sentences for juveniles, and this aspect seems to contradict the country's prior principles of social community, restoration and rehabilitation. Per the Criminal Procedures Act of 1977, South Africa allows juveniles to be given the death penalty, imprisonment (periodic or otherwise), a fine, and corporal punishment; however, some of these sentences are limited by law and multiple sections provide that instead of punishment, a juvenile can be ordered to attend probation and a treatment program or secure care facility before prison[61]. The Child Care Act provides for the protection of children who are uncared for by their biological parents, by

55. See Tadesse, *Reforming Juvenile Justice Legislation and Administration in South Africa: A Case Study* (cited in note 32).

56. See Conradie, *The Republic of South Africa* at 290 (cited in note 36).

57. See i*d.*

58. See *id.* at 291.

59. See *id.* at 290.

60. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 110 (cited in note 26).

61. See Conradie, *The Republic of South Africa* at 291 (cited in note 36) (corporal punishment may not exceed "a maximum of seven strokes with a light cane ... [and] can be administered only under the supervision of a medical doctor and in the presence of the parent(s)"). See also Republic of South Africa, *Situation Analysis of Children in South Africa* at 110 (cited in note 26).

requiring the Department to register places of care or institutions that are used for the protection and temporary care of children separated from their families[62]. For those children living with biological parents, there is positive consideration of the fact that the parents appear or, at the very least, that they ensure the child appearance[63]. Most of the principles embodied in South African law hinge on the very essence of the Convention, which not only made incorporating them into the country's law easier, but also made the enactment of the Child Justice Bill a success.

The new Child Justice Bill of 2008 takes the procedures outlined in the Criminal Procedures Act and aligns them with the Constitution and International Law[64]. The Bill even explicitly mentions the Convention in the Preamble[65]. The Bill "establishes a separate criminal justice process for those children accused of committing offences [sic] and includes a focus on procedures for individualized assessment and preliminary inquiry, diversion and restorative justice"[66]. This legislation establishes a clear Juvenile Court[67].

Under South African law a juvenile is an individual between the ages of 7 and 20[68]. This new Bill raises the age at which children have criminal capacity to 10 years old, meaning children under this age will automatically be referred for social services if they commit a crime, instead of being arrested or prosecuted[69]. However, children

62. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 113 (cited in note 26).

63. See Conradie, *The Republic of South Africa* at 290 (cited in note 36).

64. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 26).

65. Child Justice Act 75 of 2008, § 3 (S Afr) (it is identified under Guiding Principles). See also Skelton and Tshehla, *International Instruments Pertaining to Child Justice* at 16 (cited in note 12).

66. The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 108 (cited in note 26).

67. See Conradie, *The Republic of South Africa* at 286 (cited in note 36).

68. See *id.*

69. See *id.* (this also means that children under the age of 10 have an irrefutable presumption that they are unable to possess criminal capacity, this group is rendered *doli incapax*). See also Child Justice Act 75 of 2008, § 7 (S Afr). See also The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 26).

as young as 14 can be arrested and prosecuted[70]. Therefore, children under the age of 14, but over the age of 10, have a rebuttable presumption as to lacking criminal capacity: in these cases, it must be proved that the child knew the difference between right and wrong and had the requisite capacity before being prosecuted[71] beyond a reasonable doubt[72]. The Bill also introduces preliminary inquiry in which a child is assessed, and a determination is made as to whether children can be diverted and still successfully amend for their crimes[73]. The idea that children must be treated with special care is sprinkled throughout the new piece of legislation[74]. The Bill even requires a Youth Court model in which a probation officer assesses the child when charged, after which the officer makes a referral for release or detention; these programs help get the child to take accountability, and amend the harm done to the child, victim, or community[75]. Unfortunately, diversion and arrest statistics are at best conclusionary because they are based on limited factors, such as specific arrests, which makes sense considering the instruments of South Africa governing juvenile justice promote diversion out of the system[76].

The result of these governing Acts is that various different institutions have been established to deal with juveniles[77]. As mentioned, some of the juvenile courts in South Africa are not *ordinary courts*, much like the United States, rather they create separate institutions to deal with children in need of care or with those committing *adult crimes*. However, when juveniles commit a crime, they are brought before a juvenile (criminal) court only upon an arrest, summons, written notice, final warning, or indictment[78]. South African Juvenile Court is

70. See *id.*

71. See *id*. at 115.

72. Child Justice Act 75 of 2008, § 11 (S Afr). See also Conradie, *The Republic of South Africa* at 286 (cited in note 36).

73. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 26).

74. See *id.* at 108.

75. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 115 (cited in note 26).

76. See *id.* at 108-09 (estimates suggest that approximately 101,000 children were arrested annually during the period of 2001-2006).

77. Conradie, *The Republic of South Africa* at 287 (cited in note 36).

78. See *id.* at 289.

promoted as a last resort because juveniles can be ordered directly to prison, where they may be held with and treated similarly to adults[79]. These institutions are governed by the United Nations Congress on Crime Prevention and Treatment of Offenders, which was adopted in 1955 and promotes discipline aimed at developing self-discipline, establishing adequate habit and a sense of moral responsibility[80]. In addition, juvenile arrest has been limited to serious crimes such as murder, armed or dangerous robbery, arson, sexual assault, theft, and fraud[81]. Finally, the Bill specifically speaks to restraints, stating they should only be used on a child offender under exceptional circumstances[82].

Alternative programs to the Children's Court and the Juvenile Court, include Child Care Schools as a means to rehabilitate and reintegrate the child back into society[83]; Reform Schools, not to be confused with Child Care Schools, are institutions meant to *train* the children who have not been successful at rehabilitation and give them job skills, if possible[84]; Clinic Schools, which are not subject to court intervention[85], were enacted in an effort to take care of children that would be detrimental to themselves or others in a traditional classroom[86]. The model of South Africa focuses on the diminished individual responsibility of children by sanctioning behavior and providing provisions for treatment in which the children's social needs are accounted for in an environment where they can learn to respect others[87].

Like the United States, South Africa uses legislation to regulate the juvenile justice system, but the cultural implications of South African law place a larger emphasis on children in conflict with the law and attempt to remedy this behavior through restorative justice. Unlike the

79. See *id.* 296-97.

80. See *id.*

81. Child Justice Act 75 of 2008, §§ 20, 30 (S. Afr); see also Conradie, *The Republic of South Africa* at 297 (cited in note 36).

82. Child Justice Act 75 of 2008, § 33 (S Afr).

83. Conradie, *The Republic of South Africa* at 293-94 (cited in note 36).

84. See *id.* at 295.

85. See *id.* at 295-96.

86. See *id.* at 295-96.

87. *See* Skelton and Courtenay, *South Africa's New Child Justice System* at. 338-39 (cited in note 18).

United States, South Africa has enacted two separate systems to deal with children in conflict with the law including the Children's Court and the Juvenile Court. The Children's Court and other programs enacted by the new Child Justice Bill deal exclusively with children in need; only when the children have committed serious offenses will they be adjudicated before a Juvenile Court, while the United States, as a whole, relies on a Juvenile Court in a punitive way to seek retribution from children in conflict with the law.

### 2.1.2. *South Africa's Governing Law in Action*

Some relevant case law helps to illustrate how South Africa has put into use these various instruments.

In *S v. Williams*, whipping was abolished as a sentence because it was a "cruel, inhuman and degrading treatment"[88]. The basis for the decision in *S v. Williams* came from language in the South African Bill of Rights but, as time went on, the courts began to analyze issues relating to children in the purview of the Convention and the subsequent Child Justice Act of 2008. With regard to sentencing, South Africa has embraced the best interest of the child standard, which originates from the Convention and is incorporated into the Child Justice Act.

In *Brandt v. S*, a 17-year-old committed a heinous murder of an elderly woman[89]. The court acknowledged the Constitution and international instruments when making the declaration that child offenders deserve special attention and that the best interest of the child required different rules to be applied to sentencing child offenders[90].

In *DPP v. P*, a 12-year-old recruited two adults to murder her grandmother. She was convicted of murder but received a suspended sentence[91]. The court explains the light sentence as being based on the Convention's concept that detention is a matter of last resort and that that concept is linked to the best interest of the child analysis[92]. While South African courts look at the seriousness of the offense, the circumstances of the offender, and interest of the community, they

88. *S v. Williams and Others,* 1995 (3) SA 632 (CC).
89. *Brandt v. S*, 2004 JOL 1322 (SCA).
90. See *id.*
91. 2006 (1) SACR 243 (SCA).
92. See *id.*

also embrace the best interests of the child standard that is repeated throughout the Convention. Another case went so far as to call a police officer arrest that does not account for the best interest of the child unconstitutional.

In *MR v. Minister of Safety and Security*, the Constitutional Court held that a police officer, with discretion to arrest a child, must balance the conflicting interest and the constitutional requirements of the best interest standard or else the arrest was unlawful[93].

Whether the issue is detention or a minimum sentencing scheme, South Africa makes clear that the international law of the Convention and the South African Constitution are real restraints on Parliament which determine how judicial officers should treat children[94]. For example, in *A v. S*, a 16-year-old was arrested, and the court noted that, since the accused was a child at the time of the crime, his trial had to be conducted in terms of the provisions of the Child Justice Act 75 of 2008[95]. Further, the court noted that every Child Justice Court must ensure proceedings which are not hostile and appropriate for the age and the understanding of the child[96]. The court even clarified that the requirement of a parent or guardian's presence at a trial must be a meaningful presence to help the child[97]. In this case, the conviction and the sentence were set aside because the regional magistrate materially departed from the Child Justice Act which every Child Justice Court is obliged to adhere to[98].

These cases are just a few illustrations of how South Africa relies heavily on its international and domestic legislation in cases involving children.

93. *MR v. Minister of Safety and Security*, 2016 (2) SACR 540 (CC).

94. *Centre for Child Law v. Minister for Justice and Constitutional Development and Others*, 2009 (2) SACR 477 (CC).

95. *A v. S,* [2019] ZAECGHC 64.

96. See i*d.*

97. See i*d.*

98. See i*d.*

### 2.2. *United States and the Historical Influences on its Juvenile System*

Unlike South Africa, the United States does not base its legislation on the international laws, but on the federal and state law instead. The United States has intruded on international affairs quite often but does not expressly participate when the international community seeks to ratify a new treaty in an effort to harmonize the principles around the world[99]. A prime example is the United States' refusal to ratify the Convention because it focuses on economic, social, and cultural rights; "merely good social policy"[100] one might say, but not enough to alter an entire legal system. Whether the United States refused to ratify the Convention because it did not want the international community to infringe on its already established system or because it did not agree with specific provisions that could not be altered to the United States' liking is moot. The point is that the United States still embraces the goals of the Convention despite its failure to ratify one of the most influential pieces of International Human Rights Law[101].

Traditionally, in the United States, there was no minimum age of criminal responsibility[102]. Therefore, juveniles who violated criminal laws were treated in the same way as adult offenders[103]. The idea that juveniles were different from adults can be traced back to the origins

99. See *United States Ratification of International Human Rights Treaties*, Hum Rts Watch (July 24, 2009), available at https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties (last visited November 22, 2020) (the United States has not ratified any human rights treaties since December 2002, including the Convention on the Elimination of All Forms of Discrimination against Women; the Convention for the Protection of all Persons from Enforced Disappearance; Mine Ban Treaty; the Convention on the Rights of Persons with Disabilities; the Optional Protocol to the Convention against Torture).

100. Cohen, *Introductory Note* (cited in note 10).

101. See *Convention on the Rights of the Child*, Unicef, available at https://www.unicef.org/child-rights-convention (last visited November 22, 2020).

102. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36). See also *Minimum Ages of Criminal Responsibility in the Americas*, Child Rts Int'L Network (2019), available at https://archive.crin.org/en/home/ages/Americas.html (last visited November 22, 2020).

103. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36).

of the Juvenile Court[104]. By the 18th century, children *below the age of reason* were presumed to lack criminal capacity, which meant that 7-years-olds or younger children could not have criminal intent, but they could be sentenced to prison or death if found guilty[105]. It has been found that children under the age of 12 and those who have offended are two to three times more likely to become violent offenders later in life[106].

Children started to be viewed as morally and cognitively immature, so the Society for the Prevention of Juvenile Delinquency established a facility to house and rehabilitate juvenile offenders[107]. The Houses of Refuge were intended to separate children from the adult jails and penitentiaries they were being held in[108]. Even children who committed status offenses were being held in adult prisons[109]. A status offense is a noncriminal act committed by a child that happens to be considered a crime (solely) because the child commits it[110]. These crimes include "truancy, running away from home, violating curfew, underage use of alcohol, and general ungovernability"[111]. Most of these crimes would fall under the jurisdiction of the Children's Court in South Africa. In 2011, there were approximately 116,200 status juvenile offenders

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104. See Daniel P. Mears, et. al., *The "True" Juvenile Offender: Age Effects and Juvenile Court Sanctioning*, 52 Criminology 169, 169 (2014) (children were considered to "be malleable and capable of being reformed"). See also Peter J. Benekos and Alida V. Merlo, *Juvenile Justice in the United States*, in Juvenile Justice: International Perspectives, Models and Trends 396, 370 (John A. Winterdyk ed., 2015).

105. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36).

106. See Burns, et. al., *Treatment, Services, and Intervention Programs for Child Delinquents*, United States Office of Juvenile Justice and Delinquency Prevention (March 2003) 1, available at https://www.ncjrs.gov/pdffiles1/ojjdp/193410.pdf (last visited November 22, 2020).

107. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36).

108. See *Juvenile Justice History*, Ctr on Juv and Crim Just, available at http://www.cjcj.org/Education1/Juvenile-Justice-History.html (last visited November 22, 2020).

109. See *id.*

110. See United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

111. *Id.*

and 8,800 of them were detained in secure facilities[112]. Children who partake in this kind of behavior have been viewed to exhibit signs of personal, familial, and community issues, which are general factors underlying all offenders[113]. However, some of these behaviors should be tolerated to an extent as they allow children to learn from their mistakes which is an important part of being a child[114]. This concept is among those found throughout the Convention: break the cycle with education and diversion because children's inherent nature makes them most likely to be rehabilitated. These status offenders can cross lines within the system and be deemed *de facto* delinquent, in need, or follow under some other statutory category[115].

While the United States was dealing with overpopulated prisons, it was also dealing with child poverty and neglect[116]. These struggles led to the creation of the Houses of Refuge in New York and Boston; the legislation creating these houses premised that an age-based differentiation between juveniles and adults should ensure institutional separation[117]. These institutions attempted to house "poor, destitute and vagrant youth who were deemed by authorities to be on the path towards delinquency"[118]. Similar to South Africa, the displaced children became the focus of criminal reform advocates. The system of

112. See *Status Offenses: A National* Survey, Coalition for Juvenile Justice 5, available at http://www.juvjustice.org/sites/default/files/resource-files/Status%20Offenses%20-%20A%20National%20Survey%20-FINAL%20-%20WEB.pdf (last visited November 22, 2020).

113. See United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

114. See Franklin E. Zimring, *American Juvenile Justice* 20 (2nd ed. 2018). See also *Literature Review: A Product of the Model Programs Guide* (cited in note 4) (however, this learning period should be concentrated, with privileges extended gradually over time for the opportunity of the child to have more experiences. Hopefully, this will combat poor decision making).

115. See United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

116. See *Juvenile Justice History* (cited in note 108).

117. See *id.* (as of 2017, 16-year-olds were still being held in adult prisons; this needs to change to prevent destroying lives). See also Teresa Wiltz, *Children Still Funneled through Adult Prisons, But States are Moving Again It,* Usa Today (June 17, 2017), available at https://www.usatoday.com/story/news/2017/06/17/how-raise-age-laws-might-reduce-recidivism/400065001/ (last visited November 22, 2020).

118. *Juvenile Justice History* (cited in note 108).

the Houses of Refuge failed to reduce crime rates of children and established separate confinement for poor and delinquent children[119]. Alternative programs were introduced shortly after the Houses of Refuge including out-of-home placement and probation[120]. Unlike South Africa, whose legislative body predominantly influenced the reform, the push for the United States to recognize that children need different treatment than adults when in conflict with the law was originally advocated by social reformers[121].

However, these facilities were eventually taken over and incorporated into the Juvenile Court by the States, which used the doctrine of *parens patriae*[122] (State as a surrogate parent) to make judgments that were in the best interest of the child, specifically in ways that the State would not have intervened with an adult[123]. The first Juvenile Court was established in Illinois in 1899, and by 1910, 32 states have established either juvenile courts or probation services for juveniles; this trend continued until two states were left to enact an administrative system for juveniles in 1925[124]. In 1968, the Juvenile Delinquency Prevention and Control Act recommended child offenders be dealt with based on their crimes, for instance, children with noncriminal or status offenses should be diverted outside the court[125]. Traditionally, there was an idea that less violent or status offenders were *true*

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119. See *id.*; see also Bartollas, *United States* at 302 (cited in note 36).

120. See *Juvenile Justice History* (cited in note 108).

121. See *id.*

122. See Zimring, *American Juvenile Justice* at 4 (cited in note 114) (this doctrine was present for most of the 20th century focusing on three values: children in need of supervision; family supervision of those who are dependent; the state should educate children and only intervene when the family fails; and the state should be able to decide what is in the best interest of the at-risk children).

123. See Nat'l Center for Juvenile Justice,*Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36). See also *Juvenile Justice History* (cited in note 108). See also Mears, *The "True" Juvenile Offender: Age Effects and Juvenile Court Sanctioning* (cited in note 104) ("A key element [of the doctrine] was the focus on the welfare of the child. Thus, the delinquent child was also seen as in need of the court's benevolent intervention").

124. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36). See also *Juvenile Justice History* (cited in note 108).

125. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 86 (cited in note 36).

offenders because the Juvenile Court's philosophy was that they were most culpable and most likely to reform their behavior[126]. The way, in which the Juvenile Court attempted to deal with delinquents, was further affected by the Federal Juvenile Justice and Delinquency Prevention Action of 1974, which called for a push for diversion rather than detainment[127]. The Act sought to have children under the age of 15 diverted for status offenses[128]. The courts focused on rehabilitation of offenders rather than punishment, which led to a distinction between juvenile and criminal courts[129]. The jurisdiction of the Juvenile Court originally handled unruly children who needed reinforced parental authority, thus, justifying the legal doctrine of *parens patriae*[130]. Like South Africa's Children's Court, the United States began to consider its Juvenile Court as an institution that could rehabilitate children in conflict with the law. State statutes set the age limits for original jurisdiction of the juvenile court, which is usually cut off at 18 years of age[131]. However, Juvenile Court judges were afforded a tremendous amount of discretion, because doing what was best for the child, pursuing their rights instead of merely honoring them, required a tremendous amount of power[132]. Jurisdiction may be extended beyond the age of 18 under special circumstances[133]. However, the discretion of the judge and the likelihood of curing the juveniles in *treatment* soon called for a reform[134].

126. See Mears, *The "True" Juvenile Offender: Age Effects and Juvenile Court Sanctioning* at 170 (cited in note 104).

127. See Burns, *Treatment, Services, and Intervention Programs for Child Delinquents* at 8 (cited in note 106).

128. See Zimring, *American Juvenile Justice* at 3 (cited in note 114).

129. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36) (juvenile court would have to waive its jurisdiction for a juvenile to be tried as an adult; hearings were informal; and due process protections were deemed unnecessary).

130. See *Juvenile Justice History* (cited in note 108). See also Bartollas, *United States* at 303 (cited in note 36).

131. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 93 (cited in note 36).

132. See Zimring, *American Juvenile Justice* at 6 (cited in note 114).

133. In Massachusetts this may be extended to 20 years, but the oldest is 24 years. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 93 (cited in note 36).

134. See *id.* at 84.

While the international community was moving towards rehabilitation and diversion, the United States' juvenile justice system seemed to be moving away from these ideologies and began focusing on the seriousness of the crime committed. The Juvenile Justice and Delinquency Prevention Act called specifically for the deinstitutionalization of status offenders as well as a separation of juvenile offenders from adults[135]. Then, a rise in juvenile crimes, especially violent crimes, led to a "Get Tough" era in spite of the 1974 Act[136]. The 1980s and 1990s experienced spikes in violent juvenile crime and, as a result, states began to move towards a *law and order* approach; following which offenders charged under certain laws would be excluded from the juvenile court regardless of age or they would face mandatory sentencing[137]. It was clear to the juvenile system that repeat offenders needed to be controlled even if that meant eliminating special protections[138].

During this period, South Africa began to incorporate the international policy of rehabilitation into its legislation and governance of its Children's Court and its Juvenile Court, while the United States started the transition of its ideology on how to deal with child offenders towards the punitive focus. Throughout the "Get Tough" era, most States enacted laws simplifying the process to transfer a child to an adult court or required the imposition of a mandatory sentence in an effort to combat serious juvenile offenders[139]. This is one instance where the United States as a whole directly enacted laws conflicting with the Convention, specifically Article 37, which requires imprisonment of child offenders to be used as a measure of last resort. For example, the National Advisory Committee for Juvenile Justice and Delinquency Prevention sought to "Get Tough" on serious offenders

135. See *id.* at 86.

136. See Bartollas, *United States* at 304 (cited in note 36).

137. See Nat'l. Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 86 (cited in note 36).

138. See Zimring, *American Juvenile Justice* at 8-9 (cited in note 114).

139. See Barry Krisberg, et. al., *The Watershed of Juvenile Justice Reform* , 32 Crime and Delinq. 5, 9 (Jan. 1986) (starting around 1980, this "Get Tough" era spurred three different categories of statutory changes including making it easier to prosecute juveniles in adult courts (California and Florida) [,] lowering the age of judicial waiver (Tennessee, Kentucky, and South Carolina) [and] excluding certain offenses from juvenile court jurisdiction (Illinois, Indiana, Oklahoma, and Louisiana)). See also Bartollas, *United States* at 308 (cited in note 36).

in 1984 by encouraging development of preventative detention, transfer to adult courts, mandatory sentencing for violent crimes, and restoring the concept of accountability or just deserts[140]. As a member of the United Nations, the United States has an obligation to implement the international principles found in the Convention in good faith; however, during the "Get Tough" era, the United States discredited the inherent difference between children and adults by subjecting them to punitive punishment rather than educational diversion. Despite this setback for juvenile justice, the United States began to transform again, mainly because of the United States Supreme Court, which has a similar function to South Africa's Constitutional Court.

### 2.2.1. *United States' Supreme Court Influences on its Juvenile System*

As the United States is a Common Law country, a series of Supreme Court cases also govern the juvenile justice system. The following part will be a brief description of the significant Supreme Court cases.

The rise of procedural safeguards for juveniles began with *Kent v. United States*. This case illustrates an instance, where a 16-year-old, with a prior record, was charged with rape and robbery[141]. The Juvenile Court judge, in his sole discretion, held no hearing on the case and waived jurisdiction without giving a reason[142]. The Supreme Court found the waiver invalid because the minor was entitled to a hearing with all the same procedural due process and fair treatment requirements of an offender in an adult court[143]. The Court ruled that the child should have been afforded a hearing, his counsel should have been allowed to examine the investigation giving way to the waiver, and the court needed to give reason for the transfer[144]. This marked the United States' turn from a model of informality in favor of a more formal system for juveniles.

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140. See Krisberg, *The Watershed of Juvenile Justice Reform* at 8-9 (cited in note 139). See also Bartollas, *United States* at 304 (cited in note 36).

141. *Kent v. United States*, 383 US 541, 543 (1966).

142. See *id.* at 546.

143. See *id.* at 552. See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 89 (cited in note 36).

144. *Kent*, 383 US at 556.

A year later, in *In re Gault*, a 15-year-old, who was on probation, made a lewd call to his neighbor[145]. No notice was given to his parents before he was taken into custody, nor after he was sent to the Children's Detention Home[146]. The minor and his parents were not informed about a hearing, so they failed to attend; this resulted in a sentence to the State Industrial School for the remainder of his minority[147]. If the minor were an adult, he would have received a maximum punishment of a $50 fine or two months imprisonment[148]. The Supreme Court decided that hearings, which may result in the institutionalization of a juvenile, require some of the basic due process rights such as notice, counsel, and protection against self-incrimination[149]. The Court also explicitly rejected the doctrine of *parens patriae* as being a State's unlimited power for procedural arbitrariness[150]. This decision marked the United States turn away from rehabilitative justice for juveniles to a more restrictive and punitive system[151].

The adjudication stage in the United State juvenile system is similar to that of any trial where a plea is heard and evidence is presented[152]. *In re Winship* extended the requirement of proof beyond reasonable doubt to children charged with acts constituting adult crimes[153]. However, *Mckeiver v. Pennsylvania* denied the right of a jury trial to juveniles[154]. An argument made on behalf of jury trials for juveniles was that they needed protection from the state; this perception was rejected because the Court found that allowing jury trial could jeopardize the informality, flexibility, and confidentiality of juvenile

145. *In re Gault*, 387 US 1, 4 (1967).

146. See *id.* at 5.

147. See *id.* at 7.

148. See *id.* at 29.

149. See *id.* at 30-57.

150. See *id.* at 17-20, 30, See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 89 (cited in note 36). See also Bartollas, *United States* at 303 (cited in note 36).

151. See Krisberg, *The Watershed of Juvenile Justice Reform* at 28 (cited in note 139). See also Bartollas, *United States* at 303 (cited in note 36).

152. See Bartollas, *United States* at 308 (cited in note 36).

153. *In re Winship*, 397 US 358, 368 (1970). See also Bartollas, *United States* at 308 (cited in note 36). See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90 (cited in note 36).

154. *Mckeiver v. Pennsylvania,* 403 US 528, 550 (1971). See also Bartollas, *United States* at 308 (cited in note 36).

court proceedings[155]. Further, the Court stated that jury trials are not constitutionally required in juvenile court hearings, because a trial by jury most likely "destroy[s] the traditional character of juvenile proceedings"[156]. Therefore, while children had acquired a significant amount of procedural rights, they were not afforded the right to a jury trial in Juvenile Court for fear of blurring the line between the juvenile and adult courts even further. Despite the move towards a punitive system, most of these procedural decisions could be viewed as working towards the accepted international standards of child treatment in court proceedings, which, as Article 40 of the Convention suggests, should assure the respect of the individual dignity and worth.

In addition to *Kent*, *Breed v. Jones* also governs transfer proceedings[157]. In *Breed v. Jones*, a petition was sent to the Superior Court of California asking to have a 17-year-old tried as he committed an act which, if committed by an adult, would constitute robbery[158]. The next day he had a detention hearing which ordered him to be detained while the petition was pending[159]. The Court found that the juvenile was subjected to two trials[160]. Therefore, trying a "respondent in Superior Court, after an adjudicatory proceeding in Juvenile Court, violate[s] the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment"[161].

In terms of privacy rights, two cases are illustrative. In *Oklahoma Publishing Co. v. District Court*, an order was issued to enjoin news members from publishing the name or picture of a minor child in connection with a juvenile proceeding[162]. However, as the name of the juvenile was being used in relation to the crime reporting it was held

155. *McKeiver*, 403 US at 545.

156. See id. at 540. See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Report* at 90 (cited in note 36).

157. See Bartollas, *United States* at 307 (cited in note 36). See generally *Kent v. United States,* 383 US 541 (1966). See also *Breed v. Jones,* 421 US 519 (1975).

158. *Breed*, 421 US at 521.

159. See *id.*

160. See i*d.* at 533.

161. *Id.* at 541. See also Bartollas, *United States* at 307 (cited in note 36). See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

162. *Oklahoma Pub. Co. v. Dist.* Court In and For Oklahoma Cty, 430 US 308, 308 (1977).

that the order issued by the District Court violated the news members freedom of press[163]. Another case dealing with the news and juvenile reporting is *Smith v. Daily Mall Publishing Co.*, where it was held that the State could not punish the truthful publication of a delinquent's name that was lawfully obtained[164].

The United States Supreme Court also took a stance on some sentencing for juveniles.

In *Eddings v. Oklahoma*, a 16-year-old shot and killed an officer after being pulled over on the Oklahoma Turnpike[165]. The Court held that state courts must consider all relevant mitigating evidence including age for a juvenile charged with a crime and facing the death penalty[166]. Taking into account the offender's age was a significant step towards conceptualizing principles embraced by the international community.

In *Schall v. Martin*, the Court was asked to decide whether preventive pretrial detention was valid[167]. The Court found that preventive detention served legitimate state interests of protecting the juvenile and society[168]. In addition to the regulatory purpose, the Court felt the procedural protections a that preceding detainment were sufficient[169].

In *Thompson v. Oklahoma*, a 15-year-old, at the time of his offense, was convicted of first-degree murder and sentenced to death[170]. The Court expressed the opinion that "even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century"[171]. The Court held

163. See *id.* at 311-12. See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

164. *Smith v. Daily Mail Pub. Co.*, 443 US 97, 106 (1979). See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

165. *Eddings v. Oklahoma*, 455 US 104, 105-06 (1982).

166. See *id.* at 117. See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

167. *Schall v. Martin,* 467 US 253, 273-74 (1984).

168. See *id.* at 256-57.

169. See *id.* at 280. *See also* Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

170. *Thompson v. Oklahoma*, 487 US 815, 819 (1988).

171. See *id.* at 838.

that the Eighth and Fourteenth Amendments prohibit the death penalty for persons under the age of 16 at the time of their offense[172].

Finally, *Roper v. Simmons* reconsidered the question of whether a person between the ages of 15 and 18 can be subjected to the death penalty[173]. A 17-year-old plotted and executed a murder in which he duct taped a woman's entire face before throwing her into a river[174]. Despite the atrocity of the crime, the Court held that the Eighth Amendment prohibited sentencing a child under the age of 18 to death because that sentence was reserved for "a narrow category of the most serious crimes"[175]. This was just one of three cases that cited to research concluding children must be sentenced differently than adults and thus recognized the diminished criminal responsibility and greater capacity for rehabilitation[176]. As a direct embodiment of the Convention, this was a step toward recognizing that typical sentencing was not appropriate for a minor and that child offenders should be sentenced in proportionality to their crime, but also by taking into account various mitigating factors about the child's inherent nature as a child.

In *Graham v. Florida*, a 16-year-old and three other friends attempted to rob a restaurant in Florida[177]. The prosecutor chose to have the child tried as an adult, which meant that his charges carried a life sentence without the possibility of parole[178]. The Court referred to a Global Law and Practice guide which declared that only 11 nations authorize the sentences of life without parole for juvenile offenders and only two of those, one being the United States, impose the

172. See *id.* See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-9 (cited in note 36).

173. *Roper v. Simmons*, 543 US 551, 555–56 (2005).

174. See *id.* at 556-58.

175. See *id.* at 568 sqq. (the opinion includes an appendix identifying the states permitting the imposition of the death penalty on juveniles. For those states that do permit the death penalty most have no minimum age requirement, for those that do have a minimum age requirement, the youngest is 16 years old. At the time of the opinion only 12 of the 50 states prohibited the death penalty entirely). See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-91 (cited in note 36).

176. See generally *Roper v. Simmons*, 543 US 551 (2005); *Graham v. Florida*, 560 US 48 (2010); *Miller v. Alabama*, 567 US 460 (2012).

177. *Graham*, 560 US at 52.

178. See *id.* at 53.

sentence in practice[179]. This case holds: "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide"[180].

In *Miller v. Alabama*, two 14-year-olds were convicted of murder and sentenced to life imprisonment without the possibility of parole in each of their respective cases[181]. Each case involved state mandatory sentencing schemes in which the juvenile's *lessened culpability* and *greater capacity for change* are ignored[182]. The Court held that mandatory sentences of life without parole for juveniles violate the Eighth Amendment[183].

A distinguished research professor of Criminal Justice, among others, believes that "the lack of political will – not public opinion – is the main barrier to developing a more balanced approach to sentencing and correctional policy"[184]. They offer central themes to the public opinion including its increasing acceptance of policies that are punitive as citizens hear more and more disturbing stories about offenders and their crimes[185]; seeking the punishment to fit the crime with a willingness to seek lesser punishments upon evidence of mitigating circumstances[186]; taking a strong stance on violent crime based on the *common sense* that people who offend should not be left on the streets to reoffend[187]; believing that rehabilitation should remain a goal of the correctional system[188]; and believing violent youths forfeit their protections as children[189]. These ideologies, taken together, prohibit

179. See *id.* at 80.

180. See *id.* at 82.

181. See *Miller*, 567 US at 465 sqq. (Jackson was charged with capital felony murder and aggravated robbery, while Miller was charged with murder in the course of arson).

182. See *id.*

183. See *id.* See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 90-92 (cited in note 36).

184. See Francis T. Cullen et. al., *Public Opinion About Punishment and Corrections*, 27 Crime and Just. 1, at 57 (2000).

185. See *id.* at 58.

186. See *id.* at 58-59, 60.

187. See *id.* at 59.

188. See *id.*

189. See *id.* at 60.

the United States from fully implement the international principles of the Convention.

### 2.2.2. *United States' Governing Law in Action*

In practice, the United State juvenile system differs from South Africa's as it embraces a crime control model, embedded into the juvenile justice system, which focuses on due process, discretion of enforcement authorities, punishment and retribution in order to protect society and hold children responsible for their crimes[190]. Similarly to South Africa, in the United States the first contact a juvenile has with the criminal system are through police officers[191]. The latter, however, have broad discretion to divert children away from the court[192]. Indeed, police officers may make a determination based on the seriousness of the offense, the respect shown to him from the juvenile, the apparent social class, prior record and the effect on the community[193]. If the police officer makes a determination that juvenile court is appropriate, then the latter will step into the role of controlling and correcting the behavior of the child[194].

First, a detention hearing where the situation is assessed in terms of protecting the child and ensuring public safety will firstly occur[195]. This is followed by an intake hearing in which a preliminary screening determines the best resolution to the situation[196]. In the intake hearing,

190. See Benekos and Merlo, *Juvenile Justice in the United States* at 388-90 (cited in note 104). See generally *Juvenile Court Procedures*, 81 Harv. L. Rev. 171 (1967). See also Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 89 (cited in note 36).

191. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 94 (cited in note 36).

192. See *ibid*. See also Bartollas, *United States* at 305 (cited in note 36).

193. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 94 (cited in note 36). See also Bartollas, *United States* at 305 (cited in note 36).

194. See Bartollas, *United States* at 306 (cited in note 36)

195. See Nat'l. Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 94 (cited in note 36) (during the process of a case it may be deemed to be in the child's *best interest* to be held in a secure detention facility). See also Bartollas, United States at 306 (cited in note 36).

196. See Nat'l. Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 94. See also Bartollas, United States at 307.

the intake unit will decide if the court has statutory jurisdiction and will either dismiss the case, divert it to a diversionary agency, place the juvenile on informal probation, or file the complaint with the court[197].

Ultimately, the goal of the juvenile justice system in the United States is the ability to control and correct the behavior of children violating the law. There are a variety of opinions on how to reform the juvenile justice system in order to effectively achieve the goals set out. These include, namely, *parens patriae*, advocating for *just desserts* over rehabilitation, or simply dealing with juveniles in the adult court system[198].

Essentially, overall, the United States implements only parts of the Convention while South Africa has effectively and expressly incorporated the Convention into their child justice legislation. In fact, despite legislative emphasis on diversion in the United States, the juvenile court still functions as a criminal tribunal and transfers a substantial amount of cases to adult courts. Differently, South Africa has managed to create a holistic juvenile system with a focus on dealing with child offenders in non-criminal ways and reserving the Juvenile Court for those serious offenses which, instead, the United States would transfer to an adult court.

### 2.2.3. *Massachusetts as a Sample Study*

When examining the juvenile justice system in the United States, it is more straightforward to look at one State, since each State has the authority to enact its own laws to govern within its borders and typically they all differ in certain aspects from one another. In this respect, Massachusetts represents a suitable case study, being a typical frontrunner in the Union: Massachusetts was, indeed, the first State to establish a higher education college and in 1636, Harvard University became the first college of its kind in the United States[199]. In 1891, Massachusetts enacted the first juvenile probation system in which criminal courts were required to appoint probation officers to

197. See Bartollas, *United States* at 307 (cited in note 36).

198. See *id.* at 305.

199. See *Harvard at a Glance*, Harvard, available at https://www.harvard.edu/about-harvard/harvard-glance (last visited November 22, 2020).

juveniles[200]. In addition, Massachusetts was the first state to legalize same sex marriage[201].

Self-reported statistics suggest about half of children participate in illegal activity in Massachusetts[202]. Nonetheless, only a small percentage are arrested. This small percentage is startling as the FBI reports 7,281 children under the age of 18 were arrested in Massachusetts in 2018[203]. An even smaller portion is committed to correctional facilities[204]. As a State within the United States, Massachusetts is subject to the Federal laws as well as the United States Supreme Court. However, as long as the State laws do not conflict with these higher authorities, Massachusetts may enact the juvenile system it sees fit. The Massachusetts Juvenile Court is governed by Massachusetts General Laws chapter 119 and 218 among others. The jurisdiction of the court is over children in need of services[205]; the care and protection of children[206]; offenders under the age of 18[207]; and neglected and delinquent children[208]. This encompasses the population of both the Children's Court and the Juvenile Court of South Africa. In addition, the Juvenile Court shares jurisdiction with the Supreme Judicial Court and the Superior Court in all proceedings. In Massachusetts there is a distinction between a delinquent offender and a youthful offender:

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200. The Probation act of 1878 applied only to Massachusetts. See Skelton and Tshehla, *International Instruments Pertaining to Child Justice* at 36 (cited in note 12).

201. See *Obergefell v. Hodges*, 135 S Ct 2584, 2597, 2604-05 (2015) (in 2003, the Massachusetts Supreme Judicial Court ruled that the State's ban on same sex marriage was unconstitutional. See *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003). In reaching this decision the Court references the State's Constitutional ban on second class citizen status. See *id.* at 312. This ruling sparked additional states to grant same sex couples the right to marry, but some states went the other way resulting in a great divide in the country. Then in 2015, the United States Supreme Court ruled that the right to marriage is a fundamental right that should be enjoyed by all persons).

202. See *An Internative Overview of the Massachusetts Juvenile Justice System*, Citizens for Juvenile Justice, available at https://www.cfjj.org/jj-system-overview (last visited November 22, 2020).

203. See *id.*

204. See *id.*

205. Mass Gen Laws ch 119, § 39E (2012).

206. Mass Gen Laws ch 119 § 24 (2008).

207. Mass Gen Laws ch 119, § 52 (2018); Mass Gen Laws ch 218, § 60 (1992).

208. Mass Gen Laws ch 218, § 60 (1992).

delinquent offender is a child between 12 and 18 who commits an offense against the law of the state[209], while a youthful offender is a person who is subject to an adult sentence between the ages of 14 and 18 and has a prior juvenile history[210].

The procedures of the Juvenile Court are governed by the following: Massachusetts Rules of Civil Procedure in proceedings seeking equity relief, Juvenile Court Rules for the Care and Protection of Children, the Rules of the Supreme Judicial Court, Massachusetts Rules of Criminal Procedure in all delinquency and youthful offender proceedings, Juvenile Court Standing Orders and Applicable Trial Court Rules Uniform Magistrate Rule 1[211]. Ultimately, when a complaint is filed in Juvenile Court, it alleges the child is a delinquent child as defined in the law[212]. Moreover, it is expected that, when police officers refer a child to the Juvenile Court, they must attach an offense-based tracking number. The State, however, may only proceed if the person alleged to be delinquent has committed an offense while between the ages of 14 and 18 with a prior record and which would subject him to prison if he had been an adult[213]. Once an adjudication has been made the delinquent child may be placed on probation as a form of sanction which may be imposed until the age of 18, although certain violations shall remain out of that child's file[214]. In addition, the Juvenile Court judge may make a determination as to whether the child should be committed to the Department of Youth Services until he is 18 or whether to dismiss the case[215]. This type of special care embraces the principles of proportionality, account of age and education. A youthful

209.Mass Gen Laws ch 119, § 52 (2018) (these offenses could not be civil infractions or first offense misdemeanors).

210. *Ibid*., but see also Mass Gen Laws ch 119, § 21 (2018) (for definitions more closely related to those children in need or status offenders)

211. See *Juvenile Court*, Mass.gov, available at https://www.mass.gov/orgs/juvenile-court (last visited November 22, 2020)

212. Mass Gen Laws ch 119, § 54 (2019).

213. *Ibid*., but see also Mass. Gen. Laws ch. 119, § 52 (2018) (this is the definition for a youthful offender).

214. Mass Gen Laws ch 119, § 58 (2013).

215. See *An Internative Overview of the Massachusetts Juvenile Justice System* (cited in note 202).

offender may be sentenced by the fixed statutory recommendation as provided in the law for an offense of the same kind[216].

In 2018, *An Act Relative to Criminal Justice Reform* was passed. This implemented numerous reforms including Juvenile Justice, CORI reform, DNA database creation, etc[217]. For present purposes, the law made a significant change to Juvenile Justice[218]. The new legislation in Massachusetts embraces many of the same international values that South Africa expressly put into its Child Justice Bill. In fact, the minimum age a juvenile can be charged with a delinquent complaint is raised from the age of 7 to 12[219]. This effectively narrows the jurisdiction of the juvenile court to only those between the ages of 12-18[220]. In addition, the law decriminalized disturbance of a School Assembly, disturbing the Peace and all first-offense misdemeanors for which punishment is no more than 6 months incarceration or fine[221]. As with regard to disturbance of School Assembly, decriminalizing it implies that the "police cannot arrest or file charges against a juvenile for disturbance of an assembly or for any such conduct within the school building or on the school grounds"[222]. By decriminalizing disturbing the peace, instead, the "police cannot arrest or file charges against a juvenile for disturbing the peace within the school buildings"[223]. In Massachusetts, Child Requiring Assistance is the legislative title for persons within the Juvenile Court age jurisdiction and runs away from home, fails to obey parents and school regulations, is habitually truant

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216. Mass Gen Laws ch 119, § 58 (2013).

217. Mass Gen Laws ch 119, §54, 86, 89 (2018); § 11:50 Jurisdiction of Juvenile Court-Original jurisdiction, 14C Mass Prac § 11:50 (5th ed.) (2018).

218. See generally S Rep No. 189-2371 (2017-2018).

219. Mass Gen Laws ch 119, § 54 (2019); S Rep No. 189-2371, at § 73 (2017-2018) (before the amendment was made to the definition of a delinquent child in Mass Gen Laws ch 119, § 54, the minimum age a child could be charged with a crime was seven.). See also Mass Gen Laws ch 119, § 52 (2018). See also *Spring 2018 Criminal Justice Reform Bill*, Commonwealth of Massachusetts, available at https://www.mass.gov/files/documents/2018/05/15/FINAL%20CRIMINAL%20JUSTICE_0.pdf (last visited November 22, 2020).

220.S Rep No. 189-2371, at § 1 (2017-2018) (this means the age of criminal majority was amended to be 18 years of age).

221. See *Spring 2018 Criminal Justice Reform Bill* (cited in note 219). See also *Wallace W. v. Commonwealth*, 482 Mass. 789, 790 (2019).

222. *Spring 2018 Criminal Justice Reform Bill* (cited in note 219).

223. *Id.*

or is exploited[224]. As most of these reforms suggest, Massachusetts has embraced the international principles found in the Convention since it seeks indeed to bring certain offenses committed by children out of the criminal sphere. Upon the latter's request they may petition to be diverted to a local family resource center in which they will be subjected to an assessment to see whether this might prove beneficial for them[225]. Twenty-four-hour holds on juveniles are prohibited in this state and disposition options include in-home placement, subjections to medical and psychiatric treatment and placement with a relative or child agency[226]. The focus on decriminalizing status offenses mirrors the legislature's goal of diversion. In particular, the latter is of great relevance since it has been found that children exposed to the processing system of the Juvenile Court are more likely to experience negative effects in their development in comparison to diversion programs[227]. The focus on the best interests of the child is advocated as the primary consideration under the Convention and Massachusetts has implemented this principle by using it as the foundation for a significant portion of the recent reforms.

In fact, in Massachusetts a juvenile who has only been charged with a status offense, has no prior delinquent history, or deemed to be dependent, may not be placed in a secure detention facility[228]. Furthermore, once a person is sentenced to prison, except as a habitual criminal, the court shall set sentences based on the fixed maximum and minimum terms; specifically, in the case of a life sentence for murder committed by a person between the ages of 14 and 18, there is a minimum term of not less than 20 and no more than 30 years[229]. Murder is a legitimate State interest and a juvenile charged with murder must be transferred to the Superior Court[230]. Similarly, when a ju-

224. See *Status Offenses: A National* Survey at 29 (cited in note 112).

225. See *id.* See also Mass Gen Laws ch 119, § 54A (2018).

226. See *Status Offenses: A National* Survey at 29 (cited in note 112).

227. See Brianna Hill, *Massachusetts Raises Minimum Age of Criminal Responsibility*, 39 Child Legal Rts J 168, 168 (2019).

228. Mass Gen Laws ch 119, § 87 (2018).

229. Mass Gen Laws ch 279, § 24 (2014).

230. *Commonwealth v. Wayne* W., 414 Mass. 218, 226 (1993).

venile is charged with a criminal offense, nonmurder offenses should be joined in Superior Court[231].

The new reforms to juvenile justice law in Massachusetts also state that restraints[232] can only be used on a child if the Juvenile Court judge finds that: "(1) the juvenile presents an immediate and credible risk of escape that cannot be curtailed by other means; (2) the juvenile poses a threat to his or her own safety or to the safety of others; or (3) restraints are reasonably necessary to maintain order in the courtroom"[233]. For the purposes of this addition, it has been determined that the Juvenile Court officers cannot use a blanket procedure requiring restraints for juveniles when they have been charged with committing certain serious offenses[234].

In light of these considerations, it appears clear that the new juvenile justice reforms in Massachusetts (as well as in the United States generally) are in line with – or better, moving toward – the principles established in the Convention[235]. These reforms are oriented in the direction of a shared international understanding of how child offenders should be treated: break the child out of the cycle, which comes from the understanding that "if a child enters the system at a young age, they will be less likely to break free of the system as they approach adulthood"[236]. However, this will only overload diversion programs like South Coast Youth Courts[237], which now has a larger populace it must try to help. The Youth Courts referenced for the United States or Massachusetts are similar to South Africa's Youth Court model, although they are often run by non-profit organizations instead of the state. The following sections of this article will hence illustrate the specific points in which South Africa and the United States, specifically

231. *Commonwealth v. Soto*, 476 Mass. 436, 436 (2017).

232. Mass Gen Laws ch 119, § 86 (2018) (restraints are described as any device limiting the children's voluntary movement including leg irons and shackles).

233. S Rep No. 189-2371, at § 86 (2017-2018). See also Mass Gen Laws ch 119, § 86(b) (2018). See *Spring 2018 Criminal Justice Reform Bill* (cited in note 119).

234. S Rep No. 189-2371, at § 86 (2017-2018).

235. See generally Griffin and Wolff, *The Convergence of U.S. Juvenile Justice Policies and the U.N. Convention on the Rights of the Child* (cited in note 11).

236. Hill, *Massachusetts Raises Minimum Age of Criminal Responsibility* at 168 (cited in note 127).

237. South Coast Youth Courts, available at http://www.southcoastyouthcourts.org/ (last visited November 22, 2020).

focused on Massachusetts, are converging on the shared ideals of how to deal with child offenders in the criminal system.

### 3. *Prominent Principles Embraced by South Africa and Massachusetts*

With the Convention on the Rights of the Child the international community stressed the importance of setting a minimum age of criminal responsibility, this is an important aspect which both South Africa and the United States have embraced. Actually, the acknowledgment that a minimum age of criminal responsibility should exist indirectly forces countries to incorporate diversion programs into their juvenile justice systems, because it involves that the ordinary criminal justice system does not have the proper means to handle juvenile offenders. Moreover, the Convention was the starting point of a reconsideration of the types of crimes minors can be charged with, as well as the types of sentences assigned to juvenile offenders, and the handling methods of children in and out the courtrooms.

#### 3.1. *"Am I too young to be arrested?"*

The Convention has become a significant part of South African law. This is due not only to its ratification, but also because the country has proved to be able to comprehensively embed the principles of the Convention into its national law. For instance, the Convention refers only to the minimum age of criminal capacity, in that it demands member countries to establish an age at which there is no capacity to commit crimes[238]. The rationale underlying the minimum age of criminal capacity acknowledges the special position children are in. In fact, it has been suggested that exposure to violence and crimes increases a child's likelihood of engaging in antisocial or criminal behavior[239]. Age thus acquires relevance in juvenile law and in fact the Convention sets the maximum age of a child at 18 years old[240]. This

238. G A Res, art. 40(3)(a) (cited in note 1).

239. See Hema Hargovan, *Child Justice in Practice: The Diversion of Young Offenders*, 44 S. Afr. Crime. Quarterly 25, 25 (June 2013).

240. G A Res, art. 1 (cited in note 1).

effectively narrows the jurisdiction of any member countries' juvenile system to those persons under the age of 18, but above the established minimum age. It also acknowledges the inherent immaturity of children which suggests they cannot comprehend the difference between right and wrong and, instead, leads to consider them more receptive to rehabilitation[241].

South Africa mirrors the Convention by setting the maximum age at 18, although the jurisdiction is extended to the age of 21 under certain circumstances[242]. The minimum age of criminal capacity in South Africa is, instead, 14. However, children under the age of 14 and above the age of 10 are granted a rebuttable presumption to capacity if the State can prove beyond a reasonable doubt that such capacity in fact exists[243]. This means that children under the age of 10 are automatically referred to social services upon committing a crime or if they are deemed to be in need[244]. This is preferable compared to arrest as, assumedly with the Youth Court model South Africa has enacted, a probation officer will be able to determine the underlying cause of the delinquent behavior[245]. Hence, if the country can address the roots of this behavior before it becomes habit, it can lower the chances of a child's reoffending later in life[246].

Establishing a minimum age is an obligation for those who have ratified the Convention. The United States, however, as a member of the United Nations and only a signee of the Convention, is expected to implement *soft law* in good faith when the foreign law is not in conflict with its sovereign law[247]. Traditionally, the Common Law of the

241. See generally *Roper*, 543 US 551 (2005); *Graham v. Florida*, 560 US 48 (2010); *Miller v. Alabama*, 567 US 460 (2012). See also S'Lee Arthur II Hinshaw, *Juvenile Diversion: An Alternative to the Juvenile Court*, 1993 J Disp Resol 305, 305 (1993).

242. Child Justice Act 75 of 2008, §1 (S Afr).

243. See *id.* at §§ 7, 11 (S Afr). See also Conradie, *The Republic of South Africa* at 286 (cited in note 36).

244. The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 26).

245. See *id.* at 115.

246. See Burns, *Treatment, Services, and Intervention Programs for Child Delinquents* at 1 (cited in note 106).

247. See Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 417 (cited in note 5) (States that sign the Convention regardless of ratification are at least expected to refrain from

United States presumed that a child younger than 7 lacked all criminal capacity[248], thus setting the minimum age lower in comparison to the established age of 10 in South Africa. This could nevertheless be circumvented in practice as this class of children could still be sentenced to prison or death if found guilty of a crime[249]. In this respect, it is interesting to note that in the Supreme Court case *In re Winship*, the United States established the concept that the standard of proof should be beyond a reasonable doubt when children are charged with adult crimes[250]. Therefore, not only have South Africa and the United States sought to enact a minimum age of criminal capacity, but both States consider that the prosecution should adopt the same burden of proof required in an adult case when a child under the age of 18 is charged as an adult. In the case of the United States, moreover, it is clear that this concept of diminished criminal responsibility up to a certain age has been embraced well before the Convention.

The United States is difficult to infer from because State sovereignty insists that the Federal Government cannot reign over all decisions. Here, the Juvenile Court's jurisdiction is usually set at a maximum of 18, but the state may elect to change this age[251]. Effectively, in both countries the jurisdiction of the Juvenile Court is extinguished when the offender turns 18[252]. More specifically, in Massachusetts a delinquent child is an individual between the ages of 12 and 18[253], but offenders between the ages of 14 and 18 may be subject to adult sanctions if they commit adult crimes[254].

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acting in such a way that would conflict with or defeat the object and purpose of the Convention).

248. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 93 (cited in note 36).

249. See *id.* at 84.

250. See *id.* at 90. See *In re Winship*, 397 US 358, 368 (1970). See also Bartollas, *United States* at 308 (cited in note 36).

251. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 93 (cited in note 36).

252. S Rep No. 189-2371, at § 1 (2017-2018) (the Age of criminal majority was amended to mean 18).

253. See *id.* at § 73.

254. Mass Gen Laws ch 119, § 54 (2019); Mass Gen Laws ch 119, § 52 (2018). See also *Spring 2018 Criminal Justice Reform Bill* (cited in note 219).

Both countries have recognized the inherent difference in children which is a warrant of a minimum age for criminal responsibility, regardless of ratification. Nevertheless, this international principle has significant repercussions that should be acknowledged. Since both countries will continue to experience crime rates for children under the respective minimum age, the focus should be on providing formal, well-funded resources for families that are experiencing trouble[255]. This implies that if a child under one of the respective countries' minimum age commits a crime and the police responds, the officer will be obliged to call social services as the child cannot legally be arrested[256]. This is acknowledged by South Africa in the hopes that the automatic diversion will be in the best interest of the child[257], and this is a principle fully implemented by the Convention. In fact, this appears more reasonable for South Africa, since a larger population of its delinquent children require assistance.

### 3.2. *To Skip Class or Not to Skip Class, that is the Question*

The United Nations, as a coalition of countries, respects that each has its own identity. One of the main purposes of the organization was "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"[258]. Therefore, the Convention does not speak to specific offenses that children can be charged with, as these are matters which must be determined by the member States. This is reasonable in consideration of the fact that crimes are a changeable phenomenon across cultures and often even over time[259]. Criminologists will typically group crimes into categories, but the States through public policy, statutes, and other

255. See Hill, *Massachusetts Raises Minimum Age of Criminal Responsibility* at 168 (cited in note 227).

256. See *id.* at 169.

257. Child Justice Act 75 of 2008, § 7, (S Afr). See also Republic of South Africa, *Situation Analysis of Children in South Africa* at 114 (cited in note 26).

258. UN Charter art. 1, § 3.

259. See Scottish Centre for Crime and Justice Research, *Theories and Causes of Crime*, University of Glasgow 1, available at http://www.sccjr.ac.uk/wp-content/uploads/2016/02/SCCJR-Causes-of-Crime.pdf (last visited Nov. 22, 2020).

measures determine the specific crimes[260] that will fall under their own classifications. For example, in regard to status offenses the Convention states: "State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all and take measures to encourage regular attendance at schools and the reduction of drop-out rates"[261].This could be intended as the international community accepting truancy among the contributing factors leading to criminal behavior if not a civil crime in and of itself.

In South Africa, the Juvenile Court or the Criminal Court for children may hear cases involving crimes falling under government authority or good order, communal life, personal relations, property, economic affairs and social affairs[262]. Realistically, the political strife that occurred throughout South Africa's history and still continues in some parts today, is a significant contributor to criminal behavior among the youth[263]. Among those that are reported, it appears that the Juvenile Court in South Africa deals with children who commit crimes against property, with crimes against personal relations running a close second[264]. In the new Bill enacted by South Africa, a child may only be placed in a prison if arrested for an offense such as murder, theft or fraud, among a few others[265], and there are compelling reasons to do so[266]. As mentioned, the Children's Court deals with a different kind of child: those in need of care[267]. The crimes these children commit could be called status offenses[268] in the United States,

260.The categories are often referred to as Violent Crimes, Property Crimes, White Collar Crimes, Organized Crimes, and Consensual or Victimless Crimes.

261. G A Res, Art. 28(1) (cited in note 1).

262. See Conradie, *The Republic of South Africa* at 288-89 (cited in note 36).

263. See Martin Schönteich et. al., *Crime in South Africa: A Country and Cities Profile*, Institute for Security Studies (2001)

264.See Conradie, *The Republic of South Africa* at 289 (cited in note 36).

265. See Child Justice Act 75 of 2008, §1 (S Afr).

266. See *id.* at §30(5).

267. See The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa at 114* (cited in note 16); see also Conradie, *The Republic of South Africa* at 293 (cited in note 36).

268. United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

but they are not deemed criminal under South African law[269]. Such children falling under the jurisdiction of this Court are orphaned, cannot be controlled, are habitually truant, associate with immoral or vicious persons, with beggars, etc[270]. On the basis of the Convention, courts which try to rehabilitate children's truant behavior should catch misbehavior early on and prevent it in the future.

In the United States, children can be charged with the same crimes as adults. As of 2017, most children under the age of 17 committed crimes of burglary, theft, arson, and vandalism[271]. In terms of murder, children in the United States are transferred to the Superior Court to be judged as adults[272]. In the United States, children can also be charged with status offenses which consist of skipping school or running away from home, consuming alcohol or tobacco, or breaking curfew (if enacted)[273]. However, these children can be deemed delinquent if their behavior is habitual and can contribute to criminal behavior later in life.

In Massachusetts, a juvenile may not be placed in a secure detention facility if has only been charged with a status offense, has no prior delinquent history, or is deemed to be dependent[274]. The State places an emphasis on the fact that children should be allowed to make mistakes (to some extent)[275]. Evidently, child crime within these countries has led to both seeking remedies to this behavior. Such remedies include diversion to a welfare agency or a diversion program such as Youth Court. In a way these are attempts to merge them into a hybrid system

269. See Conradie, *The Republic of South Africa* at 293 (cited in note 36).

270. See *id.* at 292.

271. See Nat'l Center for Juvenile Justice, *Juvenile Offenders and Victims: 2014 National Reports* at 84 (cited in note 36).

272. *Commonwealth v. Wayne W.*, 414 Mass 218, 226 (1993).

273. See *Curfew by State,Nat'L Youth Rts. Assoc.* (2019) available at https://www.youthrights.org/issues/curfew/curfew-laws/#info (last visited November 22, 2020) (these curfews are often enacted by town). See also United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

274. Mass Gen Laws ch 119, § 87 (2018).

275. See Zimring, *American Juvenile Justice* at 20 (cited in note 114). See also United States Office of Juvenile Justice and Delinquency Prevention, *Literature Review: A Product of the Model Programs Guide* (cited in note 4).

both the philosophy of the United States' "Get Tough" concept of accountability and the better interest of the child.

### 3.3. *Sentencing: Diversion instead of Death*

The Convention has the comprehensive purpose of establishing diversion approaches to children. The Convention expresses that State Parties should "recognize that every child has the inherent right to life [and the] State Parties shall ensure to the maximum extent possible the survival and development of the child"[276]. This is the Convention's attempt at focusing on the best interests of children as well as their well-being. Explicitly, it takes a stand against "torture or other cruel, inhuman or degrading treatment or punishment"[277]. The Convention enacts an outright prohibition on capital punishment and the sentence of life without the possibility of parole on persons under the age of 18[278]. The international community saw the detrimental effect the juvenile system can have on children, so it promotes legal safeguards for judicial proceedings in addition to "[a] variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes [sic] and other alternatives to institutional care"[279].

In South Africa, instead of punishment a court may order the child to be placed under the supervision of a probation officer[280]. However, sentences like corporal punishment are allowed under strict requirements and it is reserved for immoral deeds with the intention to cause injury[281]. Then, in 1990, the death penalty was suspended due to political changes[282]. The new Bill in South Africa lists a variety of sentencing options ranging from community-based sentences and restorative justice sentencing to probation and detainment[283]. The vast

276. G A Res, art. 6. (cited in note 1).
277. GA Res, art. 37(a) (cited in note 1).
278. *Ibid.*
279. G A Res, art. 4 (cited in note 1).
280. See Conradie, *The Republic of South Africa* at 291 (cited in note 36).
281. See *ibid.*
282. See generally Anna Skelton, *Freedom in the Making: Juvenile Justice in South Africa*, in Juvenile Justice in Global Perspective (2015).
283. Child Justice Act 75 of 2008, § 72-79 (S Afr).

difference between the internal courts of South Africa is that the type of court generally determines the course that the court will take. For instance, the Juvenile Court typically diverts offenders to institutions such as reform schools and prisons, while the Children's Court will divert to child-care schools[284]. The ordering of the options represents the objectives of sentencing such as accountability, retribution, reintegration into the community, and the use of imprisonment as a last resort[285]; all of these are key features of the international community as established by the Convention. It is evident from the Criminal Procedures Act that South Africa would often qualify their sentences for juveniles or advocate for more personalize measures[286]. South Africa also focuses on the seriousness of the crime when sentencing or even bringing the juvenile into the system[287]. This is similar to the transition the United States experienced during its "Get Tough" era; South Africa nevertheless attempted to stay in the track of diversion.

As of 2012, a juvenile in the United States, cannot receive a mandatory sentence of life without parole, even in murder cases[288]. In *Graham v. Florida*, has been stated that a child who does not commit homicide may not be sentenced to life without the possibility of parole[289]. When children are tried for *adult crimes*, such as murder, a judge must be allowed to consider the child's age and any other relevant circumstances while determining punishment[290]. Most legislation deals with serious offenders thus the laws on sentencing revolve around

284. See Conradie, *The Republic of South Africa* at 293 (cited in note 36).

285. Child Justice Act 75 of 2008, § 69 (S Afr)

286. See Conradie, *The Republic of South Africa* at 291 (cited in note 36) (corporal punishment may not exceed "a maximum of seven strokes with a light cane … [and] can be administered only under the supervision of a medical doctor and in the presence of the parent(s)"). See also Republic of South Africa, *Situation Analysis of Children in South Africa*, Unicef, 110, 115 (2009), available at https://www.westerncape.gov.za/text/2009/5/situation_analysis_of_children_in_south_africa.pdf (last visited November 22, 2020).

287. See Child Justice Act 75 of 2008, §§ 20, 30 (S Afr). See also Conradie, *The Republic of South Africa* at 297 (cited in note 36).

288. See *Miller v. Alabama*, 567 US 460 (2012).

289. See *Graham v. Florida,* 560 US 48 (2010).

290. See *End Juvenile Life Without Parole,* ACLU (2019) available at https://www.aclu.org/end-juvenile-life-without-parole#targetText=In%20the%20United%20States%20each,JLWOP%22%20in%20the%20United%20States (last visited November 22, 2020).

transferring a juvenile to adult court where they would be subject to adult determination [291]. This contrasts the trend in the international community because it weighs the seriousness of the crime over the age of the offender instead of balancing them together. Less serious offenders often receive probation or are required to attend school. These models appear to be similar on their face, but further data will need to be collected to truly understand the impacts of these instruments on sentencing. Clearly, individual States are embracing the ideals behind diversion rather than actual criminal sentencing which aligns perfectly with the principles of the Convention.

Massachusetts takes things a step further by prohibiting a first offender alleged of a status offense from secure detention[292]. Murder is the exception in that juveniles are almost always transferred to adult courts. In these cases, limits are set on the mandatory sentences[293]. The biggest convergence on the principle of diverging for sentences instead of detaining is the use of Youth Courts in both South Africa and Massachusetts[294]. Clearly diversion has been enacted as an international principle for the treatment of children in the juvenile justice system. It is a viable alternative to official programs[295].

### 3.4. *Proper Treatment and Care of Juveniles*

The Convention suggests repeatedly that children should be "dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence [sic]"[296]. Another example is its reference to arrest and detention which is to be in conformity with the law and used as a last resort for a short period[297]. The Convention calls for children to be treated with a sense of dignity and worth,

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291. See Scott Harshbarger and Carolyn Keshian, *The Attorney General of Massachusetts' Bill Relative to the Trial and Sentencing of Serious Juvenile Offenders*, 5 BU Pub Int LJ 135, 136 (1996).

292. Mass Gen Laws ch 119, § 87 (2018).

293. Mass Gen Laws ch 279, § 24 (2014).

294. See *South Coast Youth Courts*, available at http://www.southcoastyouthcourts.org/ (last visited November 22, 2020).

295. See Hinshaw, *Juvenile Diversion: An Alternative to the Juvenile Court* at 312 (1993) (cited in note 141).

296. G A Res, art. 40(3)(b), (4) (cited in note 1).

297. G A Res, art. 37(a)(b) (cited in note 1).

which reinforces their respect for society[298], and also recognizes the importance of separating children from adults[299]. The remaining provisions of the article discuss due process rights which all children should be afforded including prompt notification, fair and speedy hearing, and the right against self-incrimination[300]. Evidently, the inherent nature and likelihood of reform among children entitled them to special care. It is the old argument that it takes a village to raise a child but teaching children to reflect on their crimes in a productive way is exactly what programs like Youth Court across South Africa and the United States seek to do.

Besides due process rights and general treatment, the Convention does not speak specifically to restraints, but for purposes of illustrating how children should be subjected to different treatment, and this is a good example to illustrate the harmonizing ideologies. In South Africa, children are given rights of personality, protection, well-being, having age accounted for, and being subject to detainment as a measure of last resort[301]. Also, the best interest of the child is a driving focus[302]. Children in this country are entitled to legal representation and a wholistic approach which accounts for the offenders age and life circumstances[303]. The new Bill also installed a preliminary inquiry system that provides diversion and restorative assessment[304]. Interestingly, the new piece of legislation also speaks to restraints, stating they should only be used on a child offender under exceptional

298. G A Res, art. 40(1) (cited in note 1).

299. G A Res, art. 37 (cited in note 1). See also Mears, *The "True" Juvenile Offender: Age Effects and Juvenile Court Sanctioning* at 170 (cited in note 104).

300. G A Res, art. 40(2)(b)(ii)-(iv) (cited in note 1). See also Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 414 (cited in note 5).

301. Constitution of the Republic of South Africa Act, No. 108 of 1996, § 28. See also the Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 108 (cited in note 16).

302. Sloth-Nielsen,*Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 417 (cited in note 5).

303. G A Res, art. 37(c) (cited in note 1). Compare Sloth-Nielsen, *Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law* at 410 (cited in note 5). But see also Conradie, *The Republic of South Africa* at 290-1 (cited in note 36).

304. The Presidency Republic of South Africa, *Situation Analysis of Children in South Africa* at 108 (cited in note 16).

circumstances[305]. The language is very similar to the recent Massachusetts legislation: "[n]o child may be subjected to the wearing of leg-irons when he or she appears at a preliminary inquiry or child justice court, and handcuffs may only be used if there are exceptional circumstances warranting their use"[306]. These guidelines embody the Convention principle that children, even those who commit crimes, should be afforded basic dignity and special care.

In the United States, as discussed, there was a "Get Tough" era and relevant case law that has shaped the recent juvenile justice system. This era was more punitive than in the past, but States, like Massachusetts, are slowly moving back to a rehabilitation model, which conforms with the Convention. Unfortunately, some states have been unable to internalize this international principle; those states still use solitary confinement in which a person is placed in an environment of extreme isolation and shackles for the punishment of juveniles[307]. This type of detention on juveniles can lead to "depression, anxiety and even psychosis"[308]. In court appearances, some states automatically authorize the use of shackles to physically restrain offenders, including "handcuffs, straitjackets, leg irons, belly chains, [etc.]" during their court appearances[309]. This can be seen as a stigmatizing and traumatizing experience for children[310].This is a direct by-product of the "Get Tough" era and detaining serious offenders with adults.

Taking a look at the cases as they progressed, it is clear the United States values a punitive justice system but also considers the best interest of the child as time progresses. The one place the United States falls short is in cases of murder where juveniles may be subject to up to 30 years in prison[311]. Due process rights such as the right to notice,

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305. Child Justice Act 75 of 2008, § 33 (S Afr).

306. *Ibid.*

307. See Anne Teigen, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement,* National Conference of State Legislatures, available at http://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx (last visited November 22, 2020).

308. *Id.*

309. See *id.*

310. See *id.*

311. Mass Gen Laws ch 279, § 24 (2014).

counsel, confrontation, cross-examination, and the privilege against self-incrimination were established with the exception of jury trials[312].

As a frontrunner state, Massachusetts is taking steps towards eradicating the method of using restraint, there

> a juvenile shall not be placed in restraints during court proceedings and any restraints shall be removed prior to the appearance of a juvenile before the court at any stage of a proceeding unless the justice presiding in the courtroom issues an order and makes specific findings on the record that: (i) restraints are necessary because there is reason to believe that a juvenile presents an immediate and credible risk of escape that cannot be curtailed by other means; (ii) a juvenile poses a threat to the juvenile's own safety or to the safety of others; or (iii) restraints are reasonably necessary to maintain order in the courtroom[313].

Restraints are defined as any device limiting the voluntary movement of the child including leg irons and shackles, which have been approved by the trial court department [314]. Massachusetts is one of the ten States which limit or prohibit the use of solitary confinement and shackles because of the detrimental effects on juveniles [315]. Based on the understanding that children are inherently different from adults it makes sense to advocate for different procedures when they become involved with the court system. The due process rights ensure fairness and protect the juvenile, but the special protections of the juvenile court ensure that the cycle is not perpetuated.

312. See generally *Kent v. United States*, 383 US 541 (1966), *In re Gault*, 387 US 1 (1967), *McKeiver*, 403 US 528 (1971).

313. MGL ch. 119 §86(b).

314. MGL ch. 119 §86.

315. See Teigen, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement* (cited in note 308).

## 4. *Conclusion*

The perspective of this article is limited and is not meant to be a comprehensive illustration of the juvenile system in South Africa or in the United States. More broadly, this article attempts to illustrate the international principles embraced by South Africa and the United States, and advocate that they need to be further internalized by the United States, even though some of the individual States, like Massachusetts, have already begun to implement these international values.

This article has displayed a general theme of converging principles on the care and treatment of children within the juvenile system. In the case of South Africa, children have obtained a unique position in the law: partially it depends on South Africa's acknowledgement of international law, but this is also possible thanks to the various cultural implications of rehabilitation. Otherwise, the United States has failed to ratify the Convention, and enacts policy directly conflicting with it by adopting a punitive, crime model for its juvenile system. However, the unique structure of the United States allows individual States to choose to enact more protection for children, as long as their laws do not contradict the federal system, because federal law is a "*floor, not a ceiling*" to guarantees and protections. This allows individual States, such as Massachusetts, to freely embrace the international values emerging from the Convention.

Restorative juvenile justice is trending internationally. Massachusetts has jumped on board and it is time for the United States to do the same nationwide by implementing the principles of the Convention more effectively. Both countries have made large strides with juvenile justice reform. Due to the general informality, confidentiality, and inconsistent reporting of the juvenile system, it is difficult to confirm that diversion is the primary method of addressing child offenders in any system, but it is clear that both South Africa and Massachusetts share the same goals in this path towards diversion and treating children with self-worth.

First, both South Africa and the United States find a rationale behind limiting the age of criminal responsibility because children deserve special treatment when they enter the system. Their inherent nature makes them good candidates for rehabilitation and reintegration, which is why the Convention encourages members to set this

standard. As the Convention does not set the exact age, it is interesting to notice that South Africa sets its minimum age at 14 with a rebuttable presumption at 10 years old, while Massachusetts sets their minimum age at 12.

Second, educating child offenders is a significant principle held by the international community as it equips minors with tools to break out of the criminal cycle. Both South Africa and the United States have taken measures to ensure truancy is a crime which children can be punished for. Alternatively, they have enacted guidelines favoring diversion when a child goes before a criminal court.

Third, the Convention enacts a prohibition on death penalty and life imprisonment, but this is a principle which the United States as a whole has not lived up to.

However, many individual States, such as Massachusetts, are beginning to incorporate this type of language into their individual legislation. Finally, both South Africa and the United States embrace the importance of treating a child with dignity which includes giving the child proper due process rights and utilizing detention as a last resort. Although not specifically mentioned in the Convention, both South Africa and Massachusetts' prohibition or restriction on the use of restraints on children in the courtroom embodies the principle of treating children with dignity and worth. All of these specific measures further the harmonization of the international principles. Unfortunately, due to the evolution and history of the United States juvenile system, it may be very hard to break fully away from the punitive model it has established and embrace all of the international values established in the Convention as South Africa has already done.

# Modern Challenges in International Law and Indigenous Rights: The United Nations Declaration on the Rights of Indigenous Peoples, Indigenous Women's Activism, and the Issue of Violence Against Indigenous Women

Francesca Gottardi*

*Abstract*: Historically, Indigenous women have been the target of violence at an alarming rate compared to the non-Indigenous population. This work explores how Indigenous women have used the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) to call for the end of this abuse. The United States and Canada are two North American Federal governments with a strong presence of Indigenous Peoples. Even though Canada and the United States have signed UNDRIP, in North America as many as four in five Indigenous women experience violence in their lifetime. This work looks at how and why there is still such a significant rate of violence against Indigenous women in the U.S. and Canada. In addition, this article surveys the current extent of Indigenous women's participation in the policymaking process. It then explores what changes in law and policy should flow from Indigenous women's activism and in what ways Indigenous women can and should become more involved in the decision-making process. This work also aims to reflect on how the law and policies in the U.S., in Canada and at an international level could more efficiently address the issue. Indigenous women have historically been absent from the decision-making process and even when they are given a voice and their rights are emphasized, for instance with UNDRIP, countries are not complying with their responsibilities on the matter. Consequently, Indigenous women are de facto denied the possibility to participate in the debate, and their claims are left unheard. This article concludes that they should be empowered to advocate for enhanced accountability of the individual countries and the international community alike. In fact, increased participation of Indigenous women in the decision-making process increases the opportunity for Indigenous voices to be heard, in a quest to fight the widespread issue

of violence against Indigenous women.

*Keywords*: International Law; International Human Rights; Indigenous Rights; Feminist International Politics; Violence Against Indigenous Women.

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## 1. *Introduction: the issue of violence against indigenous women*

As a non-Indigenous woman living in the United States, I was surprised to notice that within the general population, and even in legal communities, there is little knowledge – and sometimes a lack of awareness – of Indigenous Peoples' issues and emerging discussions. Indigenous Peoples' societies in the United States and in the world share a pattern of commonalities and dysfunctions, even if geographically distant[1]. Violence against women is one of such dysfunctions. The breakdown of traditional societal patterns caused by the colonization process, land loss and loss of identity seems to be connected with

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1. See J. Paul Seale, et al., *Alcohol Use and Cultural Change in an Indigenous Population: A Case Study from Venezuela*, 37 Alcohol and Alcoholism 603 (2002), available at https://academic.oup.com/alcalc/article/37/6/603/205098 (last visited November 14, 2020).

this type of violence[2], as exemplified by the words of Winona LaDuke, Executive Director of Honor the Earth: "Violence against the land has always been violence against women"[3]. Starting by the premise that, historically, Indigenous women have been the target of violence at an alarming rate, compared to the non-Indigenous population[4], this article examines how the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) addresses the issue of violence against Indigenous women and facilitates a positive change, considering also how UNDRIP has been used by those subjects to call for the end of this violence. The analysis is conducted through two case studies: the United States and Canada. These countries have been chosen because they adopt a different legal approach in the treatment of Indigenous Peoples and at the same time share a similar common law framework and a federal type of government. This selection allows for an even ground for comparison. Canada and the United States have both signed UNDRIP, but still report high violence levels against women: in North America, as many as four in five Indigenous women have experienced violence in their lifetime[5]. This study proposes to analyse how and why there still is such a significant occurrence of violence against Indigenous women in their territory. Particular attention is posed in surveying the extent of Indigenous women's participation in the policymaking process. Finally, this research explores the ways Indigenous women can get more involved in the decision-making process and what changes in law and policy should flow from Indigenous

2. See Genevieve M. Le May, *The Cycles of Violence against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013*, 12 PSU McNair Scholars Online Journal 1, 12 (2018), available at https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1177&context=mcnair (last visited November 14, 2020).

3. See Thane Maxwell, *Coalition of Native American and Women's Organizations File Submission to United Nations Requesting Intervention in Epidemic of Sexual Violence* (Honor the Earth, May 11, 2015), available at http://www.honorearth.org/un_submission_may2015#:~:text=On%20April%2021%2C%202015%2C%20a,Lakes%20and%20Great%20Plains%20region (last visited November 22, 2020).

4. See generally Shannon Speed, *Incarcerated Stories: Indigenous Women Migrants and Violence in the Settler-Capitalist State* (University of North Carolina Press 1st ed. 2019).

5. See André B. Rosay, *Violence against American Indian and Alaska Native Women and Men*, 277 NIJ Journal 39, 41 (2016), available at https://nij.ojp.gov/library/publications/nij-journal-issue-no-277 (last visited November 14, 2020).

women's activism. More specifically, this study aims to reflect on how the law and policies in the two countries could address the issue in a more efficient way and to what extent Indigenous women's activism would be conducive to this goal.

Indigenous women must be substantially more involved in the creation of law and policy in the United States and Canada, as well as in the international community. They have historically been absent from decision-making process and leadership roles[6]; moreover, even when they are given a voice, countries do not comply with the responsibilities stemming from being UNDRIP signatories. Consequently, Indigenous women are *de facto* denied the possibility to participate and their claims are left unheard[7]. Increased participation of Indigenous women in the decision-making process would dramatically improve the opportunity for Indigenous voices to be heard, in a quest to fight the widespread violence against Indigenous women. For this reason, they should be empowered to advocate for enhanced accountability of the individual countries and of the international community.

## 2. *Research questions and design*

This article aims to shed light on how empowering Indigenous women and Indigenous movements leads to positive change at the intersection between international law and public policy. The relevance

6. See Grazia Redolfi, Nikoletta Pikramenou and Rosario Grimà Algora, *Raising Indigenous Women's Voices for Equal Rights and Self-Determination*, 31 NEJPP 1,6 (2019), available at https://scholarworks.umb.edu/nejpp/vol31/iss2/9/ (last visited November 14, 2020). Echoing the work of Kimberle Crenshaw, the authors remark that when addressing "participatory rights with regard to Indigenous women, it is important to analyze the various struggles they experience in the exercise of these rights. The structural obstacles to women's effective participation in decision making are multiplied when various identities intersect. Among many Indigenous women, for instance, the intersections of gender, race and poverty can amount to a triple discrimination'". This may offer some context as to the challenges faced by Indigenous women in accessing decision-making and leadership roles.

7. See Inter-American Commission on Human Rights, *Indigenous Women and Their Human Rights in the Americas* (April 17, 2017), available at https://www.iwgia.org/images/documents/popular-publications/indigenous-women-americas.pdf (last visited November 22, 2020).

of my questions lies in understanding potential improvements and new directions for action in the context of the international, American and Canadian legal framework[8]. Indigenous women have played an increasingly crucial role in advancing Indigenous Peoples' rights, for instance in the fight for the protection of Indigenous sacred sites[9]. This work analyzes how their leadership and action can extend to other areas and have a lasting impact on the current public policy and international legal debate. A careful look is taken at the extent to which the absence of their voice has impacted the perpetuation of the dysfunctions discussed in this analysis. Violence against Indigenous women is examined looking at how UNDRIP addresses the issue and provides tools to facilitate change.

The research questions develop on three levels. On the legislative level, this study analyzes how UNDRIP, if at all, addresses violence against Indigenous women. Specifically, it looks at how Indigenous women have used UNDRIP to call for the end of violence against women. At the policy level, this work looks at how and why there is such a significant occurrence of violence against women in Indigenous communities, despite the fact that both the United States and Canada signed UNDRIP. In particular, this study examines how the

8. This work strives to utilize two case studies that are suitable for comparison – the U.S. and Canada. See Gary King, Robert O. Keohane and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* at 19 (Princeton University Press 1st ed. 1994). The authors discuss case study selection, suggesting ways to approach case studies to produce useful causal inferences. Their advice is for the theoretical framework to be as concrete as possible to generate observable implications. King et al. show skepticism towards the use of case studies, but see Alexander George, Andrew Bennet, *Case Studies and Theory Development in the Social Sciences* at 20 (Belfer Center Studies in International Security 1st ed. 2005). George and Bennett maintain that case studies are useful for theory development. This study builds on King et al. and George and Bennett's scholarship to ensure the inferences drawn are methodologically sound and informed of the possible risks in using case studies.

9. See Francesca Gottardi, *Sacred Sites Protection and Indigenous Women's Activism: Empowering Grassroots Social Movements to Influence Public Policy. A Look into the "Women of Standing Rock" and "Idle No More" Indigenous Movements*, 11 Religions 380 (2020), available at https://www.researchgate.net/publication/343177108_Sacred_Sites_Protection_and_Indigenous_Women%27s_Activism_Empowering_Grassroots_Social_Movements_to_Influence_Public_Policy_A_Look_into_the_Women_of_Standing_Rock_and_Idle_No_More_Indigenous_Movements (last visited November 22, 2020).

law and policies in the U.S. and Canada are tackling the question[10]. The third level of analysis subsumes the first two and seeks to examine what changes in law and policy should stem from Indigenous women's action. Precisely, what are the ways Indigenous women can become more involved. It is worth briefly noting that in the Indigenous field of research, scholars have long lamented a lack of literature in the realm of "gendered processes and effects of Indigenous [women] and self-determination"[11]. The hope leading this work is to fill the gap, moving from an interdisciplinary use of the literature available.

### 3. *Violence against Indigenous women at the intersection between international law and political science*

Although violence against women is a universal phenomenon, it reaches alarmingly high rates amongst Indigenous Peoples: Native American women residing in Indian Country are victims of domestic violence and physical assault at rates 50 percent higher than women of other ethnicities[12]. In North America as many as four in five Indigenous women have experienced violence in their lifetime[13]. Christopher Cunneen and other Indigenous scholars point out that this and other dysfunctions are a result of the historical trauma of colonization, which caused the disruption of Indigenous traditional culture and societies, both under a collective and an individual standpoint[14]. Also the international community has detected their vulnerability. ta. Indigenous women's increased exposure to violence was recognized

10. Given the predominantly common law framework of the U.S. and Canada, this work is widely informed by case law to trace the evolution of the policy approach adopted by the countries at issue.

11. See Rauna Kuokkanen, *Self-determination Women's Rights at Intersection of International Human Rights*, 34 Human Rights Quarterly 225, 231 (2012), available at https://www.corteidh.or.cr/tablas/r28090.pdf (last visited November 22, 2020).

12. See Rosay, *Violence against American Indian and Alaska Native Women and Men* (cited in note 5).

13. See *ibid.*

14. See Chris Cunneen, *Colonial Process, Indigenous Peoples, and Criminal Justice Systems,* 2013 UNSW Law Research Paper 386 (2014), available at https://ssrn.com/abstract=2218865 (last visited November 22, 2020). See also Le May, *The Cycles of Violence against Native Women* (cited in note 2).

by the UN General Assembly in the Declaration on the Elimination of Violence Against Women (DEVAW)[15]: Article 1 of the Declaration defines violence against women as "gender-based violence", that causes "physical or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty"[16]. This definition includes various forms of violence, such as sexual violence, intimate partner aggression and family violence.

### 3.1. *Violence against Indigenous women: a constructivist, feminist, and decolonial approach*

This article is informed by Indigenous feminist and decolonial theories that investigate violence against women, including domestic and sexual assault. Specifically, this work relies on the theoretical framework of feminist Indigenous decolonial scholars like American Anishinaabeg theorist and activist Winona LaDuke, as well as Wilma Mankiller. From the Canadian perspective, the focus is on the ideological theories of Indigenous activist Sharon McIvor. These eminent decolonial theorists help support the participatory framework proposed in this research. Furthermore, they emphasize the need for Native people to engage with, dismantle and decolonize the settler state. They show how crucial participation is in fostering gender-sensitive decolonizing practices.

In her advocacy work, LaDuke identifies colonization as a significant factor in putting Indigenous women at an increased risk of violence[17]. She – along with other scholars, like Judith Aks – calls for female participation in decision-making processes according to UNDRIP, supporting a system that adopts a bottom-up approach rather than a top-down one[18]. In this regard, the relationship between theory and practice is a very debated topic amongst feminists, which Amrita

15. See *Declaration on the Elimination of Violence Against Women*, UN General Assembly (December 20, 1993), UN Doc A/RES/48/104.

16. See *ibid.*

17. See Le May, *The Cycles of Violence against Native Women* at 14-19 (cited in note 2). See also Maxwell, *Coalition of Native American and Women's Organizations File Submission to United Nations* (cited in note 5).

18. See Judith H.Aks, *Women's Rights in Native North America: Legal Mobilization in the US and Canada, Law and Society* (LFB Scholarly Pub. 1st ed. 2004).

Basu explores deeply. Basu proposes to move from universal to particular and from the international level down to the local one, in order to build a multi-layered and inclusive type of governance[19]. Further, the literature highlights that violence against Indigenous women is rooted in the fact that Native women have been depicted as savages and below human, or even as non-human[20]. It also traces those practical reasons that have forced them to live in remote and isolated communities, with lessened access to services and protection.

In addition, the research of Howard-Wagner, Bargh and Altamirano-Jiménez shows that the rise of neoliberalism contributes to exacerbate the problem of violence against Indigenous women[21]. This comes from the fact that neoliberal policies tend to transfer resources from the public to the private sector, limiting the government's role in providing social welfare programs and subsidies while vehemently defending individual freedoms[22]. In fact, in Western countries that have strongly embraced a neoliberalist approach–such as the U.S. and Canada–the impact of neoliberal governance on Indigenous Peoples has been enabling on the one hand and constraining on the other. For instance, this system allowed to foster the rejection of unwanted

19. See Amrita Basu, *Who Secures Women's Capabilities in Martha Nussbaum's Quest for Social Justice*, 19 CJGL (2010), available at https://journals.library.columbia.edu/index.php/cjgl/article/view/2589 (last visited November 22, 2020).

20. See Cherry Smiley, *A Long Road behind Us, a long Road Ahead: Towards an Indigenous Feminist National Inquiry,* 28 Canadian Journal of Women and the Law 308, 308 (2016), available at https://www.utpjournals.press/doi/abs/10.3138/cjwl.28.2.308 (last visited November 21, 2020). See also Tracy Bos, *Native Americans in Literature*, 18 LAJM 71 (2002), available at https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1310&context=lajm (last visited November 22, 2020). See also *Johnson and Graham's Lessee v. McIntosh,* 21 U.S. 543, 5 L. Ed. 681 (1823).

21. See Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez, *The Neoliberal State, Recognition and Indigenous Rights: New Paternalism to New Imaginings* at 113-240(The Australian National University 1st ed. 2018).

22. See Jeffrey A. Gardner and Patricia Richards, *Indigenous Rights and Neoliberalism in Latin America* in The Palgrave Handbook of Ethnicity at 859-865 (Ratuva S. eds, 2019); Annapurna Devi Pandey, *The Challenges of Neoliberal Policies and the Indigenous People's Resistance Movement in Odisha, India,* 28 e-cadernos CES 46 (2016), available at https://www.researchgate.net/publication/327113566_The_Challenges_of_Neoliberal_Policies_and_the_Indigenous_People%27s_Resistance_Movement_in_Odisha_India (last visited November 22, 2020).

State intervention in Indigenous affairs[23]; however, it *de facto* limited the resources available to Indigenous Peoples and their access to essential services, such as healthcare and education[24]. Such limits, in turn, arguably decrease social mobility and negatively affect Indigenous women, who usually come from a disadvantaged background[25]. Therefore, scholars have suggested that the current "neoliberal globalization process produces a new patriarchal subordination of women [...] by the fact that apparently value-free economic priorities, namely commodification of everything and the maximization of profit, are made central goals of all societies"[26]. Ultimately, this work is informed by the multi-faceted aspects that characterize violence against Indigenous women, which are part of complex historical, ideological and material reasons and synergies.

### 3.2. *Indigenous Peoples in the international legal framework*

At an international level, the leading organization responsible for protecting Indigenous rights is the United Nations (UN)[27]: founded in 1945, it currently counts 193 member states[28]. Its constitutional document – The Charter of the United Nations – sets the scope and

23. See Fiona MacDonald, *Indigenous Peoples and Neoliberal "Privatization" in Canada: Opportunities, Cautions and Constraints*, 44 CJPS 257, 261 (2011), available at https://www.jstor.org/stable/41300541?seq=1 (last visited November 22, 2020).

24. See *id.* at 266.

25. See Donna M. Klingspohn, *The Importance of Culture in Addressing Domestic Violence for First Nation's Women*, 9 Front. Psychol, (2018), available at https://www.frontiersin.org/articles/10.3389/fpsyg.2018.00872/full (last visited November 21, 2020).

26. See Maria Mies and Veronika Bennoldt-Thomsen, *The Substistence Perspective: Beyond the Globalised Economy* at 46 (Bloomsbury Publishing PLC 1st ed. 1999).See also Rauna Kuokkanen, *Globalization as Racialized, Sexualized Violence*, 10 International Feminist Journal of Politics 216 , 216 (2008), available at https://www.tandfonline.com/doi/abs/10.1080/14616740801957554 (last visited November 22, 2020).

27. See *Declaration on the Rights of Indigenous Peoples*, UN General Assembly (September 13, 2007), UN Doc A/RES/61/295. See also *Declaration on the Elimination of Violence Against Women*, UN General Assembly (December 20, 1993), UN Doc A/RES/48/104 and *Universal Declaration of Human Rights*, UN General Assembly (December 10, 1948).

28. The list of Member States of the United Nations is available at https://www.un.org/en/member-states/ (last visited November 22, 2020).

guiding principles of the UN. Article 1.2 underscores the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"[29]. In its Preamble it also highlights the importance of "fundamental human rights, [...] the dignity and worth of the human person, [and] the equal rights of men and women"[30]. The UN action has guided the progressive strengthening of the international human rights' protection system, upon which the rising significance of the defence of Indigenous Peoples' rights is founded[31].

The Permanent Forum on Indigenous Issues (UNPFII) is a fierce promoter of the UN effort to advance Indigenous rights[32]. UNPFII has played a pivotal role in advancing UNDRIP and its principles, which the U.S. formally adopted in 2010[33]. In Canada, UNDRIP was first opposed in fear of an increase in land disputes[34], but the objector status to the declaration was finally withdrawn on May 10, 2016[35]. Canada was also weary of UNDRIP's potential impact on natural resource development in light of the Declaration's clauses on Indigenous Peoples' right for informed consent[36]. Similarly, the U.S. feared that, even if not legally binding, the Declaration could give rise to tribal nations'

29. See UN Charter art. 1 §2.

30. See *id.* at Preamble.

31. See Jens Woelk and Francesco Palermo, *Diritto costituzionale comparato dei gruppi e delle minoranze* at 31 (CEDAM 2nd ed. 2011). See also Laura Giraudo, *La questione indigena in America Latina* at 39-61 (Carocci Editore lst ed. 2009).

32. The Forum was established in July 2000 by the United Nations Economic and Social Council (UNESC) as an advisory body specialized in Indigenous issues. The mandate of the UNPFII is to examine Indigenous issues in relation to social and economic development, human rights protection and culture safeguard. The Forum has sixteen members, who are leading experts in Indigenous Rights and issues. The Forum is held in high regards within the UN hierarchy as part of the UNESC and as it reports directly to the General Assembly.

33. See Woelk and Palermo, *Diritto costituzionale comparato dei gruppi e delle minoranze* (cited in note 31).

34. William B. Henderson, *Indigenous Self-Government in Canada*, The Canadian Encyclopedia, (2018), available at https://www.thecanadianencyclopedia.ca/en/article/aboriginal-self-government (last visited November 22, 2020).

35. See Tim Fontaine, *Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples*, CBC (2016), available at https://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272 (last visited November 22, 2020).

36. See *ibid.*

claims to exercise their inherent sovereign powers beyond the limitations currently in place[37].

UNDRIP has been criticized for making only a few specific references to women[38]. The term "violence against women" does not explicitly appear in the text of the Declaration. Nonetheless, in its wording, UNDRIP identifies challenges particular to Indigenous Peoples–including high rates of violence–and it also recognizes Indigenous women as a protected category.

Article 7 of UNDRIP assumes specific relevance in the context of violence against women in so far that it affirms that Indigenous Peoples "have the rights to life, physical and mental integrity, liberty and security of person. Indigenous Peoples [...] shall not be subjected to any act of violence"[39]. Article 22 of the Declaration was written with particular attention to the rights of Indigenous women[40]: Paragraph 2 posits that "States shall take measures, in conjunction with Indigenous Peoples, to ensure that Indigenous women [...] enjoy the full protection and guarantees against all forms of violence and discrimination"[41], including effective and special measures to ensure continuing improvement of their economic and social conditions[42]. Article 22.2 may prove very useful when read in conjunction with Article 37, which affirms Indigenous Peoples' right to "the enforcement of treaties" and entails the fulfilment of those obligations that ensure safety on the reservations[43].

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37. See N. Bruce Duthu, *Compliance or Evasion? An Assessment of Tribal Sovereignty in the United States on the 10th anniversary of the UN Declaration on the Rights of Indigenous Peoples*, 1 Sorbonne Student Law Review 127, 131 (2018), available at https://www.pantheonsorbonne.fr/fileadmin/EDS/newsletter-EDS/numero_8/SSLR-RJES_Vol._1_n._1_2018.pdf (last visited November 22, 2020).

38. See generally Aimée Craft, et al., *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws*, Center for International Governance and Innovation, (2018), available at https://www.cigionline.org/sites/default/files/documents/UNDRIP%20Fall%202018%20lowres.pdf (last visited November 22, 2020).

39. See *ibid.*

40. See *Declaration on the Rights of Indigenous Peoples*, UN General Assembly (cited in note 27).

41. See *ibid.*

42. See *ibid.*

43. See Indian Law Resource Center, *Using the Declaration to End Violence Against Native Women,* available at https://indianlaw.org/content/

Lastly, Articles 18, 19 and 38 underscore the importance of Indigenous Peoples' free, prior and informed consent, along with good faith consultation and cooperation, with regard to causes "that would affect their rights"[44]. This clause particularly refers to those legislative measures taken in pursuance of the goals of the Declaration. The articles should be read in conjunction with UNDRIP Articles 3, 4 and 5, which assert the right of Indian nations to self-determination. At the core of such rights is Indigenous Peoples' ability to preserve their institutional structures (i.e., judicial and law enforcement systems), which foster public safety and violence deterrence in Indigenous communities[45]. In this respect, Article 35 plays a pivotal role in underscoring that "Indigenous Peoples have the right to determine the responsibilities of individuals to their communities". UNDRIP, through this article, promotes the advancement of tribal authority. This includes competence to deter and respond to violence against women in the community, regardless of whether it was committed by an Indigenous person or not[46].

In light of the international Indigenous rights framework outlined above, it is clear that, although UNDRIP does not expressly address violence against women, it is an essential tool to protect Indigenous women's interests.

### 3.3. *Indigenous Peoples in the U.S. domestic legal framework*

At the U.S. domestic level, Native Americans have a unique status which impacts the management of the violence against Indigenous women's crisis. With 6.7 million peoples that identify as Native Americans or Alaska Natives, accounting for 2 percent of the population, Indigenous Peoples are a sizeable component of the U.S. population[47]. Native Americans are legally framed as "domestic dependent

using-declaration-end-violence-against-native-women (last visited November 22, 2020).

44. See Craft, et al., *UNDRIP Implementation* (cited in note 38).

45. See Indian Law Resource Center, *Using the Declaration to End Violence Against Native Women* (cited in note 43).

46. See *ibid.*

47. The data describes the total number of individuals who identify as Native Americans of Alaska Natives either alone, or in combination with another ethnic

nations"[48], a notion referring to the European idea of feudatory states, where small nations attach themselves to larger nations for self-preservation purposes[49]. This unique treatment is often misunderstood as a surrender of sovereignty on the part of Native Americans. However, it was initially conceived as an alliance between two sovereign nations, in which the Native Americans would receive protection from the U.S. Government[50]. The U.S. Constitution recognizes this framework in Article I, Section 8, Clause 3 – also known as the "Commerce Clause". According to the Commerce Clause, Congress is authorized "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"[51].

By this provision, Native American tribes are acknowledged as (semi) sovereign and separate political entities with treaty-making power[52]. Therefore, the U.S. Constitution recognizes Indian tribes' unique status in the U.S. legal system. Through this clause the Congress could begin formal relations with Indian tribes[53]. In addition, Native Americans born in the U.S. territory have been conferred U.S. citizenship under the Indian Citizenship Act (ICA), passed by Congress in 1924.

The unique status of Indigenous Peoples in the U.S. is especially relevant in taking action to address the problem of violence against

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identity. About 2.9 million people (0.9% of the U.S. population), identify solely as American Indian or Alaska Native. See US Census Bureau, *American Indian and Alaska Native Heritage Month: November 2017* (Oct 6, 2017), available at https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html (last visited November 22, 2020). See also Joyce M. Wolburg, *The Demise of Native American Mascots: It's Time to Do the Right Thing*, 23 Journal of Consumer Marketing 4 (2006), available at https://www.researchgate.net/publication/242235935_The_demise_of_Native_American_mascots_It%27s_time_to_do_the_right_thing (last visited November 22, 2020).

48. *See Cherokee Nation v. State of Ga.,* 30 U.S. 1, 8 L. Ed. 25 (1831). See also N. Bruce Duthu, *American Indians and the Law* (Penguin books 1st ed.2008).

49. See *Cherokee Nation. v. State of Ga.* (cited in note 48).

50. See Duthu, *American Indians and the Law* at 69-74 (cited in note 48). See also N. Bruce Duthu, *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism* at 74-128 (Oxford University Press 1st ed. 2013).

51. US Const Art I.

52. See Duthu, *Compliance or Evasion?* (cited in note 37).

53. Kevin Washburn et al., *American Indian Law: Native Nations and the Federal System Cases and Materials* (UNM Law 1st. ed. 2010).

women. In light of their legal status, and treaty-making power, Native Americans should be granted more autonomy and more participatory devices in the decision-making process that concerns the furtherance of policies to address the issue.

### 3.4. *Indigenous Peoples in the Canadian domestic legal framework*

In considering how violence against Indigenous women can be addressed, the Canadian federal framework also plays a relevant role. According to the 2016 national census, there were 1,673,785 Indigenous Peoples in Canada, accounting for 4.9 percent of the total population[54]. In 1876, the Canadian Federal Government dismantled the traditional Aboriginal Peoples' system with the Indian Act, which *de facto* imposed a Federal Government extensive control on Indigenous matters by establishing the Department of Indian Affairs[55]. The rise of Indigenous movements in the 1970s, with their revival in the 2000s, led to the Constitutional acknowledgment of the right to self-government of Indigenous Peoples in Canada, through the Constitution Act of 1982. Notably, the latter recognized "existing Aboriginal and treaty rights"[56].

Today, Aboriginal Peoples in Canada do not hold a unique status of "Domestic Dependent Nations" as it is in the United States[57]. Instead, individual communities have achieved differing levels of self-governance through modern-day treaties between Indigenous Peoples and the Canadian federal government: the Comprehensive Land Claims[58]. Pursuant to such land claims, Aboriginal Peoples in Canada have the right to traditional use and occupancy of their land. Further, these claims gave rise to various forms of acknowledgment of

54. See *Aboriginal Peoples in Canada: Key Results from the 2016 Census*, Statistics Canada (The Daily, October 25, 2017), available at https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.pdf (last visited November 22, 2020).

55. See *An Act to Amend and Consolidate the Laws Respecting Indians*, SC 1876 Ch. 18 §2, available at https://www.aadnc-aandc.gc.ca/eng/1100100010252/1100100010254 (last visited November 22, 2020).

56. See Government of Canada, *Reclaming power and place: the final report of the national inquiry into missing and murdered indigenous women and girls*, 1a, 211 (2019).

57. See *Cherokee Nation v. State of Ga.* (cited in note 48).

58. See Fontaine, *Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples* (cited in note 35).

Canadian Indigenous Peoples' rights – i.e., settlements, establishment of local governments, participatory rights and land rights.

### 4. *UNDRIP to Call for the End of Violence Against Indigenous Women: A Look at the U.S. and Canada*

One of the questions this work explores is how Indigenous women have used UNDRIP to call for the end of violence against women, although it is still relatively early to give a definitive answer on the Declaration's effectiveness on this matter[59]: even though thirteen years have passed since the adoption of the Declaration, it is still a challenge to analyse how UNDRIP has been implemented – let alone to investigate whether Indigenous women have been successful in using it to prevent violence against them[60]. However, some preliminary observations can be drawn.

As of September 2020, 144 nations have adopted UNDRIP. Given the scope of this work, the analysis will focus on the U.S. and Canada.

An important point to clarify is that UNDRIP is a declaration and, as such, is not legally binding as a treaty would be. Therefore, the Declaration does not create new rights: it serves as a tool, instead. It raises awareness of the specificities of Indigenous Peoples' human rights and brings them to the attention of the international community. In other words, the Declaration provides a clear framework to promote the implementation of Indigenous rights in the international arena, but it is not binding for the States[61]. Nonetheless, eminent Indigenous scholars, such as James Anaya, have argued that, even if not formally binding, UNDRIP has received such overwhelming support, and its principles are so foundational that it ought to be regarded as

59. See Kuokkanen, *Self-determination Women's Rights* (cited in note 11).

60. See Rauna Kuokkanen, *Indigenous Women's Rights and International Law: Challenges of the UN Declaration in the Rights of Indigenous Peoples*, Routledge Handbook of Indigenous Peoples' Rights. Eds. C. Lennox and D. Short. Routledge (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414293 (last visited November 22, 2020).

61. See *ibid.*

customary international law[62]. Therefore, it should be applied by international and state tribunals[63].

In the U.S. UNDRIP is the base upon which Indigenous women have been advocating for their rights. Winona LaDuke and Wilma Mankiller provide the most striking example of UNDRIP-based feminist advocacy in the United States. LaDuke is the woman behind the website HonorEarth.org, for which she serves as an executive director, advocating for the advancement of Indigenous women's rights through participation[64]. Mankiller, before her passing in 2010, had strongly advocated for the need to enhance Indigenous women's participation in policy making and leadership roles, and for the need of the U.S. to adopt UNDRIP to facilitate this endeavor[65]. The two scholars invoke Indigenous women's participatory rights under Articles 18, 19 and 38; they underscore the importance of consulting and cooperating with Indigenous women in causes that would affect their rights.

In Canada, the flagship example of feminist decolonial UNDRIP-based advocacy is delivered by indigenous activist Sharon Donna McIvor. In 2011, McIvor referred to UNDRIP in arguing for gender discrimination in Bill C 31, which established the so-called "second generation cut-off", providing that Indigenous women who married a non-Indian man would not be able to transmit to their children the

62. See James Anaya, *International Human Rights and Indigenous Peoples* at 79–82, 124, 151 (Wolters Kluwer 1st ed.2009).

63. The literature of James Anaya and Bruce Duthu provides insights on the legal framework by exploring the power relations between Indigenous Peoples and the settler state governments under whose jurisdictions they reside and in conceptualizing the power relations between them. They also look at the significance of treaty-making history in developing the Indigenous-to-federal-government power structures. Anaya and Duthu then analyze modern trends that see Indigenous Peoples at the forefront for claiming their rights and aspiration to control their destiny. See generally James Anaya, *Indigenous Peoples in International Law,* (Oxford University Press, 2nd ed. 2004). See also Duthu, *American Indians and the Law* (cited in note 48).

64. Information about Winona LaDuke are available at http://www.honorearth.org/meet_the_team (last visited November 22, 2020).

65. See Indian Law Resource Center, *Mankiller in Indian Country Today – Obama's Opportunity: Add America's Name to Declaration* (2009), available at https://indianlaw.org/node/396 (last visited November 22, 2020). See also National Congress of American Indians, *Internships/Fellowships: The Wilma Mankiller Fellowship Program*, available at http://www.ncai.org/about-ncai/internships-fellowships (last visited November 22, 2020).

status of Canadian Aboriginals[66]. McIvor won in the British Columbia Supreme Court in 2007 and she also subsequently won the appeal in 2009[67]. As a consequence, the Canadian Government amended the Indian Act accordingly. In this case the relevance of UNDRIP was challenged, since it was not yet adopted in Canada when the dispute occurred; still, it provided an important soft law point of reference[68]. McIvor also relied on the international regime of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Universal Declaration of Human Rights[69]. Although Bill C-31 does not directly refer to violence against women, it is intimately related to it. A critical factor in violence against Indigenous women is their vulnerability: by reinstating agency, autonomy and ultimately connections with their community and identity, Indigenous women become more independent and less vulnerable, which lessens the risk for them to become targets of violence.

### 4.1. *Case Study No.1: The United States and Violence Against Indigenous Women*

In the U.S., data show that violence against Indigenous women is widespread: Native American and Alaska Native women are 2.5 times more likely to be raped or sexually assaulted than other women[70].

66. See Sharon Donna McIvor, *Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights*, 16 Canadian Journal of Women and the Law 106, 107 (2004), available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/cajwol16&div=14&id=&page= (last visited November 22, 2020).

67. See *McIvor v. Canada (Registrar Indian and Northern Affairs)*, BCCA 153 (2009).

68. See Pamela D. Palmater, *Presentation to the Parliamentary Standing Committee on Indigenous and Northern Affairs Re: Bill S-3 – An Act to Amend the Indian Act (Elimination of Sex-based Inequities in Registration)* (5 Dec. 2016), available at https://sencanada.ca/content/sen/committee/421/APPA/Briefs/PamelaPalmater_2016-12-05e.pdf (last visited November 22, 2020).

69. See *McIvor v. Canada (Registrar Indian and Northern Affairs)*, BCSC 827, §277 (2007).

70. See *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA,* Amnesty International USA at 30, (2007), available at https://www.amnestyusa.org/wp-content/uploads/2017/05/mazeofinjustice.pdf (last visited November 22, 2020). See also Indian Law Resource Center, *Using the Declaration to End Violence Against Native Women* (cited in note 43).

Furthermore, statistics reveal that offenses against American Indian women are overwhelmingly interracial: 96 percent of the crimes are committed by non-Indian perpetrators[71]. Moreover, Indian tribes did not have jurisdiction to prosecute non-Indian offenders, as the Supreme Court, in *Oliphant v. Suquamish Indian Tribe* (1978), held that tribes do not have the full sovereignty of a state or the Federal Government in non-Indian citizens' affairs[72]. The combination of a high amount of violence taking place on Indian lands, complex rules that operate in Indian Country and the limited resources provided by the Federal Government resulted in a high percentage of cases being declined.[73] As much as 52 percent of the violent crime prosecution claims were dropped for lack of federal resources, 67 percent of those were crimes involving sexual abuse and related matters[74]. Not holding perpetrators accountable causes them to feel immune and that they can continue their acts of violence with impunity[75]. From this

71. See *Ending Violence Against Native Women*, Indian Law Resource Center , available at https://indianlaw.org/issue/ending-violence-against-native-women (last visited November 22, 2020). See also *Violence against Women Reauthorization Act of 2019,* H.R. 1585 § 901. See also Rosay, *Violence against American Indian and Alaska Native Women and Men* at 2 (cited in note 5). More on the issue in Sarah Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (University of Minnesota 2015).

72. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

73. See N. Bruce Duthu, *Broken Justice in Indian Country*, The New York Times (August 10, 2008), available at https://www.nytimes.com/2008/08/11/opinion/11duthu.html (last visited November 22, 2020).

74. See Tribal Law and Policy Institute, *Enhanced Sovereignty: The Tribal Law and Order Act and the Violence against Women Act*, National Harbor, MD, USA (2013), available at https://www.tribal-institute.org/download/NADCP/2013/NADCP2013EnhancedSovereignty.pdf (last visited November 22, 2020). See also *Department of Justice Declinations of Indian Country Criminal Matters,* United States Government Accountability Office, GAO-11-167R U.S. (December 13, 2010), available at https://www.gao.gov/assets/100/97229.pdf (last visited November 22, 2020).

However, the issue is more complex than it might seem on the surface. The lack of resources of federal and state prosecutors compounds to the lack of resources needed to train tribal police on how to best secure the site to preserve the evidence. This, in turn, leads to the inability to reach the heightened "beyond a reasonable doubt" standard needed for an effective prosecution of the crime". See Duthu, *Compliance or Evasion?* (cited in note 37).

75. See Tribal Law and Policy Institute, *Using the Declaration to End Violence Against Native Women* (cited in note 43). See also United Nations Human Rights, *Impunity for Violence Against Women is a Global Concern* (UNHR, August 14, 2012) and

situation also constitutionality concerns arise due to the fact that a class of U.S. citizens (Indigenous Peoples) is conceivably treated and protected differently from another (the non-Indigenous population) on the basis of race or ethnicity of the accused[76]. This could arguably clash with the principles of due process and equal protection of the law under the Fifth Amendment of the U.S. Constitution[77].

The response of the U.S. Congress to the problem was twofold. First, in 2010 President Obama signed the Tribal Law and Order Act (TLOA): its goal was to improve law enforcement and justice in Indian Country by increasing funding for Tribal Justice Systems, enhancing the punitive abilities of tribal courts and their sentencing authority and ameliorating Federal and tribal cooperation[78]. Then, Congress passed the Violence against Women Reauthorization Act (VAWA) in 2013, followed by a second reauthorization in 2019. VAWA 2013 was a pivotal achievement for Native American women in the U.S. The Act was ground-breaking in Federal Indian Law because it introduced the concept of special domestic violence criminal jurisdiction for the tribes despite the defendant's status – Indian or non-Indian. Special jurisdiction in this context means that tribes have jurisdiction because of their inherent tribal sovereignty: VAWA 2013 challenged the legal framework established in *Oliphant v. Suquamish Indian Tribe*[79].

The revolutionary role of VAWA 2013 was underscored by the work of Native American scholar Winona LaDuke, who also was vocal about its limitations. LaDuke pointed out how VAWA 2013 was limited by the defendant and the victim's personal attributes: at least one of the defendants had to be an "Indian" and have ties with

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*Executive Director's Blog Series: No Impunity for Violence Against Indigenous Women* (Un Women, November 27, 2017).

76. See Amnesty International USA, *Maze of Injustice* at 30 (cited in note 70).

77. US Const Amend V. The fifth Amendment reads as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

78. The Tribal Law and Order Act, Pub. L. No. 111–211, 124 Stat. 2258 (2010).

79. See *Oliphant v. Suquamish Indian Tribe* (cited in note 72).

the prosecuting tribe. VAWA 2013 was also territorially limited, as it solely found application in Indian Country[80], meaning those areas of the U.S. where Indian tribes exercise their power of self-government. The main implications of land ascribing to be Indian Country are jurisdictional as tribal norms and regulations apply. When they do not, federal jurisdiction applies in lieu of state law[81].

Amidst criticism from the Trump administration, VAWA was reauthorized in 2019, with enhanced Native American Women protection. Many of the restraints discussed under VAWA 2013 persist today, but VAWA 2019 encourages developments. One of the main limitations of VAWA 2013 was the subject matter of jurisdiction, as the Act merely covered dating violence, domestic violence and violations of restrictive orders[82], while it did not cover rape or other assaults perpetrated by people unknown to the victim[83]. VAWA 2019 went past this limitation: it reaffirmed tribal criminal jurisdiction over non-Indian perpetrators for the crimes envisioned by VAWA 2013, expanding it to cover additional crimes, namely sexual assault, stalking and trafficking for all federally recognized Indian tribes. The Bill further improved the tribes' capacity to respond to sexual violence on their lands fully. Most notably, it created a tribal sex offender and protection order registry[84].

### 4.2. *Case Study No.2: Canada and Violence Against Indigenous Women*

Despite that Canada is now officially part of the UNDRIP framework, it still reports high levels of violence against women. Statistics record that Indigenous women are twelve times more likely to be

80. See Winona LaDuke, *Why the Violence Against Women Act is Crucial for Native American Women* (Honor the Earth, 2013).

81. See Durthu, *American Indians and the Law* (cited in note 48).

82. See LaDuke, *Why the Violence Against Women Act is Crucial for Native American Women* (cited in note 80).

83. See 25 USC §1304 (a)(7).

84. See Chairman Jerrold Nadler, *The Violence against Women Reauthorization Act of 2019* (House of Committee on the Judiciary, April 3, 2019), available at https://debbiedingell.house.gov/uploadedfiles/1903_vawafactsheet.pdf (last visited November 22, 2020). See also Adam Walsh Child Protection and Safety Act, Pub. Law No. 109–248, 120 Stat 587 (2006).

subject to violence than any other woman in Canada[85]. From 2001 to 2015, the homicide rate for Indigenous women in Canada was six times higher than for non-Indigenous women[86].

Indigenous women in Canada have a history of targeted discrimination by the Government. For instance, the 1876 Indian Act deprived aboriginal women of their Indian status upon marriage with a non-Indian man[87]. For more than a century, for an Indigenous woman marrying a non-Indian meant to renounce her ties with her community, culture and, ultimately, identity. Meanwhile, this did not hold true for their male counterparts. The loss of Indian status carried a loss of property rights, *de facto* depriving Aboriginal women of their identity and their autonomy[88]. The situation was only rectified in 1985, through the C-31 Bill[89].

This federal legal framework was defined by Sharon McIvor as colonialist and patriarchal. In her scholarship, McIvor also points out how in Canada there was a peculiar phenomenon: white colonialism and patriarchy had enabled unhealthy cooperation between the Canadian Federal Government and male aboriginal leadership to prevent the inclusion of Indigenous women in governance and in the decision-making process[90]. This framework contributed to render aboriginal women especially vulnerable, dependent and, ultimately, easy targets to gendered violence.

The turning point for acknowledging the scourge of violence against women in Canada was the publication of the report "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls". This primary source is invaluable in providing insights into the root cause behind the shocking rates of violence against Indigenous women in Canada. The Report was funded and supported by the Canadian Government, which made a strong statement in its commitment to tackling the issue head on. What came somewhat as a surprise is that the Government,

85. See Government of Canada, *Reclaiming power and place* at 7 (cited in note 56).

86. See *ibid.*

87. See *An Act to amend and consolidate the laws respecting Indians, Statutes of Canada* (cited in note 55).

88. See McIvor, *Aboriginal Women Unmasked* (cited in note 66).

89. See Kuokkanen, *Self-determination Women's Rights* (cited in note 11).

90. See McIvor, *Aboriginal Women Unmasked Rights* at 107 (cited in note 66).

through the Report, concluded that "violence against Indigenous women and girls is a crisis centuries in the making. The process of colonization has created the conditions for the crisis of missing and murdered Indigenous women, girls and Indigenous people that we are confronting today"[91]. The Report also underscored that, while colonization had a significant impact on all Indigenous Peoples, it had an even more dramatic one on Indigenous women and girls[92].

Ultimately, the Report highlights how ignoring the agency and expertise of Indigenous women has been a consistent pattern in the formal–and to some extent in the informal–political structures that are in charge of Indigenous affairs. Such a pattern is informed by the underlying patriarchy and misogyny that perpetuates to date, and that needs to be addressed[93]. After admitting to Canada's shortcomings, the Report provides several recommendations to address the issue: providing enhanced family services and support for Indigenous women and improving the communications amongst state to federal level of governance[94].

From this compared analysis, it emerges that, on the one hand, the U.S. Federal Government is very much concerned in resolving the plague of violence against women through a decided law-making and law enforcement policy. On the other hand, the Canadian Federal Government seems to tend to face the matter through a research-oriented approach and abstract preventative plans.

### 4.3. *New frontiers to fight violence against Indigenous women through public policy and the law*

There are changes in the law and policy that can – and should – flow from Indigenous women's action to foster their increased involvement in both the policy and the law-making processes.

A first change is encouraging the incorporation of Multi-Level Governance (MLG) structures at the federal level. MLG is here intended as "a process of political decision making in which governments

91. See Government of Canada, *Reclaiming power and place* at 229-320 (cited in note 56).

92. See *id.* at 117.

93. See *id.* at 324.

94. See *id.* at 350.

engage with a broad range of actors embedded in different territorial scales to pursue collaborative solutions to complex problems"[95]. MLG allows for the possibility to enrich the legal and political discussion by incorporating a wider variety of voices and points of view[96]; it also fosters better relationships within and among Indigenous communities, as well as between Indigenous communities and the Federal Government.

MLG can help addressing the issue of violence against women in various ways. One venue could be to incorporate tribal boards with ample Indigenous female representation in the broader decision-making process, to monitor the actions of the local and national government. Another way would be to implement a framework of self-government agreements that gives Indigenous Peoples political and legal powers similar to those of provinces and municipalities[97]. This would not only foster participation as intended by UNDRIP Articles 18 and 19, but it would also enrich the democratic process. A bottom-up approach would suit better to detect the needs of a given Indigenous community and to more effectively deal with violence against women in a manner that better accounts for the cultural framework of interaction[98].

As discussed above, one of the limitations of UNDRIP is the nature of Declaration. As already said, it is not binding and it is considered "soft-law"[99]. One of the ways this article proposes to increase the efficiency of UNDRIP at the enforcement level is to combine it with other binding international instruments, such as treaties or conventions. For instance, the CEDAW, paired with UNDRIP, has the potential to be a strong instrument in fostering Indigenous women's leadership

95. See Christopher Alcantara and Jen Nelles, *Indigenous Peoples and the State in Settler Societies: Toward a More Robust Definition of Multilevel Governance,* 44 Publius The Journal of Federalism 183, 185 (2014), available at https://www.researchgate.net/publication/262484894_Indigenous_Peoples_and_the_State_in_Settler_Societies_Toward_a_More_Robust_Definition_of_Multilevel_Governance (last visited November 22, 2020).

96. See Basu, *Who Secures Women's Capabilities* (cited in note 19).

97. See Alcantara and Nelles, *Indigenous Peoples and the State in Settler Societies* (cited in note 95).

98. See Basu, *Who Secures Women's Capabilities* (cited in note 19). See also Aks, *Women's Rights in Native North America* (cited in note 18).

99. See Kuokkanen, *Self-determination Women's Rights* (cited in note 11).

and activism. CEDAW supported the international women's movements by providing common goals, a shared language and a joint set of demands – all with (limited but important) legal implications[100]. One such demand is to require women's participation on equal terms with men, as women's contribution is crucial for the development of countries and for the promotion of global peace[101].

The role that these legal documents play in political and social movements, according to Nussbaum's practical approach, determines the effectiveness of international human rights law[102].

Article 5 of UNDRIP states the right of Indigenous Peoples to "conserve and reinforce their own political, judicial, economic, social, and cultural institutions [and to maintain] their right to fully participate [...] in the political, economic, social, and cultural life of the State"[103]. Such a concept is reiterated in Articles 18 and 19, which underscore the importance of Indigenous Peoples' prior and informed consent discussed in section 3.2[104].

Article 7(c) of CEDAW explicitly recognizes women's right to "participate in non-governmental organizations and associations concerned with the public and political life of the country"[105]. Further, Article 8 affirms that "States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations"[106]. The U.S. signed CEDAW in 1980, under Jimmy Carter's presidency, but has yet to ratify it[107]. In the 80s, President

100. See Martha Nussbaum, *Women's Progress and Women's Human Rights,* 38 Human Rights Quaterly 589 (2016), available at https://muse.jhu.edu/article/627628/pdf (last visited November 22, 2020).

101. See *Convention on the Elimination of All Forms of Discrimination Against Women,* UN General Assembly (December 18, 1979) UN Doc Res. 34/180.

102. See Nussbaum, *Women's Progress and Women's Human Rights* (cited in note 100).

103. See Craft, et al., *UNDRIP Implementation* (cited in note 38).

104. See *ibid.*

105. See UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (cited in note 101).

106. See *ibid.*

107. See Lisa Baldez, *Why Hasn't the US Ratified the UN Women's Rights Convention?,* APSA 2011 Annual Meeting Paper (August 31, 2011), available at https://ssrn.

Carter lacked the political leverage to obtain ratification from the Senate. The Senate has debated the ratification of CEDAW several times, namely in 1988, 1990, 1994, 2000 and 2010[108]. Still, it has received significant push back, primarily from the conservative wing, which cited opposition to the U.S. subjection to an international organization and CEDAW's advocacy for reproductive rights[109]. However, the Convention still holds a significant persuasive and soft power[110]. Canada ratified CEDAW on December 10, 1981. Therefore, in Canada CEDAW has the force of law, which grants higher protection compared to the United States. This calls the attention to the importance of fostering advocacy to create a fertile environment in the U.S. to ratify CEDAW, which would enhance the protection of Indigenous women's rights.

In light of what has been discussed above, the argument outlined in this article is that through the international legal instruments available, there is a potential to increase Indigenous women's agency. This result can be achieved through capacity-building programs that revolve around Indigenous women's education, training and assistance in order to enable them to be politically involved in the decision-making processes that so closely concern them[111]. These programs represent one important opportunity for Indigenous women to be key actors in achieving the 2030 Agenda for Sustainable Development, as envisioned by the United Nations[112]. Indigenous Peoples' human rights and many of the related international policies and legislation projects here examined are often regarded as part of the emerging third generation of human rights[113]. The issue at stake is that this emerging wave is carried out by aspirational documents that do not account for

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com/abstract=1900265 (last visited November 22, 2020).

108. See *ibid.*

109. See Linda Lowen, *Why Won't the U.S. Ratify the CEDAW Human Rights Treaty?* (ThoughtCo., Jan 3, 2020).

110. See Lisa Baldez, *What Impact Would CEDAW have in the US?*, APSA 2012 Annual Meeting (August 31, 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2106667 (last visited November 22, 2020).

111. UN Women *Indigenous Women: Key Actors in Achieving the 2030 Agenda (Implementing SDG 5)*, (Draft concept Note Mar 15, 2018), available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/03/CSW62-CN-March-15.pdf (last visited November 22, 2020).

112. See *ibid.*

113. See Kuokkanen, *Self-determination Women's Rights* at 227 (cited in note 11).

practical ways to achieve the rights they advocate for[114]. In fact, I have already outlined that UNDRIP is a non-legally binding, aspirational and principle-driven document, a declaration considered "soft law" (a quasi-legal instrument)[115]. Indigenous women's activism has played a crucial role in filling this gap by providing tangible ways to implement the UNDRIP principles. The Wilma Mankiller Fellowship Program for Tribal Policy and Governance offers a prime example of empowering women's agency through education. The Fellowship provides an opportunity for rising U.S. and Canadian female Indigenous leaders to learn the intricacies of public policy, advocacy and applied research. These teachings develop the skills and base-knowledge Indigenous women need to be actors in various policy and research areas and become tomorrow's leaders across the public and private sectors[116].

## 5. *Conclusion*

Indigenous women today are fighting to get their voices heard by advocating for enhanced accountability of the individual countries and of the international community alike. Still, as Laura Parisi and Jeff Corntassel remarked in their work, "due to colonization and ongoing imperial influences, both women's rights and Indigenous rights movements have been problematic spaces for Indigenous women's participation"[117]. Indigenous Peoples – and Indigenous women in particular – still face significant challenges every day, including gender equality, the empowerment of women and compound to the issue of

114. See *ibid.*

115. See *id.* at 225, 227. See also Center for International Governance and Innovation, *UNDRIP Implementation: Braiding of International, Domestic and Indigenous Laws*, 3 (May 31, 2017), available at https://www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf (last visited November 22, 2020).

116. *See* Indian Law Resource Center, *Mankiller in Indian Country Today – Obama's Opportunity* (cited in note 65). See also National Congress of American Indians, *Internships/Fellowships* (cited in note 65).

117. See Laura Parisi and Jeff Corntassel, *In Pursuit of Self-determination: Indigenous Women's Challenges to Traditional Diplomatic Spaces,* 13 Canadian Foreign Policy Journal 81, 87 (2007), available at https://www.tandfonline.com/doi/abs/10.1080/11926422.2007.9673444 (last visited November 22, 2020).

violence against Indigenous women[118]. This article reflected on possible ways to overcome them, adopting an international and comparative approach.

According to this study, violence against Indigenous women has been exacerbated by political displacement and structural violence. Therefore, increased and intentional involvement of Indigenous women in the political decisions related to their community life and their land is essential to include their perspective in matters that so intimately relate to them. The so far implemented participatory practices that entrusted Indigenous communities with increased responsibility and autonomy have brought encouraging results to counteract violence against Indigenous women. Participatory practices foster a sense of empowerment amongst Indigenous communities. Thus, there appears to be a need for a holistic approach where Indigenous Peoples, particularly Indigenous women, are informed and active participants of the matters that affect them[119]. The need of increasing Indigenous women's involvement particularly stands out in light of UNDRIP, which strongly advocates for Indigenous Peoples participation under Articles 18 and 19.

> Art. 18: "Indigenous Peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions".

> Art. 19: "States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior

118. See Tim Parke-Sutherland, *Ecofeminist Activism and the Greening of Native America,* 50 American Studies in Scandinavia 123 (2018), available at https://core.ac.uk/download/pdf/230382759.pdf (last visited November 22, 2020).

119. See Alexandra Tomaselli, *The Right to Political Participation of Indigenous Peoples: A Holistic Approach*, 24 International Journal on Minority and Group Rights 390 (2017), available at https://academic.oup.com/yielaw/article-abstract/doi/10.1093/yiel/yvx042/4781548 (last visited November 22, 2020).

> and informed consent before adopting and implementing legislative or administrative measures that may affect them".

Indigenous women have historically been absent from the decision-making process; and countries are not complying with the responsibilities stemming from being UNDRIP and CEDAW signatories. Consequently, Indigenous women are *de facto* negated the possibility to participate and their claims are left unheard.

This article focuses on the North American framework. However, there is still much room for exploring violence against women in other Indigenous communities – namely in Australia and South America. Expanding the scope of this research would provide different outlooks and new perspectives on how much diffused the phenomenon is and how Indigenous women differently address it in distinct geopolitical areas and framework of reference.

Enhanced women's participation could be an efficient remedy to the tendency towards the "tyranny of the majority", either with regards to the Federal Government or even to their male counterparts. In addition, Indigenous women's participation—i.e., through Multi-Level Governance—increases legal effectiveness, as laws and policies imposed top-down are likely to be rejected by those to whom they are addressed: they tend to construct walls rather than bridges[120]. Participation should not only be taken as an antidote for Indigenous women's rights advancement, but also as a generally promising practice to promote the integration of Indigenous Peoples and other minorities within the broader society, in order to pursue a "law of diversity and inclusion" where Indigenous Peoples represent one essential component.

120. See Aks, *Women's Rights in Native North America* (cited in note 18).

# Analytical Note on ISDS Reform from a Knowledge Perspective

Kartikeya Dwivedi, Amika Bawa and Prannv Dhawan*

*Abstract*: The effectiveness, fairness and legitimacy of the Investor-State Dispute Settlement (ISDS) mechanism is the hallmark of a trust-based and justice-oriented legal framework for international investments. The jurisprudential and institutional implications of inconsistent decision-making processes in the ISDS mechanism have led to disagreements and geo-political cleavages among various States in the contemporary context. This is also because of the main concerns in the ISDS framework about sovereignty and regulatory chill, inconsistency of the awards, knowledge asymmetries between the developed and the developing world. The article examines the most relevant scholars' contributions and the jurisprudence relating to investment disputes in order to point out the weaknesses of the actual ISDS system and to propose possible solutions, with a special attention to substantive reforms. These solutions are proposed on the basis of a knowledge perspective approach aiming to guarantee developing countries fair treatment and real possibilities of further development.

*Keywords*: investor-state dispute settlement; knowledge perspective; institutional reforms; right to development; developing countries.

## 1. *Introduction*

Investor-State Dispute Settlement (ISDS) as a method of international arbitration is one of the key issues attracting criticism in contemporary legal as well as economic scholarship. The lack of public trust and support in ISDS has led to the formulation of a political consensus among many states as well regional organisations that edges towards reform in the process of the settlement of disputes relating to international investment[1]. This paper takes the critique of the ISDS format and looks at it from the perspective of international development, aided by the concept of knowledge – flows and exchange.

The article opens with a descriptive picture of the main criticisms addressed to the ISDS system. It argues that these problematic aspects are more pressing with reference to developing countries because in their regard they may give rise to an infringement of the principle of fair and equitable treatment. The so-called *regulatory chill* indeed impairs the capacity of a state to issue regulation in the public interest. Further, the claim that the ISDS framework may have positive spill over effects on the growth of the developing countries' legal systems proves to be false. It is then suggested (section 4.) that many of these drawbacks for the developing countries originate from a situation of knowledge asymmetric, compared with the one owned by developed states, or are aggravated by the latter. This section elaborates on the importance of curating and utilising legal knowledge generated

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1. See Cecilia Malmstromm, *Investment Court System: New System for Resolving Investor-State Disputes in TTIP* (September 2015), available at https://www.youtube.com/watch?v=w_uR9cFzhjs (last visited November 21, 2020).

during the settlement of investment disputes and hint towards the formation of an international consensus over the adjudication of international investment disputes. Knowledge indeed has the power to consolidate existing power structures as the analysis of several piece of ISDS jurisprudence demonstrates. Finally, section 5, explores some of the reform prospects for the ISDS framework giving a renovated and central role to the Right to Development as enshrined in United Nations General Assembly Resolution of 4 December 1986.

## 2. *Preliminary Remarks on ISDS*

In order to contextualise ISDS in contemporary international law some preliminar considerations could be important. The International Centre for Settlement of Investment Disputes (ICSID) is the leading institution for ISDS and provides guidelines for the arbitration of International Investment Agreements (IIAs). ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), a treaty between 153 signed and ratified contracting states that first entered into force on October 14, 1966. ISDS was originally created to provide safeguards to investments from developed countries coming into developing countries, which were characterised by a relatively weaker legal system while recent trends in the data indicate that investors are increasingly arbitrating against developed countries[2]. Newly registered cases in 2015 included 37 percent from Western European, 23 percent Eastern European and Central Asian, 15 percent Sub-Saharan African, and 11 percent Middle Eastern and North African countries[3]. This suggests a clear evolution in the function of ISDS as more than a simple method of investment protection in the absence of sound domestic legal frameworks.

2. See Christoph H. Schreuer, et al., *The ICSID Convention: A Commentary* at 416 (Cambridge University Press 2nd ed. 2009 [2001]).

3. International Centre for Settlement of Investment Disputes, The ICSID Caseload-Statistics at 24-25 (2016), available at https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/ICSID%20Web%20Stats%202016-1%20%28English%29%20final.pdf (last visited November 21, 2020).

Moreover, it seems to be more – and other – of a simple investment incentive mechanism, too[4]. In fact, Professor Martti Koshkenniemi opined that the existence of ISDS is of no relevance to the attraction of foreign direct investments and executives may not be factoring in ISDS at all, while making decisions of investing or not[5]. In addition, whether Bilateral Investment Treaties (BITs) really increase foreign direct investments inflows has been the central question in several studies by researchers, too; and more than one concluded that the existence of BITs is of little consequence to the investment decisions of companies[6].

The consideration that ISDS systems do not just ensure more safeguards for investors but promote better democracy and good governance standards as common externalities has been recently reconsidered. Part of scholars still recognised these positive effects, as sustained by Christoph H. Schreuer who says that "relevant standards have shown spill-over effects into the domestic systems of the concerned countries"[7]. The provision of free and equitable treatment under ISDS is a bulwark against discrimination, delay and uncertainty

4. See Anna Joubin-Bret and Jean E. Kalicki, Introduction TDM Special Issue on "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", 11(4) Transnatl Disp Mgmt 1 (2014), available at https://www.transnational-dispute-management.com/article.asp?key=2023 (last visited November 21, 2020). See also Rebecca L. Katz, Modeling an International Investment Court After the World Trade Organisation Dispute Settlement Body, 22 Harv Negot L Rev 163, 188 (2016).

5. See Martti Koshkenniemi and Greens Efa, *Investor-State Dispute Settlement (ISDS) in EU Law and International Law* (2016), available at https://www.youtube.com/watch?v=OkqUYFoRG8U (last visited November 21, 2020) (he is talking in a conference on ISDS in EU Law and International Law organised by Greens Efa. It must be noted here that he is arguing in the context of European and American legal systems which he says are the most developed in the world. However, it is evidence to the fact that FDI attraction is not an absolute function of ISDS or even has a direct correlation to it).

6. See Nicolette Butler and Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation*, 64 Nl Intl L Rev 43, 46 (2017).

7. Christoph H. Schreuer, *Do We Need Investment Arbitration?,* 11(1) Transnatl Disp Mgmt 1, 4 (2014), available at https://www.transnational-dispute-management.com/article.asp?key=2026 (last visited November 21, 2020).

of the domestic courts for the foreign investors, Schreuer argues[8]. Such a provision would help investors, especially Small and Medium Enterprises, to "get away from the vagaries of proceeding through domestic courts"[9]. However, others as Rebecca L. Katz goes on to oppose that ISDS itself functions in vagaries as different tribunals reach different sets of conclusions based on the same facts giving not more guaranties in term of consistency and predictability[10]. Moreover, there are no evidence supporting ISDS systems have positive effect in terms of democracy and governance development.

### 3. *Jurisprudential Critique of the ISDS System*

In this context of general reconsideration among scholars of some key elements of ISDS mechanisms have been arose various criticisms. The most relevant seem to be impugned sovereignty, greater rights for foreign investors, homogeneity of arbitrators origin, opacity of the arbitration system and inconsistency of awards.

First and foremost, the concept of state-sovereignty is concerned by the application of ISDS arbitration because of a variety of reasons including but not limited to a broad interpretation of clauses that can cause *regulatory chill* effects. In fact, these clauses potentially prevent states issuing regulations or passing legislations in public interest because they might lead to legal exposure in the ISDS format. The root of this issue lies in the fact that ISDS was intended to safeguard private

8. See *id*. at 10 ("In many countries there is no independent judiciary. Even where courts are independent, in principle, their decisions are often influenced by national loyalties. When measures adverse to foreign investors are taken by way of domestic legislation, the courts are usually unable to be of assistance to foreign investors even if they were disposed to do so").

9. See *ibid.*

10. See Katz, *Modeling an International Investment Court* at 163 (cited in note 4). Compare also ICSID ARB/03/9, *Continental Casualty Company v. The Argentine Republic* (September 5, 2008), with ICSID ARB/01/3, *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic* (May 22, 2007). See also ICSID ARB/01/8, *CMS Gas Transmission Company v. The Republic of Argentina* (May 12, 2005); ICSID ARB/02/16, *Sempra Energy International v. The Argentine Republic,* (September 28, 2007); ICSID ARB/01/3*, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, Decision on Application for Annulment of Argentine Republic* (July 30, 2010).

investment in regions with weak rule of law from extreme cases of mob violence or nationalisation of industries. However, it is now at risk being abused in various ways wherein almost any regulation – environmental, health related, fiscal or otherwise made in public interest – can be considered grounds for a suit under ISDS as it may potentially hurt the profits of private investors in the region[11].

Katz substantiates this argument by citing the infamous case of *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States* where Mexico had to pay in damages when it refused to renew the foreign claimant's license to operate an hazardous waste landfill which was found to be a breach of fair and equitable treatment[12]. Many such cases like *The Renco Group, Inc. v. The Republic of Peru*[13], *S.D. Myers, Inc. v. Gov't of Canada*[14], *Saluka Investments v. Czech Republic*[15], *CMS Gas Transmission Co. v. The Republic of Argentina*[16] and *Eureko B.V. v. The Slovak Republic*[17] have been awarded in favour of the investor, finding the breach of fair and equitable treatment whenever the state engaged in policy activity in public interest. This effectively risks making the state and its functions a footnote to the profit interests of private investors[18]deepening knowledge and development asymmetries between countries.

A further criticism of the ISDS system was the likelihood of foreign investors demanding greater rights as against domestic investors by the host state. For example, in *Quasar de Valores SICAV S.A., et al. v.*

11. See Charles N. Brower and Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law*, 9 Chi J Intl L 471, 474 (2009).

12. See ICSID ARB (AF)/00/2, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (May 29, 2003). See also ICSID ARB (AF)/ 97/1, *Metalclad Corp. v. The United Mexican States* (August 30, 2000) (awarding Metalclad Corp. damages for Mexico's refusal to permit the expansion of a hazardous facility).

13. ICSID UNCT/13/1, *The Renco Group, Inc. v. The Republic of Peru* (November 9, 2016).

14. NAFTA-UNICITRAL, *S.D. Myers, Inc. v. Government of Canada,* (November 13, 2000).

15. PCA 2001/04, *Saluka Investments v. Czech Republic*, *Partial Award*, (March 17, 2006).

16. ICSID ARB/01/8, *CMS Gas Transmission Co. v. The Republic of Argentina* (May 12, 2005).

17. PCA 2008/13, *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic* (December 9, 2012).

18. See Katz, *Modeling an International Investment Court* at 173 (cited in note 4).

*The Russian Federation*, the arbitration panel found that the clause that foreigners may invoke a higher standard of protection than nationals does not seem extraordinary for reasons as follows:

> For one thing, human rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind should not be diluted by precisely the same notions of 'margins of appreciation' that apply to the former[19].

This claim suggesting an idea of greater rights is based on the fact that BITs are designed to induce foreign investment which already has been argued in prior sections to not be the only aim of the deals. However, even in the realm of theoretical international relations, this claim emerges with several problems. Suggesting that the foreign investors' rights against the state may not be diluted like the freedoms of the general population, may be a violation of the customary principle of fair and equitable treatment.

Therefore, in effect clauses similar to the above mentioned accord almost diplomatic level privilege to foreign investors simply on the account of being induced to come due to BITs special protection. There is an inherent problem with that idea, diplomatic privileges or similar are only handed out by the state to sovereign actors of other states and not to non-state actors such as private corporations. Therefore, ISDS in multiple ways becomes a regime that may be not only in violation of customary international law but also the basic political theories of a state[20].

Furthermore, another criticism of ISDS lies in the fact that the community of international investment dispute arbitrators suffers from a genuine lack of diversity. Investment arbitrators above all else

19. SCC 24/2007, *Quasar de Valores SICAV S.A., et al. (formerly Renta 4 S.V.S.A, et al.) v. The Russian Federation* (July 20, 2007).

20. The principle of free and equitable treatment and no expropriation without compensation from the perspective of international tribunals observing these principles.

are generally an elite pool of law professionals[21]. It appears that over 50 percent of ISDS arbitrators have acted as counsel for investors in other ISDS cases, while it has been estimated about 10 percent of ISDS arbitrators have acted as counsel for states in other cases[22]. Moreover, in less than 10 percent of the cases, a female arbitrator is appointed as an arbitrator. More than 90 percent of presiding arbitrators has received their higher education in OECD countries[23]. Michael Waibel and Yanhui Wu in their inquiry of political and other biases among arbitrators use sound econometric modelling and empirical data to conclude that the homogeneity of arbitrators leads to biases in their decision making[24].

This has also to do with another compounded criticism that the ISDS process itself has major issues of transparency. While judges may also suffer from a lack of diversity, they are functioning in open courts as opposed to closed door arbitrations[25]. Any biases reflected in their judgements can and should be scrutinised by civil society. On the contrary, with respect to private arbitrators, their decisions are not met with the same scrutiny and thus get away without having to explain their decision-making process, should it hinge on any such biases. Moreover, public interests and consequently public policy seldom finds its way into ISDS negotiations. Furthermore, certain ISDS policies may even prevent future public scrutiny of the decisions of the arbitration because the publication of case documents or the hearing of the case itself being public is contingent upon the consent of

21. See Jose Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields*, 1(4) Oñati Soc Legal Ser 1, 24 (2011), available at http://opo.iisj.net/index.php/osls/article/viewFile/63/207 (last visited November 21, 2020). See also Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 Am U Intl L Rev 957, 958 (2005).

22. See Michael Waibel and Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration*, SSRN Electronic Journal, 28 (2017), available at http://www.yanhuiwu.com/documents/arbitrator.pdf (last visited November 21, 2020).

23. See *id*. at 13 (Organisation for Economic Co-operation and Development (OECD) is an intergovernmental economic organisation with 36-member countries. The reference here primarily refers to the highly developed countries that support free market economies).

24. See *id*. at 20.

25. See Katz, *Modeling an International Investment Court* at 176 (cited in note 4).

the parties. Should the parties choose the arbitration to be completely anonymous, they shall be granted that request. This is laid down in the rules of procedure of the ICSID[26].

The lack of transparency in ISDS also prevents civil society organisations (CSOs) to act as *amicus curiae* and submit briefs to the tribunal in order to further democratise the process of the decision. Therefore, the lack of transparency and third-party submissions make the entire process of ISDS less democratic as opposed to previous arguments made by scholars[27] about ISDS processes promoting global governance and democracy.

Finally, ISDS has famously been criticised for coming to different decisions with different parties in cases which seem to share the same facts. In particular, the absence of a *de jure* rule of precedent or at least a set of clear common principles in ISDS decisions makes this jurisprudence even more chaotic and dangerously inconsistent. This can lead mistrust and abuses in ISDS and the lack of clear sets of rules facilitates political influences, too.

Taken as an aggregate, all these issues act as a hindrance for the development of sufficient awareness and tools within the developing world to safeguard its interests. A solution could be to centralize in ISDS evaluation the concept of *knowledge* as a shared, widespread, and worth good. The balance that must be found between stakeholders and investors interests could take into account the flows and exchanges of knowledge (in legal, technological, economic, and social field) in order to ensure the equality between the parts.

## 4. *Knowledge and Contemporary Investment Arbitration*

The concept of knowledge addresses principally two critiques of actual ISDS systems: knowledge asymmetries and inconsistency[28].

26. See International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1966), art. 48(5); ICSID, *Administrative and Financial Regulations,* reg. 22; ICSID, *Arbitration Rules,* rules 32, 48.

27. See generally Schreuer, et al*., The ICSID Convention: A Commentary* (cited in note 2).

28. See Amika Bawa, *Moving beyond aid agencies, towards knowledge platforms* (unpublished LLM thesis, O.P. Jindal Global University, 2018).

Knowledge asymmetries among countries relates to the production or access of knowledge and inconsistency is a matter of knowledge management. Generally, both further link to the existing power structures and political balance that have interest in maintaining knowledge monopoly. Scholars as Jean E. Kalicki and Anna Joubin-Bret have noted that ISDS arbitral awards have not only reinforced existing power structures but inconsistency and contradictions in arbitral have contributed towards systemic failure, too[29].

The section begins by unpacking the theoretical foundations of knowledge and concept of legal knowledge taking a multidisciplinary approach. The subsequent part studies the theory and role of knowledge in international arbitration. The aim of the first two parts is to understand the relationship between access to knowledge and consolidation of power structures and to address the issue of inconsistency and opacity that creates a trust deficit. The final part of this section takes an empirical look at selected ISDS cases through a conceptual lens of knowledge to argue for a system that ensures equitable justice through a mechanism that is accountable, consistent, transparent and thus reliable.

### 4.1 *Theory of Knowledge and the Concept of Legal Knowledge*

The philosophical foundations of the concept of knowledge can be traced to the works of the ancient Greeks – Socrates, Plato and Aristotle. Socrates and Plato viewed knowledge as a source of virtue making it an essential trait for a statesman[30]. Plato, in his famous work the *Republic*, uses the allegory of a cave wherein he argues that most men live in a fictional world, limited by their human senses, and thus are deep within the cave away from the light of the sun. He seeks for his

29. See generally Jean E. Kalicki and Anna Joubin-Bret (ed.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 1st ed. 2015).

30. See Terence Irwin, *Virtue and Law,* in John Marenbon (ed.), *The Oxford Handbook of Medieval Philosophy* at605, 610 (Oxford University Press 2012) (virtue can be said to be the driver of the ethics of law. In the philosophical work of *Summa Theologiae,* Thomas Aquinas introduces his discussion of the virtues, sins and vices before he introduces law. We might infer that he takes the understanding of virtue to be independent of, and even prior to, the understanding of laws and general principles in morality).

protagonist to move beyond the shadows and limitations of the cave in search of true virtuous knowledge, which is intangible, intrinsic, and intuitive[31]. Thus, one who possesses true knowledge – the Philosopher King – can morally guide human behaviour[32]. Thus, platonic Philosopher King is one who represents perfect knowledge and stands above the law of land and is freed from the impediment of positive law – meaning that one who acquires true knowledge lives in the state of a natural law[33]. Contrary to Plato, Aristotle's concept of knowledge is more steeped in factual reality and draws attention to the ability of human senses to gain and acquire knowledge, through experience, logic, reasoning and perception. Herein, the works of Aristotle attempt to widen the conception of knowledge bringing in together the experiential and intuitive capacities[34].

Similar conceptions of knowledge are evident in Indian philosophy. A basic principle in Jain Philosophy is *Anekantavada* – meaning that multiple truths can exist and at one point no one single point of view is completely true. However, it is only the *Kevalins,* in Jainism, that possess infinite knowledge and can know the true answer, while all others would only know a part of the answer. Again, arguing for a knowledge that is above the knowledge possessed by a common man. On the contrary, *Nyaya* Philosophy by Gautama Muni, states that valid knowledge needs to be in accordance with reason and experience, taking on a more scientific approach accompanied by logical thinking. This philosophy of knowledge, akin to Aristotelian

31. See generally Lorraine Smith Pangle, *Virtue Is Knowledge: The Moral Foundations of Socratic Political Philosophy* (University of Chicago Press 2014).

32. See Bertrand Russel, *History of Western Philosophy* at 125 (Simon and Schuster Ist 1945).

33. In a perfect society, according to Plato, everyone understands and conforms to the Natural Law. In his work, *Republic*, Plato describes an ideal state, driven by knowledge, and thus governed by principles that are universal to all making and driven by the morality of man. In such a society, or for such a person, Plato argues, there is no necessity of a positive law – the laws made by man to regulate man's behaviour.

34. STEMpedia, *Aristotle to Feynman-Learning through Experience* (September 5, 2018), available at https://medium.com/@thestempedia/https-medium-com-thestempedia-aristotle-to-feynman-learning-through-experience-304a2d7876bb (last visited November 21, 2020). See also Russel, *History of Western Philosophy* (cited in note 35).

conception, makes knowledge within the reach of the common man driven by experiential learning and search for established truths.

These broad philosophical frameworks point to two key aspects for trying to better understand the concept of knowledge. On one hand, the possessor of true or infinite knowledge acquires a unique position, often one of power, in comparison to one's peers and on the other hand, the validity of knowledge comes through a scientific, repeatable and experiential learning, an element of consistency and assurance, that builds trust in the system of knowledge.

The knowledge-power dichotomy – between who has knowledge and who has not – has evolved since its philosophical roots to actualize in multiple disciplines wherein multiple conceptions of knowledge exist. In the field of economics, knowledge as a source of innovation has incremental value unlike other factors of production – was extensively studied by scholars[35]. As concludes a relevant study on growth trends in Hong Kong and Singapore[36], the acquisition of knowledge, rather than the accumulation of raw factors of production was the force behind long-term growth[37]. Knowledge presents a fundamental comparative advantage and, particularly nowadays, it is a central part of production processes and economic growth[38]. Further, knowledge as a source of innovation accrues to the conceptualisation of knowledge as a source of competitive advantage for the functioning of an institution. Here, knowledge acquisition, its movement within an organisation, and application in projects and activities of the institution make the institution a living and growing entity. The efficiency

35. See generally John Emeka Akude, *Knowledge for Development: A Literature Review and an Evolving Research Agenda*, 18 German Devel Inst's Discuss Paper 1 (2014). See also Fritz Machlup, *The Production and Distribution of Knowledge in the United States* (Princeton University Press 1962).

36. Alwyn Young, *A Tale of two Cities: Factor Accumulation and technical Change in Hong Kong and Singapore*, 7 NBER Macroeconomics Annual 13, 64 (1992).

37. See *ibid.*

38. See Nobel Foundation, *Nobel Prize in Economics 2018: Integrating innovation and climate with economic growth*, (October 8, 2018), available at www.sciencedaily.com/releases/2018/10/181008174322.htm (last visited November 21, 2020) (William D. Nordhaus and Paul M. Romer won the Nobel prize in Economic Sciences 2018 for studying the interaction of the market economy with nature and knowledge by integrating climate change and technological innovations into long-run microeconomic analysis).

in the flow of knowledge allows the institution to capitalise on the knowledge – making it a leveraging resource, to have and maintain an advantage over its contemporaries or for its own existence. Such knowledge can be held at the individual level, organisational level or among organisations and institutions at global level.

For examples, in International Relations, knowledge as a source of power is evident in the works of Michael Foucault and Susan Strange. Strange's theory of Structural Power explores the two-way relationship between knowledge and power[39]. Where knowledge not only does shape power but also the power of actors – which can be states, agencies, lobbies, or private entities– to define and influence institutions in the international system[40].

The possession or ownership of knowledge can further be understood in two ways: first, where knowledge can be viewed as a *public* good[41] – taking the analogy of light – accruing to its limitless and imperishable qualities and "having the capacity to transform lives"[42]; and second, knowledge as a *private* good, owned by entities due to its competitive advantage and as a source of innovation. It is clear that ownership of knowledge creates dichotomies and asymmetries between those who possess knowledge and those that do not – thus the possession of knowledge gives power to one side over the other.

Specifically looking at the concept of knowledge in the legal sphere, James White articulates legal knowledge as a way of claiming meaning for experience, which is the use of human ability to reduce, to define, to make more manageable, the uncertainties that are present in every human situation. White further highlights that the law is not reduced to a capacity to read and apply a set of rules rather it is the "ability to

39. See generally Patrick Holden, *In Search of Structural: EU Aid Policy as a Global Political Instrument* (Ashgate Publishing Limited 1st ed. 2009).

40. See *id*.

41. Joseph E. Stiglitz, *Knowledge as a Global Public Good*, in Inge Kaul, Isabelle Grunberg and Marc A. Stern (ed.), *Global Public Goods: International Cooperation in the 21st Century* at 308, 325 (Oxford University Press 1st ed. 1999).

42. See Kenneth King and Simon McGrath, *Knowledge for Development? Comparative British, Japanese, Swedish and World Bank Aid* (Zed Books 2004). See also World Bank, *World Development Report 1998/1999: Knowledge for Development* (Oxford University Press 1998), available at https://openknowledge.worldbank.org/bitstream/handle/10986/5981/WDR%201998_99%20-%20English.pdf?sequence=1&isAllowed=y (last visited November 21, 2020).

think about [the rules], to interpret them separately and in relation to each other, to bring them to bear [] upon real and imagined events, and to do so both analytically and argumentatively"[43]. One can then understand legal knowledge as not just the word of law, but also the intention behind and application of the word. Legal knowledge can be said to be "an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description"[44]. Furthermore, legal knowledge is built on systems and processes of consistency. These create precedents and/or legal principles, upon which future judgements are often laid[45].

Ernst Haas defined knowledge as the sum of technical information and of theories about that information which commands sufficient consensus at a given time among interested actors to serve and guide policy and social realities[46]. Precedents indicate the legal principle driven by logical and reason-based decisions made by a court (having sufficient consensus). It is imperative to note that a decision is useful when decided upon certain principles and thus will not be binding if contrary to a set of accepted principles. In this way, precedents can be said to be a form of knowledge that is curated and applied (in an advisory or binding manner) in the process of ensuring justice. Thus knowledge, its management and reliance on existing legal principles is essential to build trust in the system and faith in the judgements of the system.

The linkages between knowledge, access, justice and trust have most recently been explored in the work of Judith Resnik wherein the author links access to justice with access to knowledge, highlighting the interdependencies between the two[47]. In her work, Resnik argues for public access to judgements in arbitration cases to ensure

43. James Boyd White, *Legal Knowledge*, 115 Harv L Rev 1396, 1397 (2002).

44. See *id*. at 1399.

45. Precedent is the legal principle created by a court's decision, founded on logic and reason, may be advisory or binding on future legal decisions.

46. See Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in Beth A. Simmons and Richard H. Steinberg (ed.), *International Law and International Relations: An International Organisation reader* at 16 (Cambridge University Press 2007).

47. See Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N C L Rev 605 (2018).

oversight, fair treatment, and trust in the system. Further, the works of Jean d'Aspremont[48], Judith A. Snider and C. Kemm Yates[49] also shed light on the use, control and management of knowledge by legal institutions. Jean d'Aspremont puts forward a narrative attempting to "re-imagine international courts and arbitral tribunals as bureaucratic bodies controlling the social reality created by the definitional categories of international law"[50]. D'Aspremont argues that such institutions control *over* (and not just through) knowledge given their bureaucratic nature, that gives them the power to intervene and redefine reality[51]. Here the control over knowledge is through the functioning of the institutions – a result of the control an institution wields over the construction of a specific reality through the application of law. The argument made here by d'Aspremont is similar to Strange's articulation of knowledge-power relations based on the way institutions themselves are created[52].

Judith A. Snider and C. Kemm Yates have attempted to understand the role of knowledge in dispute resolution in order to find the relationship between specialised or comparative knowledge and natural justice[53]. In respect to the nature of knowledge to be relied upon in arbitration, Snider and Yates articulate the importance of complying with the principles of natural justice additional to the expertise possessed at the individual level among arbitrators that bring in specialised knowledge[54]. Taking the example of *Wetherall v. Harrison*[55], Snider and Yates argue that the Court held that "it was not improper

48. See generally Jean d'Aspremont, *The Control Over Knowledge by International Courts and Arbitral Tribunals*, in Thomas Schultz and Federico Ortino, *Oxford Handbook of International Arbitration* (Oxford University Press 2018), available at https://ssrn.com/abstract=3034682 (last visited November 21, 2020) .

49. See Judith A. Snider and C. Kemm Yates, *Alternative Dispute Resolution: Use and Abuse of Information and Specialised Knowledge*, 33 Alta. L Rev 301 (1995).

50. D'Aspremont, *The Control Over Knowledge by International Courts and Arbitral Tribunals* at 328 (cited in note 48).

51. See *id*. at 336 (the author also notes, in passing, that bureaucracy often evokes pathological and systemic dysfunctions).

52. See generally Holden, *In Search of Structural: EU Aid Policy as a Global Political Instrument* (cited in note 39).

53. See Snider and Yates, *Alternative Dispute Resolution: Use and Abuse of Information and Specialised Knowledge* (cited in note 49).

54. See *id*. at 327.

55. See *Wetherall v. Harrison*, 1 Q.B. 773 (1976).

for [the arbitrator to use specialised knowledge] to interpret the case, provided that he did not use his knowledge as evidence or attempt to persuade the other members of the tribunal to reach a verdict based upon his specialised knowledge"[56]. The authors suggest guidelines on the use of knowledge for adjudication aimed to overcome the abuse of specialised knowledge that can favour one side over the other – creating asymmetries.

The use of knowledge by an arbitrator to create a bias or benefit for one side over the other should not obscure the neutrality of the procedure aimed to ensure justice. Martti Koskenniemi notes that investment arbitration, through the process of negotiations, maintains within the system a power dynamic that often favours the ones already powerful[57]. The lack of equitable access to specific, specialised and influential knowledge allows the system and its processes to create a social reality that favours those that possess knowledge over those that do not. The negotiation and decision-making process as a result create a *new* social reality, dictated by the use of specific legal knowledge over an impartial delivery of justice.

### 4.2 *Role of Knowledge in International Arbitration*

Knowledge-power and knowledge-trust relations in the context of ISDS are manifested in the power asymmetries between countries and the inconsistency of awards.

The institutional structure of ISDS – made up of a homogenised group of arbitrators having access to advanced legal systems; the monopoly of investors over filing suit; the possession or unequal acquisition of legal knowledge; and the control over the sharing of knowledge (arbitration proceedings and awards) by the claimants (investors) – contributes to the power asymmetries that exist between countries in the international arena. Furthermore, having such comparative capacities in arbitration then enables one party over another to influence the system. This emerges as an eclipse over the principle of fair and

56. See Snider and Yates, *Alternative Dispute Resolution: Use and Abuse of Information and Specialised Knowledge* at 330 (cited in note 49).

57. See Koskenniemi and Efa, *Investor-State Dispute Settlement (ISDS) in EU Law and International Law* (cited in note 5).

equitable treatment. For example, these problems and – in particular – the exercise of knowledge-power within an institution are evident in the case of the role in the United States Office of the Assistant Legal Adviser for International Claims and Investment Disputes that works closely with investors to ensure that the ISDS mechanism protects US interests abroad[58].

The ISDS system has further been critiqued for a lack of legitimacy and opaqueness for two crucial reasons. First, the IIAs are claimed to be "broad and vague" giving arbitrators the power to interpret while establishing power asymmetries[59]. The second aspect then details into the inability of the system to ensure consistency and predictability given the lack of a formal system of arbitration precedent and of appellate mechanisms and limited judicial review of awards which fosters a trust deficit that further weakens the system[60].

Several authors have made cases in respect to an appellate mechanism to promote consistency and correctness in the outcome of the arbitration process, to ensure justice and establish trust. Karin L. Kizer, Jeremy K. Sharpe, and Antonio Parra have advanced the need for an appellate mechanism to overcome the issues of inconsistency in the application of law and arbitration awards, taking the empirical support of the US commitment to enforce an appeal mechanism in its (mega) Free Trade Agreements such as the TTIP[61]. Eun Young Park[62], Gabriel Bottini[63], and Jaemin Lee[64] suggest that an appeal mechanism

58. See Katz, *Modeling an International Investment Court* at 169 (cited in note 4).

59. Nathalie Bernasconi-Osterwalder and Lise Johnson (ed.), *International Investment Law and Sustainable Development: Key Cases from 2000–2010* at 13, (International Institute for Sustainable Development 2010), available at https://www.iisd.org/sites/default/files/publications/int_investment_law_and_sd_key_cases_2010.pdf (last visited November 14, 2020).

60. See Kalicki and Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System* at 1 (cited in note 29).

61. See *id*. at 10.

62. See Eun Y. Park, *Appellate Review in Investor-State Arbitration,* in Jean E. Kalicki and Anna Houbin-Brett (ed.), *Reshaping the Investor-State Dispute Settlement System* (Brill 1st ed. 2015).

63. See Gabriel Bottini, *Reform of the Investor-State Arbitration Regime: The Appeal Proposal,* in Jean E. Kalicki and Anna Houbin-Brett (ed.), *Reshaping the Investor-State Dispute Settlement System* (Brill 1st ed. 2015).

64. See Jaemin Lee, *Introduction of an Appellate Review Mechanism for International Investment Dispute: Expected Benefits and Remaining Tasks,* in Jean E. Kalicki and Anna

would strengthen the trust and legitimacy of international investment arbitration and overcome the systemic failures of the ISDS system. Lee further substantiates the need to account for the high cost of review of awards in the ISDS system for developing countries and thus an appeal mechanism can provide an alternative given the limited access to legal capacity and resources.

While the aim of the ISDS system was to ensure autonomy, an appellate mechanism is critical to ensure that erroneous decisions can be reviewed and overturned if needed. The aim is to bring symmetry to the power dynamics between investors and states as well as will allow access to knowledge between institutions, by way of appeal. This is based on the understanding that an appellate body opens the scope of application of both common and specialised knowledge, creating an even playing field.

Access to arbitral decisions and awards in the public domain can provide a knowledge base for "attorneys [to] cite relevant decisions in support of their clients claims or defences and tribunal can delay on those decisions to support their findings in separate cases raising similar legal issues"[65]. Moreover, an appeal system could facilitate judicial and legal dialogue useful to create more clear and defined common legal principles. This leads to the issue of *arbitral precedent* that is needed to establish a base of knowledge or principles, which can be universally accepted through a commonly held set of beliefs, norms and values, that can then influence the social realities that the ISDS process attempts to adjudicate upon. In institutions, such as lots of courts, legal knowledge is used to obtain a result and create precedent, wherein the Courts are obliged to be advised by the precedent. Precedent ensures a relative consistency in decision making, that has the power to incentivise actors to establish trust among themselves and towards the system.

Currently, the ISDS system lacks a formal binding system of precedent under the doctrine of *stare decisis*. Gabrielle Kaufmann-Kohler in *Arbitral Precedent: Dream, Necessity or Excuse?* notes that despite a

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Houbin-Brett (ed.), *Reshaping the Investor-State Dispute Settlement System* (Brill 1st ed. 2015).

65. Bernasconi-Osterwalder and Johnson (ed.), *International Investment Law and Sustainable Development* at 13 (cited in note 59).

formal doctrine (*de jure*), arbitrators increasingly appear to refer to, discuss and rely on earlier cases – depicting a *de facto* form of this[66]. Such a *de facto* system, argues Nathalie Bernasconi-Osterwalder, has created a growing body of *de facto* international investment jurisprudence that not only impacts the obligations of states under respective IIAs upon which decisions are being made but also affects the future obligations, which is not open to judicial oversight and review.

The need for a formal doctrine of precedent is essential to ensure consistency in the application of legal knowledge and principles, addressing a core systemic critique, but also to build trust and create legitimate expectations among stakeholders[67]. Rebecca L. Katz argues that consistency ensures predictability, which can guide investment decisions for investors and the host state; it can also help overcome a trust deficit in the system; and increase cost-effectiveness of the process that can ensure equitable and fair settlement of disputes[68]. Additionally, access to legal knowledge and arbitral decisions can be used to support the arguments while providing the tribunal bases that can guide future decisions, overcoming the lop-sidedness created by lack of access to among actors[69].

### 4.3 *Application of Theoretical Models to ISDS Specific Cases*

The institutional experience with the existing investment arbitral mechanisms has highlighted the problem of asymmetry and inequity in the decision-making processes, that states are at least partially trying to face. In this regard, the proposition regarding establishment of investment courts under the Transatlantic Trade and the Investment

66. Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?,* 23 Arb Intl 357, 361 (2007) (Kaufmann-Kohler points out that the International Court of Justice (ICJ) and the World Trade Organisation (WTO) Appellate Body "adopt a type of de facto stare decisis doctrine" where in a "strong reliance on earlier judicial decisions are listed as "subsidiary means for the determination of rules of law" in Article 38 of the ICJ" and stated by the WTO Appellate body in the *Shrimp Turtle II* case).

67. See *ibid.*

68. See Katz, *Modeling an International Investment Court After the World Trade Organisation Dispute Settlement Body* at 174 (cited in note 4).

69. See Bernasconi-Osterwalder and Johnson, *International Investment Law and Sustainable Development* at 13-14 (cited in note 59).

Partnership are a step in the right direction[70]. However, as a good confirm of the remarkable difficulties in this regard, the negotiations and talks on this proposition had temporary stopped due to divergences between European Union and the United States[71].

In any case these issues – that the states are trying to solve – arose particularly in relation to developing countries which are often victim of unfair knowledge-power exercise. s, three arbitral awards under illustrate the challenge of sustaining institutional credibility amidst regulatory concerns. As example, under the North American Free Trade Agreement (NAFTA) it is useful to look at the arbitral decisions made in the cases of *Metalclad Corp. v. United Mexican States*[72] and *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States*[73]. In these cases, the use of the arbitral process benefits the investor in the face of a weaker developing state, where the latter was held for a breach of contract or treaty violations due to regulations taken by the Mexican government to protect the public health and environment – a matter of public interest – for the welfare of its people[74]. Here, the application of legal knowledge benefiting the claimant resulted in Mexico compensating, 16,75 million US dollars cumulatively in the two cases. The cases stemming from the right of the state to ensure environmental and public reform, and thus undertake the right to regulate,

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70. See generally Stephen S. Kho, et al., *The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System: Comparing Apples and Oranges?*, 32 ICSID Review – Foreign Investment L J 326 (2017), available at https://academic.oup.com/icsidreview/article/32/2/326/3828524 (last visited November 14, 2020).

71. European Parliament, *Transatlantic Trade and Investment Partnership Negotiations on International Court System* (October 2020), available at https://www.europarl.europa.eu/legislative-train/theme-international-trade-inta/file-ttip-investment-court-system-for-ttip (last visited November 14, 2020).

72. Katz, *Modeling an International Investment Court* at 172 (cited in note 4) (the case was filed by Metalclad Corp focusing on three violations of the North Atlantic Free Trade Agreement. The tribunal awarded in favour of Metalclad, for damages to the amount of the "sunken costs in the investment" due to "Mexico's refusal to grant a construction permit for the expansion of a toxic waste facility amid concerns of water contamination and other environmental and health hazard").

73. *Id.* at 173 (Tecmed's alleged violation of obligations under Spain-Mexico Bilateral Investment Treaty (para 93), accusing the Mexican Government of violations. The tribunal held Mexico for expropriation and fair and equitable standard awarding damages to be paid to Tecmed).

74. See *Id.* at 163.

demonstrate the limiting of the policy space of developing countries. This is on account of the deterrence created by these unfavoured awards against the state's enforcement of its prerogative to protect domestic public interests in international investment contexts. Additionally, in *Metalclad v. Mexico*, the arbitration tribunal articulated that it "need not decide or consider the motivation of intent or the adoption of the Ecological Decree"[75]. The narrow interpretation of the law to the denial of a construction permit claimed by Metalclad to the breach of NAFTA Article 1105 and Article 1110 overlooks the application of the law beyond the rules of the IIA, overlooking the issue of public health and ecological damage affecting the local environment due to dumping of hazardous wastes by the investing company[76]. This construction of a reality created a limited and asymmetrical knowledge that invariably benefits one entity – given the focus primarily on the breach of contract and the profit outcome of the investor – while disincentives the other – a nation-state acting towards the welfare of its citizens. In fact, the balance between the investors' interests and the state's aim of protecting its citizens rights was not adequately considered, in a knowledge-equity perspective. If the measures have a substantial non-discriminatory application and if they really tend to ensure better health or environmental protection according new and higher standards, it can be found no breach of duties.

Beyond constraints of arbitration mechanisms, the issue reflects the lack of flow of knowledge between international institutions that mandate a right to development[77] – more sustainable development in

75. Howard Mann, *Metalclad Corp. v. United Mexican States* at 72, 79*,* in Bernasconi-Osterwalder and Johnson, *International Investment Law and Sustainable Development* (International Institute for Sustainable Development 2010), available at https://www.iisd.org/sites/default/files/publications/int_investment_law_and_sd_key_cases_2010.pdf (last visited November 14, 2020).

76. See Esther Kentin, *Sustainable Development in International Institutions Dispute Settlement: The ICSID and NAFTA Experience*, in Nico Schrijver and Fred Weiss (ed.), *International Law and Sustainable Development: Principles and Practice* at 309, 330 (Martinus Nijhoff Publishers 2004).

77. The Declaration on the Right to Development was adopted by the General Assembly in its resolution 41/128 of 4 December 1986. See United Nation General Assembly, *Resolution 41/128*, U.N. Doc. A/41/53 (1986).

light of Agenda 2030[78] – and international mechanisms designed to bring justice through dispute resolution. Arguably, the lack of flow of knowledge (among and within institutions) and the lack of application of the law in awareness of the broader impact of the investment, continues to maintain the power asymmetry that favours the already powerful to shape the problems (and its resultant solution) through the construction a social reality, in which the ISDS system intervenes[79].

Furthermore, for the success of a dispute resolution it is essential for the parties to have trust on the procedures that will ensure justice. The trust deficit in the arbitration mechanism exists due to lack of a consistent and definitive structure giving a broad scope of powers of the tribunal and its arbitrators to interpret agreements that often reflect the existing political power-asymmetries. This creates a trust deficit between institutions of justice and seekers of justice[80]. The conflicting and inconsistent arbitral awards in the cases of *Metalclad v. Mexico vis-à-vis Methanex Corp. v. United States of America*[81] underscore the issue of arbitrary decision making on similar cases becomes evident. Both the cases were filed alleging violation of expropriation and obligation of fair and equitable treatment. Similar to *Metalclad v.*

78. Agenda 2030 is a call for countries to collectively work towards the achievement of the 17 Sustainable Development Goals. It explicitly calls for investment to be made focusing on the sectors and development needs for the success of the SDGs. See Transforming Our World: The 2030 Agenda for Sustainable Development, UN A/RES/70/1 (September 27, 2015), available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (last visited November 14, 2020).

79. See generally Jean d'Aspremont*, The Control Over Knowledge by International Courts and Arbitral Tribunals* at 328*,* in Thomas Schultz and Federico Ortino*, Oxford Handbook of International Arbitration (Oxford University Press 2018),* available at https://ssrn.com/abstract=3034682 (last visited November 21, 2020).

80. For other cases highlighting the issue of consistency, see ICSID ARB/05/8, *Parkerings-Compagniet AS v. Republic of Lithuania* (September 11, 2007); ICSID ARB(AF)/00/2 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (May 29, 2003) (both cases pertain to fair and equitable treatment – with two different and irreconcilable approaches to each of these issues). Additionally, see Katz, *Modeling an International Investment Court* at 174 and n 48 (cited in note 4).

81. Methanex Corp alleged treaty violations of expropriation, fair and equitable treatment and national treatment under Chapter 11 of NAFTA (the tribunal awarded in favour of the United States of America).

*Mexico,* in the case *Methanex v. United States* the Government of the United States made new regulations to protect the environment and public health system. However, in *Methanex v. United States*, the tribunal awarded in favour of the state as opposed to the investor wherein the tribunal held that:

> A non-discriminatory regulation for a public purpose [...] which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation[82].

The "non-discriminatory regulation for a public purpose" as mentioned in the passage above states that regulations taken by the government operating in its policy space to regulate over issues concerning its citizens (public health, environment, etc.) are not expropriation regardless of the impact on the investor[83]. The passage also articulates the existence (or non-existence in this case) of specific commitments which invariable favours developed countries as such clauses are often inserted by investors when negotiating agreements with developing countries taking away the much-needed policy space for development[84].

The inconsistency driven out of the control over knowledge, negotiations and application of law is evident in the awards of the two cases. In the *Metalclad* decision the tribunal overlooked the Ecological Decree giving a broad definition of expropriation to include the regulations undertaken by the Mexican government while in *Methanex* decision the court provided for a narrower interpretation wherein expropriation "inherently [did not include] measures taken by the governments in the exercise of their customary police powers"[85]. This inconsistency in the application of the definition of expropriation reveals the challenge of party trust and predictability of the arbitral

82. Howard Mann, *Methanex Corp. v. United States of America* at 81, 87 (cited in note 75).

83. See *id*. at 88.

84. See *id*. at 89.

85. *Id*. at 87.

process. This inconsistency denies the government the clear delimitation of the legitimate regulatory space to make effective interventions to safeguard public interest, lest the arbitral process lead to adverse consequences. The development of coherent precedent regarding the right to regulate, especially in developing countries, would substantially rectify the institutional imbalance that entrenches existing geo-economic power structures. In light of these structural asymmetries and doctrinal inconsistencies, there is a need for development of equitable legal knowledge systems which should reflect the institutional experiences of the developing countries. This would increase access to and credibility of existing legal knowledge, and lead to the creation of precedent or clear common principles that ensure justice for all parties. Given equitable knowledge's potential to bring transparency in the system, it can be reasonably expected to further enhance the prospects for convergent behaviour among all stakeholders necessary for dispute resolutions. Hence, creation and dissemination of equitable knowledge (through clear delineation of doctrine and principle that adequately represents the core concerns of developing countries, too) could transcend divides, ensure equitable resolutions predicated on the principle of non-discrimination, and more so empower the powerless as opposed to retaining the dominant power asymmetries[86].

It is necessary for dispute resolution mechanisms to retain the trust of all stakeholders, through the creation of a transparent, knowledge-driven system that ensures predictability and consistency. At the same time, there is a critical need for developed and developing countries to robustly seek the convergence in their legal and institutional approach as well as practices, so that a golden mean or a fine balance between their interests can be achieved. As discussed above, the institutionalization of equitable knowledge can play a vital role in achieving this convergence. This would be critical to retain the equity of law and its credibility informed by a common socially conscious framework that finds a middle ground between furthering the economic interests of developing countries and incentivising private investment for profit maximisation.

Knowledge, in its continuous flow of sharing, transfer, exchange, and its (re)use and evolution in the arbitral system influences the

86. Krasner, *Structural Causes and Regime Consequences* at 16 (cited in note 52).

behaviour of investors and states guiding the profit-making decisions of the former and the welfare and investment regulations of the latter. The creation, curation and access to knowledge that is used by the system then has the power to influence the system itself. This influence is evidently linked to the issue of trust and credibility of the international arbitration system, demanding the need for a system that ensures transparency and reliability within its framework along with equitable dispute resolution acknowledging and facing the development priorities, lack of access to advanced legal systems and the need for policy space to regulate investments for public benefit of developing countries.

## 5. *The Way Forward for ISDS Reform*

Taking stock of the arguments made in the previous sections, it is evident that the free flow of knowledge is not achieved in the ISDS system. Even though, given the continuous criticisms, there has been marginal improvement in transparency and in certain cases *amicus curiae* briefs have informed arbitration proceedings, the situation is far from ideal[87]. Another problem is the absence a *de jure stare decisis* doctrine that could uniform the awards around precedents that are a verified and recognised form of common knowledge. The lack of clearly established and recognised principles causes unpredictability and inconsistency and generates confusion and mistrust in ISDS. This section follows on with the argumentative trail and argues that there is a need for a reform in the system. That has been argued extensively as to whether ISDS should incorporate an Appellate Body[88];

87. See generally Bernasconi-Osterwalder and Johnson, *International Investment Law and Sustainable Development (*cited in note 63).

88. [See], for example, The Dominican Republic-Central America FTA (CAFTA-DR) annex 10-F, available at http://www.ustr.gov/sites/default/files/uploads/agreements/ cafta/asset_upload_file328_4718.pdf (last visited November 19, 2020); United States-Panama Trade Promotion Agreement annex 10-D, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/ asset_upload_file684_10351.pdf, (last visited November 19, 2020); United States-Peru Trade Promotion Agreement annex 10-D, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf. (last visited November 19, 2020).

whether there should be a new permanent organisation[89]; a new international court and/or a new international investment treaty modelled on and building further on the principles of the World Trade Organisation's Dispute Settlement Understanding (DSU) in the context of investment disputes[90].

The idea of an international investment court as a permanent body for investment dispute settlement is effectively a potential proposal for ISDS reform as well as the deep reform of existing ISDS. The objective of this section is to highlight some substantive concerns that this new or reformed bodies would have to address.

Developed nations have elaborated legal and institutional mechanisms that ensure a balance between investor rights and public interest. However, developing countries lack such elaborate institutional structures and advanced legal systems to maintain that balance. They intend to augment their development opportunities trying to attract foreign investment. However, within the current system, this has become a paradoxical process. In an ideal scenario, BITs (and investments at large) must contribute to the economic, social, and institutional development of a developing country. If not, BITs should at least not hinder this growth. However, the pre-emptive approach that characterises most BITs, moves disputes directly to an international arbitration panel bypassing domestic legal remedies, thereby, not giving a chance to domestic institutions to practice good governance internally[91]. This limits the possibilities of flows of knowledge and expressions of higher legal standards in national courts, too.

89. See generally Butler and Subedi, *The Future of International Investment Regulation* (cited in note 6).

90. See generally Katz, *Modeling an International Investment Court* (cited in note 4).

91. Howard Mann and Konrad Von Moltke, *A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States* 11–12 (International Institute for Sustainable Development 2005), available at https://media.law.wisc.edu/s/c_360/yzc4y/foreign_investment4.pdf (last visited November 19, 2020). ("Developing countries that were previously colonised emerged from the colonial era almost devoid of indigenous institutions and of the human resources required to run, let alone to develop them. Lack of human and financial capacity continues to limit necessary institutional development in many cases. It would seem almost self-evident that IIAs should contribute to the process of institutional development in developing countries. At the very least, they should not

Promote certain universal standards of good governance by strengthening domestic institutions could be done in many ways. For example, it could be given more space to domestic courts. In the situations that would not be adversely affected by strictly following the rule of exhaustion of domestic legal remedies (for instance cases that are not relatively time sensitive), the ISDS mechanisms or, in the future established, an hypothetical stable court can make it mandatory for parties to file cases domestically first and just then eventually appearing before the international body. This could create more involvement and exchanges of knowledge permitting domestic courts to face relevant cases and to dialogue more with ISDS bodies or other courts.

In the process of servicing the institutional gap between developed and developing countries, the new ISDS or investment court systems must recognise a Right to Development (RTD) of all people in the world. Adopted by the General Assembly on 4 December 1986, the United Nations Declaration on the Right to Development (UNDRTD) proclaims that:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised[92].

The establishing of BITs and their implementation throughout ISDS cannot be a way to maintain less sophisticated legal, political, or social conditions in developing countries just to protect foreign economic interests. If applicated in this way, BITs could be significant barriers of the spread of knowledge.

Another important aspect of reform is the nature of representation in the institutional apparatus of ISDS or in a new hypothetical

undermine it. Yet there is little in most existing IIAs that contributes to this goal. The approach of pre-emption that characterises many IIAs, that is the tendency to move disputes directly to the international level without providing for settlement in the host country, and without an expression of deference to the laws or institutions of the host country, may undermine efforts to achieve good governance domestically").

92. UN General Assembly, *Resolution 41/128*, at Art. 1(1).

international investment organisation. Considering the finality of the decisions and judgments of such institutions, it is important to address concerns about the lack of diversity[93]. Reforms must be thought to ensure equitable and fair representation to individuals from the Global South in these significant institutions. It must be highlighted the fact that a considerable number of the investor-state disputes take place in the developing world[94]. Ensuring equitable representation and separate benches composed of judges from diverse ranges of developing countries would not only make decision making processes more informed and fairer but would accord them greater acceptability and legitimacy.

### 6. *Proposals for a Knowledge-Perspective Reform*

The reform must ensure that the court or the reformed bodies be conscious of the developmental interests and relevant public international law issues from the developing countries perspective. This would mean that the bench of the new institution must be sensitive to a number of issues aiming to promote socio-economic development including but not limited to the obligations of implementation of the RTD; to mobilize existing provisions of international law to build momentum towards the Sustainable Development Goals (SDGs), to promote international cooperation rather than fuelling disputes and other such initiatives through its rulings, to sustain judicial dialogue with domestic courts and so on[95]. In practice, the court would essentially bring parity between the investor and the state in terms of both rights and obligations.

This parity in itself would have various manifestations and these could be considered in order to value if governmental initiatives – not at all compliant with the existing treaties – aim to rebalance unfair situations, to offer their citizens better safeguards, to set the internal market more efficiently and so on or not. Certain foreign investments

93. Katz, *Modeling an International Investment Court* at 175–176 (cited in note 4).

94. See generally Schreuer, *Do We Need Investment Arbitration?* (cited in note 7).

95. Karin Arts and Atabongawung Tamo, *The Right to Development in International Law: New Momentum Thirty Years Down the Line?,* 63 Neth Int L Rev 221, 249 (2016).

have an adverse crowding effect on domestic investments. For instance, investments in the service sector have a propensity to work with foreign suppliers creating a pressure on the balance of payments which increases imports without a corresponding increase in exports. Moreover, the profits generated from service sector investments put an additional burden on the balance of payments when they are repatriated because they do not create corresponding exports that generate foreign currencies[96]. Therefore, the linkage between foreign investment and development needs to be explicit and supported by policies that promote desired outcomes, even while they recognise the fundamental economic requirements associated with any investment[97]. Consequently, the idea of performance indicators in the context of socio-economic development of the host is important in evaluating the viability of any investment. These indicators are varied but can be categorised into six basic types: export performance; joint venture and equity ownership; research and development; technology transfer; employment and training; and other requirements such as local content requirements or the provision of surety in the form of bonds or otherwise[98]. Each of these indicator links to key aspects of economic development of the host country. For instance, these performance indicators are congruent to the modalities of development cooperation seen amongst developing countries[99]. But, given the lack of institutional arrangements to enforce these performance indicators, developing countries rarely find them enshrined in their agreements. Even if they manage being mentioned, the contemporary ISDS systems tend to hamper their adequate implementation leaving developing countries in a limbo. The argument for this puts forth by the investor's side is on the grounds that the application of performance indicators has an adverse effect on the financial efficiency of the investment itself. However, empirical analysis has shown that the trade-off

96. Mann and Von Moltke, *A Southern Agenda on Investment?* at 1–3 (cited in note 91).

97. *Id*. at 2.

98. See *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries,* UNCTAD/ITE/IIA/2003/7, (United Nations Conference on Trade and Development 2003).

99. For more information, see generally Sachin Chaturvedi, *The Logic of Sharing: The Indian Approach to South-South Cooperation* (Cambridge University Press 2016).

between the loss of economic efficiency is more than enough because it is outweighed by the gains in development and public welfare that has often better and largely good externalities[100].

Therefore, the new ISDS bodies or dispute courts should take into account the positive and negative effects or externalities of such investments when considering the breach of the contract or treaty. Moreover, by recognising the importance of the free flow of knowledge within the system of investment dispute settlements and the spirit of reforming the ISDS system, the following argument can be made to further the case of developing countries. The free and reciprocal flow of knowledge could be an independent performance indicator denoting the "viability" (not just in narrow economic sense) of an investment for the host state. The various qualifications for this claim are as follows:

- the sharing of knowledge and information between the host state and the investor regarding the operational side of any investment would lead to the building of mutual trust that would automatically reduce the chance of dispute;
- an increase in the curation and exchange of knowledge would make future investments more safe, viable and competent thereby increasing the quality of returns, externalities, and development;
- a solid and institutionalised practice of knowledge exchange would improve in the understanding and codification of the rights and obligations of both the investor and the host state. This is particularly significant for the successful formulation of an international court functioning or common ISDS principles on uniform statutes or precedents for all states informed by the concerns of economic development and investor protection equally;
- an increased flow of knowledge would make it easier to establish facts in legal proceedings, improving the quality of the outcome and bringing about a balance in the settlement of disputes.

Therefore, an explicit induction of knowledge exchange as a performance indicator of an investment is in the interest of both parties.

100. See generally Mann and Von Moltke, *A Southern Agenda on Investment?* (cited in note 91).

However, it is important to underscore that with the unprecedented growth in trade and investment flows among developing countries across all possible sectors, their geopolitical importance in the world is also on the rise. The reform of ISDS on the accounts suggested in this paper would be a step further in bringing parity between the relations between the developed and developing countries.

## 7. *Conclusion*

The institutional architecture of the ISDS systems present several criticalities. Among them, the infringement of state sovereignty due to the *regulatory chill* and the inconsistency of the awards play a crucial role. Firstly, these issues make the settlement of investment disputes biased against the rights of the states *vis-à-vis* the ones of private investors. Indeed, they compromise the state capacity to issue regulation in the public interest. The *Metalclad Corp. v. United Mexican States*[101] and *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States* well exemplify this drawback of ISDS. In these cases, a narrow interpretation of the need of better health and environmental protection led the state to be held accountable for a breach of treaty provision.

Further, these criticalities give rise to an exacerbated bias if the state is a developing one. In this context, many of the negative consequences of ISDS can be traced back to a situation of knowledge asymmetric between developing and developed countries. The lack of diversity among the arbitrators and the lack of transparency of the process further aggravate the situation. As the above theoretical analysis as highlighted, the ownership of knowledge indeed creates dichotomies and asymmetries between those who possess knowledge and those that do not. The lack of equitable access to specific, specialised and influential knowledge, on the one hand, keeps alive a vicious circle of poverty and deprivation in the developing world and, on the

101. Katz, *Modeling an International Investment Court* at 172 (cited in note 4) (the case was filed by Metalclad Corp focusing on three violations of the North Atlantic Free Trade Agreement. The tribunal awarded in favour of Metalclad, for damages to the amount of the "sunken costs in the investment" due to "Mexico's refusal to grant a construction permit for the expansion of a toxic waste facility amid concerns of water contamination and other environmental and health hazard").

other hand, consolidates a power structure of the developed countries. The *Methanex Corp. v. United States of America* demonstrates that, although the right of the state are likely sacrificed for the protection of private investors, the ones of developed countries are not as likely to be ignored as the one of developing ones.

In this context, greater representation for developing countries in the judicial tribunals and institutions needs to be seriously deliberated upon. A justice system for investment adjudication based on the principle of the free flow of knowledge can be achieved through the creation of an appellate body and of a formal system of precedents. These reforms may improve the transparency of the ISDS system, and this way facilitates the knowledge flow. However, the system needs also to be fair and equitable and to achieve this result it is important to recognize a greater role of general international law within the investor-state adjudications, with a particular reference to the Right to Development.

# Social Media and Accountability in the Cases Concerning Core Crimes

Swapnil Sharma*

*Abstract*: In these last years a dramatical increase in the use of cyber space has led to an important change also in criminal activities, emphasizing the weaknesses of actual legal frameworks in facing modern crime issues. Crime in the digital era can be more advanced due to technological instruments, moreover the modern world assists to the exponential growth of new types of crimes such as the evolving cybercriminality. With a particular regard to the Rome Statute and the International Criminal Court work, the issue which is discussed in this paper is whether the present legal structure is sufficiently efficient to deal with the problems pertaining to cyberspace, or whether new and updated laws and jurisprudence are needed. This research is supplemented by a case study examining the potential legal aspects of a situation where the ICC may have to deal with a case of multilayered crime. In the end, the public element of incitement is examined with reference to genocide, analyzing the effects of practical application of place factor and medium factors in the social media era.

*Keywords*: Cybercrime, Rome Statute, International criminal justice, Accountability, Social Media.

## 1. *Introduction*

In these last years a dramatical increase in the use of cyber space has led to an important change also in criminal activities, emphasizing the weaknesses of actual legal frameworks in facing modern crime issues. Crime in the digital era can be more advanced due to technological instruments, moreover the modern world assists to the exponential growth of new types of crimes such as the evolving cybercriminality.

In its first part, this paper will try to explore the current status of cyber jurisprudence: this section will trace the development and conceptual evolution of the concept of jurisprudence. A further segment will analyze the need and prospects of a new cyber jurisprudence, which renders itself necessary because the legal principles formulated in centuries of jurisprudence might not be up to the challenges of crimes committed using the virtual world as a tool. This paper will demonstrate that the legal framework should adapt and modify the principles of law in accordance with time.

The second part of this research will question whether the provisions of Rome Statute are ready to tackle the disputes which may arise with regards to crimes committed through social media platforms. The jurisdictional challenge posed by the conducts which take place in cyberspace will be examined with particular regard to the difficulties in identifying the competent proceeding jurisdiction; this section will discuss the applicability of article 12 and 17 of the Rome Statute of the International Criminal Court. A further provision which will be analyzed is article 25 (3) (e), whose effectiveness in a situation where a multilayered crime is instigated on social media will be questioned. This is supplemented by a case study examining the potential legal aspects of a situation where the ICC may will have to deal with any such case in the near future.

In the end the research examines the public element of incitement to genocide: this segment will analyze the effects of practical application of *place factor* and *medium factors* in the social media era.

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## 2. *Understanding Cyber Jurisprudence*

With the increase in the variety of methodologies in committing crimes, the demand for a new jurisprudence for the cyber world has emerged. This section will try to analyze whether the accomplishment in tackling this demand of jurisprudential evolution may offer potential solutions to the regulatory gap in the legal framework. The evidence of cybercrimes strongly demands a need for cyber jurisprudence[1] and it is necessary to establish a definition of cyber jurisprudence.

### 2.1. *Deriving the Definition of Cyber Jurisprudence*

No discussion of Cyber Jurisprudence could begin helpfully without defining a baseline of terms; unfortunately, Cyber Jurisprudence does not have a universal definition. It is essential to analyze and separate the term around which the present research revolves. Black's Law Dictionary defines jurisprudence as a philosophy of law or a science, which treats principles of legal reaction and positive law[2]. So, jurisprudence can be defined as the fundamental science which is capable to govern the legal structure.

Professor Gray stresses upon the nature of jurisprudence as being the systematic harmonization of the rules and procedure followed by the justice delivering institutions[3]. The above-mentioned principle also finds its evolution from the theory of jurisprudence propounded by Sir Thomas Holland[4], which states that jurisprudence is a *formal* science which rather focuses on the basic principles than the concrete details. In the context of cyber jurisprudence, the definition by Holland is crucial. He compares the science of law (jurisprudence) with

1. See Peter Stephenson, *Digital Forensic Science: An Oxymoron?,* 6 LIJ 95, 108 (2018).

2. See Bryan A. Garner, Henry Campbell Black, *Black's Law Dictionary* (Thomson/West 8th ed. 2004).

3. See John C. Gray, Some Definitions and Questions in Jurisprudence, 6 Harv L Rev , 27 (1892-1893). See also N. V. Paranjape, Nomita Aggarwal, P.S.A. Pillai, V. D. Mahajan, Jurisprudence is the systematic arrangement of the general principle of law, LJ, available at https://www.lawyersnjurists.com/article/jurisprudence-study-systematic-arrangement-general-principle-law/ (last visited November 29, 2020).

4. See Thomas Erskine Holland, *Elements of Jurisprudence* (Oxford At the Clarendon Press 1924).

the Grammar and argues that the concept of laws of different states is very similar to comparing the growth of different languages by comparing the similarities and differences between them. Through comparative law, indeed, the similarities and differences are measured. The similarities arising out of these laws is what we call the abstract science of jurisprudence. However, this should not lead one into the belief the jurisprudence is essentially preceded by the study of comparative law only. Jurisprudence is a progressive science.

Now, there are two opinions discussing relevance of cyber jurisprudence. For the first, jurisprudence is static and so the existing substantive laws can be either applied as they are or with some modifications, but no separate legislation is required. This view might be disregarded by several States that are introducing separate legislation for dealing with the cyberspace world. The second doctrine suggests that cyberspace is a *novel legal space* and hence the traditional principle of jurisprudence cannot be upright for governance of these rules[5]. Furthermore, the introduction of a separate legislation does not ensure that a separate jurisprudence is necessary, given that, following the basic principles such as the concept of rights and duties, the basic jurisprudence is most likely to remain unchanged[6]. If the States opt to create a separate jurisprudence for cybercrime or cyber-enabled crime[7], then the creation of a separate jurisprudence might be an unnecessary effort. This could lead to a bad application of the law, since the development of good jurisprudence takes years to get polished[8].

5. See Svetlana L. Paramonova, Boundlessness of Cyberspace Vs. Limited Application of The National Criminal Law (On Example Of Russian, Us-America And German Legal Systems). International Cybercrime Court, MIP for Foreign and International Criminal Law, Freiburg, Germany, available at http://old.gruni.edu.ge/uploads/content_file_1_1851.pdf (last visited November 29, 2020). See also Grigol Robakidze University, 2 Academic Digest Law 38, 40-43 (2013), available at http://dspace.nplg.gov.ge/bitstream/1234/149825/3/Akademiuri_Macne_2013_N2.pdf (last visited November 29, 2020).

6. See *id*.

7. Author suggests including cyber-enabled crimes in the category of cybercrimes due to the involvement of computer networks in combination with usage of the internet, dealing cyber-enabled crimes in the umbrella of cybercrime may provide a technologically and legally deeper view.

8. See Neil Duxbury, *Patterns of American Jurisprudence* at 61 (Clarendon Press 1st ed. 1997).

Here, it will be relevant to visit Holland's view of jurisprudence[9]. Accordingly, cyber jurisprudence should be allowed to strengthen and evolve itself while getting authority from basic principles of international law and principles of natural justice. Basically, cyber jurisprudence legislation can be framed as a delegated legislation which will derive its authority from fundamental documents and principles of international law.

### 3. *Framework of International Criminal Justice System and its Efficiency in the Context of Technological Development*

The jurisprudence of international criminal tribunals might evolve and progress by taking into consideration the actual situation and new social challenges. These laws and their application could prove to be so obsolete and unfit for the present situation that makes it almost impossible to find an interpretation suitable for a different context from the original one. As times change, the assumptions on which the laws were based may not stand true now[10]. This is particularly true with regards the legal environment surrounding technology, which will inevitably need to be considered an area in tumultuous development. In the present scenario, technological advancements raise the level of complexity while exacerbating past problems with traditional legal issues.

Since the foundation of the International Criminal Court (ICC) in 1998, a steep upward curve is marked in the technical advancements. For instance, use of computers has risen from 42% in 1998 to 89% in 2016, use of the internet raised from 25% in 1998 to 88% in 2016. Use of Social media has dramatically increased from just 5% in 2005 to

9. See Sir Thomas Erskine Holland, *Elements of Jurisprudence*, 2 The Journal of Social Forces, 790 (1924)

10. See Lindsay Freeman, *Law in Conflict: The Technological Transformation of War and Its Consequences for the International Criminal Court*, 51 NYU J Intl L & Polit, 808-845 (2018), see also Stein Schjolberg, *Recommendations for potential new global legal mechanisms against global cyberattacks and other global cybercrimes*, EastWest Institute (EWI) Cybercrime Legal Working Group (2012).

79% in 2019[11]. The data clearly reflects a rapid increase in use of cyberspace and technology, leading to deeper implications in a number of contexts. This leads to the fact that the assumption that social media and the internet would not play a substantial role, made in 1998, is no longer valid in 2020.

Taking into consideration these data and the impact of Information and Communications Technology in a wide range of fields, an area particularly influenced is the one involving contrast and aggression between nations. Here a possible implication could be a shift from the traditional military aggression to a more sophisticated and underhand informatic attack. In such case a partial transfer of the focus of prescriptions punishing international criminal responsibility from military commanders to e.g. computer programmers, engineers, security hacker etc. in the relevant matters[12] would seem inevitable; a refocusing of the punishment paradigm would also be beneficial. Given the above-mentioned statistics and development trends, the responsibility should be attached in proportion with the power and control which an individual has over facts established in court. Furthermore, the advancement of technology is of such potential that it can be instrumental in documenting and reconstructing the harming acts. The propaganda and intent in cases of incitement through social media might for example be rightly established through the documented encouragement and other relevant materials, but the courts tend to acquit defendants found responsible of mere political propaganda because the use of such compromising elements is insufficient to prove the intent to encourage the commission of the criminal acts[13].

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11. See Diego Comin, Bart Hobijin, *Cross-country technology adoption: making the theories face the facts*, 51 Journal of Monetary Economics 39-83 (2004)

12. See Peter Warren Singer, Allan Friedman, *Cybersecurity and Cyberwar: What Everyone Needs to Know* (Oxford University Press 1st. ed. 2014). An example can be seen in the evolution of the Revolutionary Armed Forces of Colombia (FARC), whose fifty-four-year war against the Colombian government ended with a fragile 2016 peace. As FARC transitions to domestic politics, its struggle has shifted from the physical to the digital front. At its camps, former guerrilla fighters now trade in their rifles for smartphones. These are the "weapons" of a new kind of war, a retired FARC explosives instructor explained. "Just like we used to provide all our fighters with fatigues and boots, we're seeing the need to start providing them with data plans".

13. See *Pierre v. Attorney General of US*, 528 F.3d 180, 192 (3rd Cir., Jun 09, 2008). In this case the Court held that specific intent requires the purpose of accomplishing

With regards to the caution court rulings show in matters of communication technology and its use as a tool for criminal activities, noteworthy is the *Bemba et al.* case[14]. Here the Appeals Chamber of the International Criminal Court (ICC) decided, in a majority decision, to acquit Mr. Jean-Pierre Bemba Gombo of charges of war crimes and crimes against humanity in the Central African Republic. The court held that the commander lacked responsibility, basing the judgement on the fact that Mr. Bemba was not physically present and indeed was at a far distance, which made him unable to instruct the subordinates to commit the crimes he was accused of. However, the Court failed to note that communication was possible through a Thuraya Satellite Phone, which made instructing the subordinates possible. The Court also failed to note that, at present, technology has enabled military commanders to control subordinates' actions in an array of different ways even if miles away from the place where conduct in question took place.

It is necessary to examine if and how traditional jurisprudential guidelines keep the pace with current day challenges. A strict application of outdated jurisprudence to cases where advanced technologies are used as means of criminal action might also bring to an excessive expansion in applying the underlying "*no witness–no case*" principle in criminal investigation[15].

### 3.1. *The International Criminal Laws and the Jurisdictional Challenge*

Due to the absence of any specific convention or provisions which deals with cyberspace, the Rome Statute acts as an important source for justice in cases of cybercrime, even if it does not contain provisions regarding intentional cybercrime. The Preamble of Rome Statute sets the foundation for a broad approach to the scope and objective of the Court. It states that most serious crimes to international concern must

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a specific result which is prohibited by the law i.e. establishing the presence of general intent will not suffice the requirement.

14. See ICC-01/05-01/13, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (2018).

15. See Dermot Groome, *No witness, no case: an assessment of the conduct and quality of ICC investigations*, 3 Penn St JL & Int'l Aff. 1, (2014).

not go unpunished. This section will focus on the problems with narrower jurisdiction of ICC. Furthermore, as the Rome Statute has one hundred and twenty State parties on which the Court has jurisdiction, a section will also examine if all the states with conduct in question can claim jurisdiction of the ICC[16].

With the increasing role of the internet as an instrument of foreign aggression, non-state actors are acquiring a substantial role to play. Using these subjects as scapegoats, States who directly promoted the international action can avoid direct responsibility in the international community. Moreover, the jurisdiction over such individuals will be often difficult to exercise due to the fact that at certain times it is difficult even for the service provider to track the location of data. The nature of the crimes may pose multijurisdictional complexity in particular cases, for example when criminal actions have been committed within the boundaries of one State, but the effects of such activities have an impact on other States. Under these circumstances, a State has the option to invoke the effects doctrine, which could be described as a recent variant of territorial jurisdiction. This principle provides that if a conduct started in a State, but its effects were deployed in a different one, then the second State has jurisdiction over the case[17]. Many States have recognized the principle of effects doctrine in national law[18]. The High Court in Zimbabwe for example stated that the traditional territorial law is being decreasingly appropriate for the principles of justice due to increased internationalization and globalization of contemporary society[19]. The effects doctrine could be a good response to jurisdictional complexity, nevertheless it is still criticized by a number of Rome Statute signatory States because of the restriction to State sovereignty it poses[20]. These considerations lead to deem

16. See Stéphane Bourgon, *Jurisdiction Ratione Loci*, s.3 §14 in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. I*, (Oxford University Press 2002).

17. See Michail Vagias, *The territorial jurisdiction of the International Criminal Court*, §6 162–208 (Cambridge University Press 2014).

18. For example, the United States adopted it from the case *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945). India has adopted this in S. 3 of Indian Penal Code, 1860.

19. See HMA 26-17 HC/CA 9/17, *S v. Mharapara*, ZWMSVHC 26 (2017).

20. See Nico Krisch, *The decay of consent: international law in an age of global public goods*, 108 no. 1 Am J Intl L 1, 40 (2018). NZSC 38 SC 32/2009, *Andrew Robert Poynter v. Commerce Commission* (2010).

the effects doctrine not well established in international law and uncertain in nature[21]. Given the troubles in determining a jurisdiction rule between states, article 12 of the Rome Statute is central, being the settled provision of law regarding jurisdiction.

### 3.2. *Jurisdiction and Article 12 of the Rome Statute*

A cornerstone of Rome Statute is article 12, which contains the precondition regarding position of jurisdiction. The theme of jurisdiction revolves around article 12 and may be seen as a compromise between state sovereignty and the concept of international justice. The structure of article 12 is designed to govern the territorial jurisdiction[22]: a different interpretative focus may lead to misreading the scope and meaning of the article, consequently damaging the quality and principles of international criminal law it sets. The power of judicial interpretation is also curtailed by drafting the *elements of crime*[23]. While article 12 provides clarity in law, it also narrows the applicability of the provisions of the Rome Statute. The Court can exercise its jurisdiction under its *ratione materiae* competence, and by applying this competence it could prevent judicial over interpretation in standard matters[24]. There still is an undiscovered area of ICC and that is when jurisdiction on conduct occurring in cyberspace might be found. At this point could be asked how the Court can exercise its jurisdiction without overstepping the judicial boundaries.

There is no clear guidance regarding the jurisdiction of the Court in cases where crimes have been committed through cyberspace and the Court itself has never delt with the subject directly. The prosecutor recently acknowledged the need to match up with the expansive advancement of technology[25]. Apart from this when authors and law-

21. See ICTFY-04/81/A, *Prosecutor v. Momčilo Perišić* (2013).

22. See Mark Klamberg (ed.), Commentary on the law of the International Criminal Court at 170-171 (Torkel Opsahl Academic EPublisher Vol. 29 2017)

23. See Jost Delbrück, Rüdiger Wolfrum, *Völkerrecht, begründet von Georg Dahm* at 1145 (De Gruyter 2nd ed. 2002).

24. See Gerhard W. Wittkämper, Britta Obszerninks, *Völkerrecht/Internationales Recht* in Wichard Woyke (ed.), *Handwörterbuch Internationale Politi* at 473 (Bundeszentral fuer politische Bildung 7th ed. 2016).

25. See Michail Vagias, *The Territorial Jurisdiction of the ICC for Core Crimes Committed through the Internet*, 21 J Conflict & Sec L 523, 524 (2016).

yers have commented upon the restrictive nature of article 12, due to ignorance while dealing with crimes committed through cyberspace, no clear position has been presented.

Since the position remains unclear, article 21 becomes relevant: in the exercise of jurisdiction «the Court shall apply in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence». The jurisdictional issue at hand should be resolved through application of interpretative principles stated at article 31 and article 32 of the Vienna Convention on the Law of Treaties. In the condition of lacuna in the ordinary sources of the International Criminal Court as mentioned in paragraph 1 (b), «applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict» should be applied. But firstly, neither the elements of crime nor the rules and procedure entail clarification for the jurisdictional challenge emerged due to cyberspace. Secondly, the Convention on Cybercrime (i.e. the Budapest Convention) remains the only legislation dealing with crimes relating to cyberspace and no other international treaty on the subject exists. The only relevant document was presented at the United Nation: a resolution titled *Countering the use of information and communications technologies for criminal purposes* passed by the Third Committee of the General Assembly in 2019[26]. Considering the lack of other sources, the only viable tools to fill the lacuna on jurisdiction of the ICC on cybercrimes, are customary international law and the general principles of international law but given the novelty of the discussed field, an entirely new legal studies sector would be necessary to fill the void

### 3.3. *Application Problems of the Article 17 of the Rome Statute*

The article 17 of the Rome Statute discusses the issues of admissibility, so it is a crucial provision to allow the investigation about the accountability of individuals who become part of a crime through social media, but it must be taken into consideration that several nations do not have appropriate laws for dealing with such factual scenarios. This may lead to cases of unfair acquittal of responsible individuals,

26. See United Nations, *Countering the use of information and communications technologies for criminal purposes*, General Assembly A/RES/73/187 (2019).

even after a genuine effort by the States to prosecute in an unbiased manner.

According to the first clause, in particular to sub clauses (a), (b) and (c) of article 17, if a State which has the jurisdiction over the case is investigating or prosecuting, or it investigated and decided not to prosecute, or it had tried the accused, then the case shall not be admissible in the Court. In fact, the incorporated principle in article 17 is the *Complementarity Principle*[27].

The only acknowledged exception is the case in which the State with jurisdiction is unwilling or unable to investigate or prosecute. But the relevance of this disposition is decreased. This is due to the fact that States have not incorporated substantive criminal laws in order to deal with the issue of core crimes committed through cyberspace. Therefore, this situation could give to potential offenders an undue advantage in evading proceedings. Moreover, even if the State prosecutes the accused, there is an high probability of getting an acquittal because of non-availability of relevant laws, and, once there is an acquittal, the criminal justice system does not allow to prosecute again for the same offence on the basis of the *ne bis in idem* principle.

It must be also noted that institutions such as European Union and other States Parties were quick to comply with adjustments. Nevertheless, it was mostly because of non-comprehensive legislation due to unwillingness of a collective step forward by the international community. This resulted in laws which do not take into account the current technological advancements. Consequently, the laws may not be clear in the modern factual scenarios, which could lead to the acquittal of the cybercriminals. The same is valid for the present provisions, that are not designed for cases dealing with cyberspace. In fact, various stretched interpretations may lead to ambiguity, which could result more convenient for persons investigated for cyber-crimes in application of article 22(2) of the Statute, stating the *nullum crimen sine lege* principle.

27. ICTR-98/44D/A, *Callixte Nzabonimana v. The Prosecutor, Judgement* (2014). See also Max Plank, *The complementarity regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the fight against impunity*, 7 Max Planck Yearbook of United Nations Law 591-632 (2003).

### 3.4. *The Regulatory Gap in Article 25*

The article 25 of the Rome Statute determines the individual criminal responsibility, so it seems legit to wonder if this provision could serve the purpose of establishing responsibility of individuals engaged in criminal acts through social media or, broadly, through cyberspace.

The Court interpretation about this disposition has led to the introduction of the concept of *indirect perpetration*, through which the difference between principal liability and accessorial liability has been set. Applying this concept to a case of crime co-perpetration, the Court went beyond the literal meaning of *control over the crime*, extending it to *control over the organization*[28], this in order to establish the liability on multi-level crime with an organized apparatus and structure. However, the statement of article 25 (1) by which «the Court shall have jurisdiction over natural persons pursuant to this Statute» does not explicitly cover also the liability of corporate bodies which might be involved in commission of crimes.

The debate for the inclusion of *juristic persons* within the Statute was taken up by the French delegation, but it has seen the objection of some Romano-Germanic States, claiming that many of the signatory States did not contain any provision relating to legal entities; for this reason it wouldn't have been appropriate to include such element in the provision. So, the French demand could not have been embodied due to non-consensus[29], and this not only reduced the jurisdictional scope of the Court, but also left a regulatory gap about corporate bodies liability. And this gap reverberates on the application of the whole Statute.

Nevertheless, in article 25 (3) (c) the responsibility for the *purpose* of: i) *aiding*, ii) *abetting*, or iii) *otherwise assisting* the facilitation of a crime seems to fall within the jurisdiction of the Court, but the meaning of these mentioned conducts still has to be defined. Since the Court has not yet specifically ruled about the elements of *aiding*

28. ICC-01/04-01/07, *Germain Katanga v. The Prosecutor*, *Judgement* at para 500 (2018).

29. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the establishment of an International Criminal Court*, A/CONF.183/2/Add.1 (1998).

and *abetting*, the interpretation of this Article is basically led by other tribunals' ruling.

Firstly, we can notice that the word *purpose* inside the disposition has the function of emphasizing the role of a strengthened *mens rea*[30]. This goes along with the *obiter dictum* set out in *Lubanga case*[31], which states that if the liability establishment of a perpetrator requires substantial effect, then the acts of co-perpetrator must amount to something more than a substantial effect.

Secondly, it is fundamental to specify the meaning of *actus reus*, in order to understand its role in cases of *aiding* and *abetting*. One of the essential requirements of *actus reus* is that a conduct should have had a substantial effect on the facilitation of a crime. Moreover, the *Tadic appeal judgement*[32] added also the element of *specific direction*, which requires that the act must be specifically directed to assist, encourage, or lend moral support in perpetrating a crime. This element has been later upheld also in the *Perisic Case*[33].

Then, since the terms *otherwise assist* work as an umbrella to encompass any other form of assistance to crime[34], other than the already mentioned forms, the case of providing any kind of platform through which crime could be somehow facilitated[35] might fall within this disposition. Nevertheless, since the ambiguity of the terms and the various rulings about them, it is a difficult challenge to effectively prove conducts of aiding or abetting. And this challenge becomes even harder when it comes about setting the liability in cases where such conducts took place in a complex context like cyberspace.

Finally, the plain reading of article 25 (3) (d) suggests that the key focus must be on the knowledge, the intention and the sharing of a common intent. If critically analyzed, this provision does not seem

30. ICC-01/04-01/10-465-Red, *The Prosecutor v. Callixte Mbarushimana, Judgement* (2011).

31. ICC-01/04-01/06-2842, *The Prosecutor v. Thomas Lubanga Dyilo, Judegement* (2012).

32. See ICTFY-94/1/AR72, *The Prosecutor v. Duško Tadic,* International Criminal Tribunal for the Former Yugoslavia (1996).

33. See ICTFY-04/81/A (cited in note 21).

34. See M. Klamberg, *Commentary on the Law of the International Criminal Court* (cited at note 22).

35. The author intends to point out the liability of administrators and supervisors on groups created on social media.

to be suitable for matters involving cyberspace, because individuals using social media may easily have different intentions from the actual crime perpetrator. However, the element of knowledge could be sufficient to establish responsibility for a kind of indulgence in core criminal activities. So, setting up this kind of liability on the basis of knowledge, giving less emphasis to common intention, might be helpful for the prevention of core crimes.

### 4. *Introduction to Genocide and to Genocide Incitement*

The term *Genocide* was first coined by Raphael Lemkin, after World War II, as the "massive destruction of a nation or an ethnic group"[36]. The legislative definition of the term is currently given by article 6 of the Rome Statute, which states as it follows:

> For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

It is not necessary for this destruction to take place in a single moment, since it can also be committed in different stages, with the same purpose of annihilating the oppressed people[37].

After the Nuremberg trial, when the term was used for the first time in a Court, every international criminal court statute contains nowadays provisions to prevent genocide.

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36. Raphael Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government. Proposals for Redress* at 79 (Carnegie Endowment for International Peace 1944).

37. See *ibid.* at 80.

It is necessary to cite art. 25 (3) (e) of the Statute, which condemns as criminally responsible and liable for punishment a person that "in respect of the crime of genocide, directly and publicly incites others to commit genocide". By the joint reading of these articles, it appears how the two crimes are intimately connected to each other despite it is not necessary for the crime of incitement to be committed that the genocide occurs. In fact, some scholars assume that it is unlikely to expect a civilian population to turn violent and to keep such behaviours on its own. Instead, it is often the result of a process of manipulation that exploits hatred and superiority complexes[38].

In the 21st century this manipulation process is facilitated by social media, which provide a wide reach for the multitude of costumers using them. Unfortunately, this also helps the targeting of oppressed groups, whose information can be easily tracked down even by the exposition of a single member account.

### 4.1 *Incitement to Genocide*

Incitement to commit genocide is arguably an inchoate crime, that in common law systems can be defined as "crimes [] that do not require the completion of a harmful act in order for criminal liability to be assigned"[39].

In other words, it means that whilst for the crime of genocide to be committed it is necessary that one of the material conducts described in article 6 of the Rome Statute are realized, for the purpose of art. 25(3), (e) genocide does not have to occur for a defendant to be convicted for incitement but must be met the specific requirement of the incitement conduct. Brendan Saslow wrote that "[t]o make a conviction, a criminal chamber must find the accused intended to perpetrate direct and public incitement to commit genocide, and perpetrated action that constitutes direct and public incitement to commit genocide"[40]. The court in the Akayesu reminded that "[i]ncitement

38. See David A. Hamburg, *Preventing Genocide: Practical Steps Towards Early Detection and Effective Action* (Boudler Paradigm Publishers 2008).

39. Larry May, *Genocide: A Normative Account* at 189 (Cambridge University Press 2010).

40. Brendan Saslow, *Public Enemy: The Public Element of Direct and Public Incitement to Commit Genocide*, 48 J Int'l L 417, 420-421 (2016).

is defined in Common law systems as encouraging or persuading another to commit an offence"[41]. But as mentioned above, the crime of genocide is so serious that the "incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator"[42].

Art. 25(3) (e) also requires the incitement to be direct and public. These being the core features of the crime, they will be analysed in the next paragraphs.

#### 4.1.1. *Direct Incitement*

Unlike generic instigation, which may be "expressed or implied"[43], it seems that incitement can only be appreciated as an active and direct behaviour. This can be argued by analysing some of the most important cases decided by international criminal courts, such as the Nuremberg trials and the Akayesu case.

In the former, the judges found Hans Fritzsche, Reich Ministry of Public Enlightenment and Propaganda, not guilty of incitement to genocide because "his speeches did not urge persecution or extermination of Jews" [44], although they were extremely racists. In the latter, the Trial Chamber explicitly addressed that "the direct element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement"[45].

The Akayesu case is also relevant because it underlines the distinction between a mere instigation and incitement. As the court clearly states "the form of participation through instigation stipulated in Article 6 (1) of the Statute, involves prompting another to commit an offence; but this is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator"[46].

41. ICTR-96/4/T, Trial Chamber, *Prosecutor v. Jean Paul Akayesu* at para 555.
42. *Id.* at para 562.
43. ICTY-IT/95/14/T, Trial Chamber, *Prosecutor v. Thimohir Blaškić* at para 270.
44. International Military Tribunal, *United States and Others v. Göring and Others*, in *Trial of Major War Criminals* at 584.
45. ICTR-96/4/T *Prosecutor v. Jean Paul Akayesu* at para 557 (cited in note 45).
46. *Id.* at para 482.

As interpreted by the Courts then, it seems that the incitement is direct when it explicitly encourages other people to commit the crime of genocide, not being sufficient an indirect incentive. It needs to be stressed though, that it is not necessary for the crime of incitement to be committed that the genocide occurs.

However, in present days, it would be relevant to consider this requirement in the light of modern technologies, thus potentially considering also indirect elements in the interpretation of incitement. As a matter of facts, the ways to communicate indirect messages through social media are increasing, and given that the directness of the incitement cannot be lacked for the perpetration of the crime, the new challenge for present day jurisprudence is to define to what extent a behaviour on social media must be active for the commission of incitement. The impact of social media in today society cannot be concealed, and these new aspects must be taken into consideration for a proper fight against genocide.

#### 4.1.2. *Public Incitement*

Beyond the element of direct incitement, the crime under article 25 (3) (e) could be committed only if the requirement of public incitement is satisfied, too[47]. The definition of this element has not been yet definitely clarified despite it has been matter of concern in important

47. See William Schabas, *Genocide In International Law: The Crime Of Crimes* at 396 (Cambridge University Press 2nd ed. 2009); ICTR 05/88/A, *Prosecutor v. Callixte Kalimanzira*.

judgments as *Akayesu*[48], *Niyitegeka*[49], *Muvunyi*[50], *Nahimana*[51] cases. On the bases of these decisions, in 1996 the International Law Commission it its Yearbook wrote that:

> [t]he indispensable element of public incitement requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large. Thus, an individual may communicate the call for criminal action in person in a public place or by technological means of mass communication, such as by radio or television[52].

So, it seems that incitement is supposed to be public when it is made in person to a number of individuals in a public place or through mass media[53]without any other specific requirement in terms of qual-

48. See Amann D. Marie, *Prosecutor v. Akayesu Case ICTR-96-4-T*, 93 (1) Am J Intl L 195 (1999) (the first case under an international tribunal to ever convict someone of genocide as defined under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and moreover, the first case to hold that rape and sexual assault may constitute acts of genocide, concerned Jean-Paul Akayesu, the former Bourgmestre (mayor) of Taba Commune, who stood trial for allowing, promoting, and ordering the killing and rape of individuals seeking refuge at Taba Commune offices. The prosecution charged Akayesu with direct and superior responsibility for genocide; incitement to genocide; crimes against humanity for acts of extermination, murder, torture, rape, and other inhumane acts; and war crimes for acts of violence to life and outrages upon dignity. In 1998, an ICTR Trial Chamber found Akayesu guilty of genocide; incitement to commit genocide; and crimes against humanity for acts of extermination, murder, torture, rape, and other inhumane acts; but the Trial Chamber found Akayesu not guilty of complicity in genocide and war crimes. The Trial Court sentenced Akayesu to life imprisonment. In 2001, the ICTR Appeals Chamber rejected Akayesu's appeal).

49. See-ICTR 96/14/T, Trial Chamber, *Prosecutor v. Eliézer Niyitegeka* at para 431.

50. See-ICTR 2000/55A/T, Trial Chamber, *Prosecutor v. Tharcisse Muvunyi*, *Judgment* at para 501.

51. See-ICTR 99/52/A, Appeals Chamber, *Prosecutor v. Ferdinand Nahimana, et al., Judgment*.

52. International Law Commission, Yearbook of The International Law Commission at 22 (United Nations Publication 1996). available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf (last visited 29 November, 2020).

53. See-ICTR 96/4/T, *Prosecutor v. Jean-Paul Akayesu* at para 556 and n 126. See Brendan Saslow, *Public Enemy: The Public Element of Direct and Public Incitement to*

ity and quantity of the audience. In *Muvunyi* case the first Chamber of International Criminal Tribunal for Rwanda affirmed that:

> [t]here is no requirement that the incitement message be addressed to a certain number of people or that it should be carried through a specific medium such as radio, television, or a loudspeaker. However, both the number and the medium may provide evidence in support of a finding that the incitement was public[54].

Accordingly to these statements, it is already clear that the criteria to determine the publicity of the incitement are highly uncertain and questionable. This flexible approach allows the courts to appreciate the peculiarities of the case but on the other hand does not ensure consistency and predictability which are fundamental principles in criminal matters. Moreover, considering that the crimes under art. 25 (3) (e) is a inchoate crime, it does not matter if the incitement conducts to the perpetration of the crime of genocide. So, despite in same situations it was considered as a presumptive element[55], should not be considered decisive[56] (or strictly, should not be considered at all) if the conduct of incitement reached its aim or not[57]. So, it would be an error to assume the element of publicity on the basis of the concrete commission of the crime, because the effectiveness of the conduct is not a required criterion.

In order to better evaluate the elements of publicity, in the Akayesu case was considered if the audience was selective or not. On these basis Akayesu was judged liable because of the place and the number of persons reached through his massages and the media used[58]. On

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*Commit Genocide*, 48 J Int'l L 417 (2016).

54. See-ICTR 2000/55A/T, *Prosecutor v. Tharcisse Muvunyi* at para 862 (cited in note 51).

55. See-ICTR 99/52/A, Trial Chamber, *Prosecutor v. Ferdinand Nahimana, et al.,* at para 1029.

56. See-ICTR 99/52/A, Appeals Chamber, *Prosecutor v. Ferdinand Nahimana, et al.,* at para 709.

57. See Saslow, *Public Enemy: The Public Element of Direct and Public Incitement to Commit Genocide* (cited in note 54).

58. See MICT 12/29/A, Appeals Chamber, *Prosecutor v. Jean-Paul Akayesu* at para 52. See ICTR 96/4/T, *Prosecutor v. Jean-Paul Akayesu* at para 556 and n 126

the other hand, on the basis of the same elements *Nahimana,* in the so called "Media Case", was considered not accountable for incitement in places where just selective group of people were present[59] but being judged liable for other conducts.

All these applicative uncertainties could be particularly problematic regarding the application to a future "online social media case". Platforms like Facebook have private groups or chats features that can accommodate up to 250 members at once[60], while Telegram has bumped up the member limit to 200,000. It would be interesting to suppose if these platforms were considered public place *in re ipsia* on the basis of the intrinsic aim of the social network to share contents and ideas and if the *selectivity* of online groups were considered relevant.

### 4.2. *Genocide Incitement and Social Media Challenges*

As clarified in the previous paragraphs the crime under art. 25 (3) (e) must meet the requirements of active, direct and public incitement. The international courts have already faced the issue of considering the commission of this crime through media (as television and radio) recognizing the amplifying force and effectiveness of these instruments. Today courts do not have already behind them cases with involvement of social media as the most common online platforms; but it is easy to think that in the next future these cases will be considered by the courts and that they will arise several questions and doubts in terms of application of the existing legal framework.

First, supposed that a passive behavior is not sufficient, it would be necessary to think if the evaluation of the incitement directness were stressed in cases involving new social media. Some questions would arise as if the mere but voluntary presence of a person in a social group inciting to genocide is sufficient to meet criminal accountability and if passive adherence is considerable enough. Moreover, shall be thought how to determine the threshold of an active behavior in the social media era and if a like or a shared post could be a decisive

59. See-ICTR 99/52/A Appeals Chamber, *Prosecutor v. Ferdinand Nahimana, et al.* at para 862.

60. See Geoff Desreumaux, *Facebook Brings Chats To Groups For Up To 250 Members At A Time*, available at https://wersm.com/facebook-chats-groups-up-to-250-members/ (last visited 29 November, 2020).

element to configure an active conduct. In this regard, must always be considered the difference between instigation and incitement where the latter requests an explicit and direct behavior and incentive to commit genocide crime, a real *call for action*.

Second, the digital era deeply changed sociality and society through social media. New virtual public places have been opened to people all over the world. Just one person can reach with its idea thousands of million persons with one simple post. In this regard, the requirement of public incitement has new ways to express itself. A particular question would arise as if the social media can be considered public places *in re ipsia* quoting their uncountable potential to reach people or if, in same cases, *selective criteria* should be applied[61]. It is not unthinkable that a closed group on a social media could be more "opened" and public as a city square. Moreover, a common affiliation and criminal purpose within a private group does not sterilize the criminal relevance of incitement conducts. In fact, it must be underlined that the effectiveness of the massage and the commission of the genocide are not requested for the perpetration of the incitement.

So, there are still several "open points" in determining which conditions and behaviors could be considered as relevant in the light of the essential requirement of activeness, directness and publicness of incitement in the new technological and social era.

## 5. *Conclusion*

Cyberspace is in the developing stage right now, proving to be a vital and tumultuous development area.

As it was discussed in the first part of this article, the view on the nature of jurisprudence presented by Holland might prove helpful to draft some universal legislation for cyber-related matters: laws and customs governing the cyber environment could find a base and supporting structure as refined legislative instrument, deriving their "moral" and driving force from universally recognized principles rooted in documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights or even

61. See ICTR 98/44D/A, *Prosecutor v. Callixte Nzabonimana* at 380.

common international law principles.. Until that time, periodical revision of jurisprudence will help in creating updated legislation. The analysis of legal documents and provisions makes it clear that those drafted in the pre-internet era cannot be always suitable to adequately help in solving cybercrimes. Furthermore, current provisions of Rome Statue pose challenges to admissibility of a judgment of crimes which are commenced or instigated on the social media platform and relying on the effect doctrine will not be a practical idea, given its uncertainty in international criminal law.

An analysis of the present legal framework suggests that the laws are not fit for the future challenges, and that there is a need for modification in the structure upholding the rule of law and justice, may bring as practical consequence the punishment of internationally relevant cybercrimes. Due to absence of a universal cyber code of conduct, we have seen that article 17 on the issues of admissibility of a case in front of the ICC might be used inappropriately. While testing the effectiveness of article 25, it was indicated that the concept of public incitement lies in a grey area in cases where social media is actively involved. Some high barriers are set for satisfying the mental element (*mens rea*), which would be difficult to prove in the Court if a case concerning liability for crime instigated at social media is analyzed. For example, as said, questions regarding a clear determination of the publicity features are still not addressed by the Court.

Creating a new sphere of jurisprudence and case law governing cyberspace will undoubtedly require time, practical application and scholars' contribution. Customary international law acts as the last resort in the order of applicable tools listed at article 21 of the Rome Statute of the International Criminal Court. So, customary law can only set up the basis for deciding any such matter and might not be helpful to rely on, to its full extent, to reach full justice. This is especially true in the criminal field where, due to the *nullum crimen sine lege* principle, change and evolution of jurisprudence recognizing the adaptation to new fields of law is arduous.

In conclusion, the first steps to ensure more effective legal rules in the cyberspace could be the action of individual nations – perhaps guided and coordinated by the deliberations of international and supernational regional bodies (e.g. the European Union) – that could

arrange laws and principles of great help in leading the way on the path to the framing of a uniform legislation to fight cybercrime.

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