THE ELSA

IE UNIVERSITY

— LAW REVIEW —

VOLUME I

ISSUE I

November 2024

Editorial Board

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EDITORIAL:

ARTICLES:

THESES:

Editorial

Dear Reader,

Before the topics of this Issue will be introduced in this Editorial, we would first like to take a moment to unveil the ELSA IE Law Review, which is now inaugurated through the publication of this Issue. This Law Review was introduced under the newly constituted European Law Students' Association at IE University, at the beginning of the year 2023, addressing the students' need for an academic legal publication within the University. It was decided that the most appropriate way of approaching this task was to constitute a Law Review, under the name of the ELSA IE Organization. Therefore, this Law Review is an Organization independent from IE University, which is run in its totality by the members of the ELSA IE Organization and undergraduate students of IE Law School. This feature gives us the ability to empower students within the Organization by giving them the reins of the Review, where they are able to develop the qualities of leadership and decision-making, while refining their editorial and writing skills by constantly developing valuable feedback for the authors of the Law Review.

In order to ensure that all of our publications are of the highest academic quality, we have established a robust and thorough internal structure of review. Furthermore, in addition to the internal review phases, we are establishing an external network of professionals that contribute their expertise through the peer review process. All of this results in the ability for our Law Review to propose to the legal community refined and reliable legal publications. As our Law Review is just within its first years of existence, we are currently working on the creation of new and diverse initiatives, which would allow even more students and interested professionals to engage with our publication.

The ELSA IE Law Review currently offers three distinct sections in its publications. First, the Articles Section features papers that are exclusively written for and under the direction of the Editorial Board of the Review. The structure and

framework of the Articles is developed in such a way that it allows the authors to explore the topic of their choice in a great depth and detail with the upper limit of fourteen (14'000) thousand words. Secondly, our Notes Section features papers that are written exclusively for the ELSA IE Law Review as well, giving the students the opportunity to contribute to the legal scholarship, while having a more flexible work schedule and a narrower focus. The Notes are limited to seven (7'000) thousand words, covering topics that are particularly relevant in the contemporary legal sphere.

Moreover, the Editorial Board has introduced a further Section, which is devoted to the publication of the highest scoring Theses completed by graduating students of the IE Law School. We believe that it is vitally important to show all of the work that is done within the IE Law School community and therefore we encourage the submission of outstanding Theses for publication in this Law Review. The submitted papers go through a selection and editorial process, as well as an additional external peer review, so that all of the published works are consistent with the values and goals of the Review.

A further element which sets this Review apart is that all of the academic papers published within this and all of the future Issues are comprehensively examined through a peer review process. The completed papers are sent to at least two (2) academics within the relevant field, followed by the full incorporation of the feedback received from their reviews. This further strengthens the reputability of the works published within the Review, and we hope that it will lead to a significant contribution to the discussions that take place within the legal community.

With the publication of the First Issue of the ELSA IE Law Review, we aim to establish an organization which will stand for the promotion of the highest quality of legal academic work, while upholding the most rigorous standards of ethics and integrity for the papers that are published along with the actions of its members and leadership. It should be recognized that while we seek to cover a diverse range of topics and jurisdictions, it is crucial to stay committed to the academic approach of

the ideas explored. We hope to see that such a commitment continues within the following publications across years to come.

We would also like to take this opportunity to express our deepest gratitude for the work completed by the Founder and First Editor-in-Chief, Mr. Jorge Sanjuán Femenía, who is currently pursuing his graduate studies at Northwestern University, in the United States of America. Without his unwavering commitment to set up the Law Review within this institution and the crucial efforts that have been done to lay out the foundations for the ELSA IE Law Review, this and all future publications would not be possible. Therefore we express the recognition and appreciation of contribution to the establishment of this Law Review.

The current Issue covers a range of different topics, starting from a discussion on Affirmative Action within the United States of America, moving the focus to International Criminal Law, Restorative Justice, and ending with two Theses focused on Continental Law covering the topics of Textile Industry of Pakistan, and European Union efforts to prevent disinformation within the Union.

First, Jade M. Toledano opens this Issue with her Article titled *The Gutting of Affirmative Action*, which is focused on the history of the Affirmative Action development and decline within the United States of America. The author explores the idea that while the recent *Harvard* case scrapped the doctrine of affirmative action in its current form, society has not yet achieved the appropriate level playing field for such doctrine to be eliminated.

Next, Alexia Collot d'Escury Ariza develops the discussion on whether the cyber attacks specifically directed against the electrical infrastructure of a country can be considered a war crime under Article 8 of the Rome Statute. This Thesis is especially focused on the ongoing conflict between Ukraine and the Russian Federation, concluding that while the classification of such conduct as war crimes is an existing possibility, there are several obstacles that stand in the way of a definitive conclusion on such an issue.

Thirdly, Carolina Gisela Franco Herrera explores the ideas of implementation of Restorative Justice into the current penal systems within Europe. The author

argues that Restorative Justice "does not have to be implemented in isolation from established criminal justice systems," while highlighting the importance of such an approach at the sentencing and post-sentencing stages of a criminal case.

The Issue further covers the current challenges the Textile Industry is confronted with in light of the proposed amendments to the EU's Waste Framework Directive. Ida Nydelius, in her Thesis explores the consequences that countries such as Pakistan may face as the EU pushes forward the legislation to pursue the green transition.

Lastly, this Issue closes with a discussion by Marie-Therese Burkard focused on the efforts of the European Union to curb the spread of misinformation and disinformation in a highly digitized environment. Specifically, her Thesis explores whether the European Union's Digital Services Act is an appropriate tool to tackle the spread of harmful disinformation on social media within the EU.

While this Issue covers many diverse legal topics and jurisdictions, it is representative of the main aim of the ELSA IE Law Review – the creation of a legal forum where authors can explore various legal issues without being constricted to one particular jurisdiction. We invite you to explore the pages of this publication and hope that you will be inspired by the topics covered within this Issue, to become part of our ongoing dialogue. Whether as a future author or avid reader we will be more than happy to welcome you into our future editions!

Written by

Maksim Kudinov, Nicolò Milanesi and Elektra Sarafopoulou

The Gutting of Affirmative Action: A Failure To the Fair Pursuit of Happiness

Jade Maria Toledano

ABSTRACT

Known throughout the world as the land of the free and home of the brave, The United States of America is recognized as a beacon which is enriched with opportunities for its inhabitants. However, beyond the rose-colored lenses, The United States of America, composed of diverse populations on all spectrums, continues to struggle severely with significant and potentially shattering ideological divides, particularly on issues deemed to be political, such as affirmative action. Affirmative action became a trigger term for opinions from all the perspectives following the Supreme Court's landmark decision in Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023). This ruling reversed long standing precedents, dismantling a system designed to promote educational access for underrepresented minorities, deeming its existence as fundamentally unconstitutional. The decision, critiqued as a setback for Black and Hispanic students, those who have been marginalized in the past of this country, underscores the ongoing struggle for racial equity in higher education institutions. Affirmative action, a policy rooted in addressing historical racial discrimination, is viewed by advocates like the ACLU as essential for creating diverse and inclusive academic environments. This academic Article aims to examine the implications of the Supreme Court's decision through the lens of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, not solely legally, but socially as well. It contextualizes affirmative action within a broader historical and legal framework, tracing its evolution and the legal battles that have shaped its implementation. The analysis of the decision in question underscores the moral and social contract binding American society to uphold principles of fairness and equal opportunity,

especially in the educational sphere. By revisiting key cases and sociological shifts, this paper argues for the necessity of affirmative measures to rectify persistent inequalities and foster a more just society.

INTRODUCTION

The United States is known for being the land of freedom, enriched with opportunities for its citizens by serving as a lighthouse beacon for hope of the American Dream. An emblematic melting pot of cultures, languages, and nationalities that endow the U.S. populace with a mosaic of differing opinions—at least, that is what the American people should be taking away from the variety of perspectives available to them at their fingertips. Instead, the country's people divide themselves based on personal ideologies regarding a wealth of topics, one of the most recent matters in question being the latest ruling on affirmative action by The Supreme Court of the United States and its potential constitutionality in the Summer of 2023. As best said by The New Yorker, "The history of affirmative action is woven into the history of American race relations, and the history of American race relations is woven into the history of America."[1]

On June 29, 2023, the United States Supreme Court decided on *Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023),* reversing the standing precedent on affirmative action and thus annulling a system created to provide underrepresented individuals with a path to higher education, in the name of colorblindness.[2] According to a New York Times article, said decision of the Harvard Admissions case is a deafening affront to Black and Hispanic students who aspire to attend a competitive university; statistics provided to the New York Times

[1] Louis Menand, The Changing Meaning of Affirmative Action, The New Yorker, (Jan. 13, 2020), https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action

[2] Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023) 600 U.S. ___ No. 20-1199. Although this case is the catalyst for this legal Article, it is a landmark ruling that will be used to uphold future lawsuits; regardless, this case will be analyzed in further detail along the journey of this Article. For more information about this case in terms of specifics, reference: Students for Fair Admissions Inc. v. President & Fellows of Harvard College, 600 U.S. ___ (2023),

by the United States Department of Education shows the inequity of attendance of minorities into colleges with less than a twenty-five percent acceptance rate.[3] The decision will dramatically reduce the diversity of incoming classes at selective institutions, creating a domino effect in various sectors across society. Affirmative action is a societal and legal issue that addresses the bigger picture—the need to recommit to greater equity, quality, and accessibility to American higher education for everyone.

In the words of The American Civil Liberties Union (ACLU), affirmative action is a race-conscious policy which aims to address the American track record of racial discrimination by responding to "the structural barriers that have denied underrepresented students access to higher education. Race-conscious admissions practices allow universities to consider a student's race as one factor in the admissions process in order to help create a diverse student body that enriches the educational experiences of all students."[4]

As can be inferred from the ACLU's definition of affirmative action, in order to move forward in creating a just society, it is necessary to acknowledge the country's faults and historical shortcomings to ensure that policies in the modern era are enacted and *protected* to guarantee the highest possible fairness in the land of liberty. Due to the COVID-19 pandemic, the Supreme Court of the United States had not readily convened[5] to illustrate their opinions and dissents as they did in *Students*

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[3] Richard Arum, For Most College Students Affirmative Action Was Never Enough, The New York Times, https://www.nytimes.com/interactive/2023/07/03/opinion/for-most-college-students-affirmative-action-was-not-enough.html

[4] The American Civil Liberties Union was created after World War I. As terror sweeped the nation, many times the liberty of citizens paid the price. The creation of this apolitical organization resulted due to the 1920 "Palmer Raids," in which Attorney General Mithcell Palmer ordered the arrests of thousands of people without warrants and bypassed all their constitutional protections which catalyzed the events which led to the creation of the ACLU. For more information, reference: aclu.org/news/racial-justice/what-you-need-to-know-about-affirmative-action-at-the-supreme-court

[5] In the following link, CNN Senior Supreme Court Analyst Joan Biskupic speaks about the monumental historic moment that trancurred that moment in the courtroom. Biskupic is an American journalist who analyzed the surroundings of the courtroom live on television; she explained how since the pandemic of COVID-19 rocked the world, the judges had not been physically present to discuss and announce the transition of legal precedent. For more information, reference: https://www.cnn.com/2023/06/29/politics/affirmative-action-supreme-court-ruling/index.html

for Fair Admissions Inc. v. President & Fellows of Harvard College (2023).[6] The historical importance and significance of the new Court Justices coming together for the first time to cement this new shift on the constitutionality of affirmative action is not lost in the court-written opinion as the divided nature of the court is all but evident.

In the Court's reasoning for the decision to forgo the utilization of racial backgrounds in college admissions in *Harvard*, therefore bypassing the *Grutter* decision which will be elaborated upon later in these pages, there is a distinct recognition that was made: the Fourteenth Amendment's equal protection clause is ambiguous, so it cannot—and should not under any circumstance—be used for racially-conscious remedies which, in turn, create racial balancing in higher education institutions; that outcome would be concluded to be unconstitutional according to the opinion of Chief Justice John Roberts.[7] Racial balancing refers to the concept that a school should admit students on an equal scale of the demographics of their community, according to The National Constitution Center.[8] The majority opinion written by the Justices claim that the generality of *equal protection under the law* is not specific or focused enough to allow for the reconciliation of that guarantee with affirmative action, and instead defies its implications on the general scale when compared in the wider scope of society. The same thought process was first established in *Grutter v. Bollinger* (2003).[9] In *Grutter*,

[6] *Supra* note 2.

[7] *John G. Roberts, Jr*, Oyez, https://www.oyez.org/justices/john_g_roberts_jr (last visited Jun 27, 2024) As best described by Oyez, Roberts has been a main character in the legal sphere on the national level in the United States: "John G. Roberts, Jr. has advocated and implemented a refocusing of the Supreme Court to an era of judicial restraint and deference to the existing power structure in American politics… In 2005, Bush originally nominated Roberts to fill the seat left by Sandra Day O'Connor when she announced her plans to retire, but after Chief Justice Rehnquist died, Bush withdrew his nomination in order to nominate him to Chief Justice of the Supreme Court of the United States instead. During his confirmation hearings, the Senate responded very well to his kind Midwestern demeanor and his promise of refocusing the court into a limited role of interpreter, not creator, of laws. The Senate confirmed his nomination, making Roberts the youngest Chief Justice in 100 years. Roberts remained a political pragmatist on the bench, a persona he developed working in the executive branch under Republican leadership."

[8] National Constitution Center, Is racial balancing in schools constitutional?, National Constitution Center, https://constitutioncenter.org/media/files/racialbalance.pdf

[9] *Grutter v. Bollinger*, 539 U.S. 306 (2003). Please reference: https://www.oyez.org/cases/2002/02-241

Justice Sandra Day O'Connor[10] delivered the majority opinion of the Court, writing that the University of Michigan's attempt at filling a certain percentage of minority applicants would "amount to outright racial balancing, which is patently unconstitutional."[11] This case, although will be elaborated upon later in this Article, is a legal cornerstone which dismantles the Harvard decision. In the case of *Grutter,* affirmative action was upheld under the emphasis that the measures in question are intended to be solely temporary in order to adequately rectify historical injustices and inequalities. Affirmative action is meant to be in place until the playing field is sufficiently addressed; however, this mark has not been reached due to unwavering and significant racial and economic inequalities.

The present ruling in the *Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023) (the "Harvard Admissions case")* stems from the reasoning that, at the core of the Constitution, the guarantee of equal protection is an actual promise that the government is responsible for treating all citizens equally,

[10] Sandra Day O'Connor: First Woman on the Supreme Court, The Supreme Court of the United States,
https://www.supremecourt.gov/visiting/exhibitions/SOCExhibit/Section2.aspx#:~:text=She%20helped%20repeal%20a%201913,jointly%20held%20with%20their%20spouses.
("Having already served in the three branches of state government, O'Connor was about to make an even more profound mark on history. During his 1980 presidential campaign, Ronald Reagan made a commitment to appoint a woman to the Supreme Court of the United States. When Justice Potter Stewart retired in 1981, President Reagan fulfilled that promise by nominating O'Connor, noting that she was a 'person for all seasons.' The Senate unanimously confirmed her appointment on September 21, 1981, and four days later, she took her seat on the Bench. During her nearly 25 years on the Court, Justice O'Connor was often at the center of the Court's deliberations. While personally disdaining the label 'swing vote,' O'Connor frequently found herself referred to as such by the press because her pragmatic approach to judging sometimes resulted in her vote being cast among the majority in 5-4 decisions. She authored 676 opinions in her career, 301 of which were the Opinion of the Court, touching on a wide range of issues."

[11] Although this reasoning will be further analyzed throughout this writing piece, this is the first time that the logic seems to be unbalanced in terms of the privileges that different ideologies establish as constitutionally acceptable. With both of these cases mentioned, *Grutter, supra footnote four,* and the current catalyst, the *Harvard* case, the mentality of racial balancing being unconstitutional is established by creating a sense that the minority individuals in the U.S. should not receive more assistance while non-minority groups are already on an uneven playing field to begin with. However, the *Grutter* decision served to cement the fundamental necessity of affirmative action thus ensuring its longevity for the foreseeable future, until it's gutting by the Harvard case in 2023. This will be further discussed later on, but for more information of the racial balancing opinion established by O'Connor, reference here: https://teachingamericanhistory.org/document/grutter-v-bollinger-2/

regardless of their race, religion, sex and sexual orientations, and nationality.[12] In the fourth and final point addressed by the SCOTUS, the Fourteenth Amendment was called into question along with Title VI of the Civil Rights Act of 1964, which illustrates the prohibition of any person being discriminated against based on race.[13]

This Article aims to interpret what is believed to be the true intention, or rather, the interpretation the Court has now backtracked upon but should have upheld of the Fourteenth Amendment and the Civil Rights Act of 1964, in order to outline the necessity to create diverse mechanisms to aid marginalized groups and thus contextualize the meaning of them in efforts to justify the not-yet-ending necessity of affirmative action. The structure will be constituted by a timeline of the landmark cases which created the regulation of strict scrutiny in the attempt to conclude with a fundamental analysis of the true validity of the decision taken by the Court, taking into consideration the current state of the country and historic sociological eras.

The U.S. is built off the blood, sweat, tears, and sacrifices of all marginalized and non-marginalized groups in the country, thus, the social contract binding society together morphs into a moral obligation to establish pathways for everyone's equal opportunity for success. According to the George W. Bush Institute,[14] one of the most marginalized groups of the U.S., immigrants, are part of the foundational structure of the country. Immigrants arrive in the U.S. with an aspiration to seek a better life, chasing the American Dream, whilst enriching the cultural fabric, even when confronted with severe nationalist sentiments.[15] The American Dream is what many

[12] As the US cements itself on the case law provided by other courts, Justice Sandra Day O'Connor (*See* note 9)held monumental importance as the first woman in the United States Supreme Court. She held conservative ideals, which are reflected in the statements echoed above and in the Harvard Admissions case. The sentiment that the government had to disregard race was written in the 1990 case of *Metro Broadcasting, Inc. v. FCC* (Metro Broadcasting v. FCC, 497 U.S. 547 [1990]).
For more information, please reference both:
https://www.law.cornell.edu/supct/html/89-453.ZD1.html#:~:text=At%20the%20heart%20of%20the,1073%2C%201083%20(1983).

[13] *Supra* note 2.

[14] Carlos Gutierrez, Immigrants Put America First: In Coming Here, They Affirm Our Values, The Catalyst, https://www.bushcenter.org/catalyst/democracy/gutierrez-immigrants-validate-values#:~:text=The%20United%20States%20is%20a,and%20making%20our%20democracy%20stronger.

[15] *Id*.

wish for themselves and their families; an opportunity for growth in a society that will afford them the chance to be a fraction of a diverse and inclusive society in which basic staples are afforded for citizens, like financial stability and education. The American Dream is a symbol–a metaphoric constellation of wishes for everyone: it can symbolize money, safety, or simply a place where such dreamers think they will get the opportunity to seek one's true potential instead of hitting a glass ceiling, a tragic illusion of opportunity. However, the reversal of affirmative action in educational institutions makes it increasingly difficult for underprivileged students to enter selective colleges, which can be observed through the following two data sets, thus hindering the fair pursuit of a better future, *of a better tomorrow*.

In an observational study conducted in Texas circa 2004 after the 5th Circuit Court's decision in *Hopwood v. University of Texas* (1996),[16] the primary conclusion enhanced the idea that "the [end of the] use of race in college admissions in Texas [...] immediately impacted the application behavior of minority students."[17] That

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The U.S. is often referred to as a melting pot–it was even referred to as that in the first paragraph of this note. That is a true statement; the country was founded upon immigrants, yet over two centuries later, a nationalist and patriotic sentiment surrounds immigrants in a negative connotation. As described by The George W. Bush Institute, "even though nearly all Americans are descendants of immigrants, [Americans] have often had a tempestuous relationship with newcomers. Whether because of nationalist sentiment, xenophobia, or simply fear of change, our country has at times enacted policies that have run contrary to American ideals. The Chinese Exclusion Act, the 1924 Immigration Act, or quota-based laws restricting immigration from certain parts of the world, are just a few examples of reactionary policies that gained wide support in the past. Today we are living through a resurgence of these sentiments. At a time of rapid change driven by technology, globalization, and demographics, there are many Americans who are directing their fears toward immigrants." There is a clear recognition that marginalized groups, such as immigrants, are part of the backbone and foundation of the U.S., yet these immigrants are discriminated against.

[16] Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996)

[17] It is important to note and understand the specific statistics that enhance the conclusion that ending affirmative action does indeed lower minority applicants' admissions. In the study conducted for statistics, it was found that Hispanic students applying to college dropped by approximately 1.6 percentage points whilst that of African-American students dropped by 2.1 percentage points; the conclusion parallels the end of affirmative action in Texas due to *Hopwood v. University of Texas* (1996) not affecting the application of white students. This conclusion of affirmative action playing a strong role in the applications of these minority students is also reflected through the plan passed by the Texas State … Legislature. The House Bill 588 of 1997, also commonly referred to as the "Top 10% Rule," guaranteed students who graduated in the top ten percent of their high school class admission to any public college in Texas. After this bill was passed in the southern, heavily

specific study observes the behavior of student applications in line with the following data points provided by The U.S. Department of Education via The New York Times which analyzes the actual statistics regarding admissions. The data in the aforementioned article accentuates the current demographic state of minority admissions into selective institutions, in which "the majority of Black and Hispanic students attend universities that accept more than three-quarters of their applicants," since according to college admission rates of 2021, less than five percent of minority students who applied to institutions with less than a twenty percent acceptance rate were actually accepted.[18]

The lack of appropriate measures to further promulgate the promise of *Brown v. Board of Education* (1954)[19] is an issue that legislators and politicians must take action upon, and rectify in a timely and adequate manner, in order to render a better future for the next generation of young adults entering positions entrusted with power and authority to mold the tomorrow. The true meaning of *Brown* in today's age is that of a symbol of the continuing disparities in educational access across the nation. According to sixty-five members of the United States Congress, "*Brown* does not stand for an absolute commitment to 'colorblindness.' Rather, the promise of *Brown* has always been about undertaking affirmative efforts to reduce racial isolation and promote educational equity."[20] Unfortunately, not too long ago, there was a time in the country when students of different skin colors could not be

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immigrant-population based state, the percent of minority students who applied to college increased significantly according to the study.
For more information, reference: Lisa M. Dickson, *Does ending affirmative action in college admissions lower the percent of minority students applying to college?,* Volume 25, Issue 1, Economics of Education Review, Pages 109-119 (2006).

[18] *Supra* note 3.

[19] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (*See* note 49)

[20] Presented is a memorandum style brief presented by Robert C. "Bobby" Scott, a member of the 118th United States Congress. Along with him, another sixty four members of congress joined him as *amici curiae* supporting respondents in the conclusion reached within this brief. This specific excerpt from the submission showcases the fundamental promise for the promotion and fostering of educational equity, which seems to be a priority that has been lost in favor of other factors in the constitutional and societal juristic hierarchy. For more information, reference: https://www.supremecourt.gov/DocketPDF/20/20-1199/232377/20220801142100516_20-1199%20aNd%2021-707%20Amici%20Brief.pdf.

taught in the same classroom, which the United States judicial system permitted and reinforced as legal under *Plessy v. Ferguson* which gave rise to the doctrine of "separate but equal."[21]

The deep wound created by past injustices based on the color of one's skin or socio-economic status must be mended. Without affirmative action, there is a weaker legal precedent that forces and enshrines the obligation upon the U.S. population to commit to fostering a more equitable workforce and educational field because as referenced in the surveys' data previously mentioned, the wind to the sails of students dreaming of higher education is cut short because the of the lack of legal precedent standing behind them as a guardian angel.

It is of imperative importance for there to be a bipartisan consensus reached by all citizens in order to work together towards a future that can afford all children an equal chance to succeed, regardless of the color of their skin, their parents' socioeconomic status, or their creed. In order to foster that, constitutional precedents and the law of the land must be respected and abided by to ensure a fair system, while additionally being interpreted in such a way that ensures an understanding in alignment with the needs of the society at the time of judgment. Although at first glance one may believe that the previous notion aligns more with colorblind holistic approaches to admissions, it actually orients itself to solve and compensate for past inequities such as Jim Crow laws[22] and discrimination against minorities. These inequities allowed for a social hierarchy to be established, a system that goes against America's creed of individual liberty and freedom which is not compliant with the ideal of individual autonomy, nor is it a respectful and rich legacy to leave the

[21] Plessy v. Ferguson 163 U.S. 537 (*See* note 41).

[22] History.com Editors, Jim Crow Laws, HISTORY (Feb. 28, 2018), https://www.history.com/topics/early-20th-century-us/jim-crow-laws.

The notion of Jim Crow laws are those which were imposed following the freeing of slaves in the American Southern States, The were constituted as a collection of State and local regulations and statutes enacted that even without slavery, continued to racially segregate and discriminate against African Americams. These measures consisted of "separate but equal" facilities in which White Americans and African Americans could not share the same schools, transportations, and services. This discrimination was also institutionalized by systemic limits put to African Americans in the political system which barred the proper democratic values and procedure to proceed.
(*See* note 48).

children who now grow up to be the leaders of tomorrow. Creating this harsh, segregated, and unequal playing field based on the color of one's skin only establishes the true and fundamental inconsistency that current policies have with the Declaration of Independence, that although the the pyrrhic truth is self-evident about all being equal, there is no such veracity about the existence of the fair *pursuit of happiness.*

AFFIRMATIVE ACTION'S JOURNEY IN JURISPRUDENCE AND LEGISLATION

In order to be able to analyze the debated unconstitutionality or societal validity of the latest SCOTUS precedent on affirmative action, it is of the essence to be cognizant of previous landmark jurisprudence which have left a lasting impression on case law regarding the admissions criteria of selective higher education institutions. Starting from the origins of the country in 1776, to 2023, affirmative action stems from the gradual implementation of the blessings of liberty, which were however broken at intervals as a society and justice system. As a common law system, the gradual incorporation and affirmation of such laws and case judgements that rule in favor of creating more equality in American society is contested by the *Harvard* case, a blatant reversal of all progress which will now be organized chronologically. This upcoming segment of the Article aims to create a timeline for a historical contextualization of differing pieces of legislation, jurisprudence, and more that will at length, aid the final analysis to understand the disputed legality of the *Harvard* case.

I. The Declaration of Independence (1776)

1776, a time of turmoil that became a pivotal point in the history of the western world. Aggrieved European settlers' struggle for independence came from the breaking point caused by the treatment that the English Crown had with them from afar. The iconic line which is illusioned in the title of this Article, of *a* [*fair*]

pursuit of happiness, was coined in The Declaration of Independence (1776), as part of a larger proclamation on the heavily guarded parchment which presented numerous grievances by the people against the monarchy. The Second Continental Congress adopted *the Declaration*, which was drafted by some of the founding fathers of The United States of America with the ideas of the Enlightenment paving its way, and revolutionizing the democratic republics foundation.[23] In this Declaration, it is written that "we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[24]

This is where the derivation of this Article's title comes from. Although The Declaration of Independence legally has no binding effect whatsoever, it resembles more of a patriotic sentiment that the country cherishes and respects to the highest standard as it is the document that purely recognizes freedom, liberty, and the pursuit of happiness to its highest extent. As the United States has progressively become further politically polarized,[25] there is a remnant of ardor to upkeep certain promises that the country was founded upon, one of them being a *fair and equal* pursuit of happiness for all which must be perpetually fought for. *The Declaration* says that all men are created equal, and that equality has slowly but surely been expanded to include groups that were then discriminated against; that is where

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[23] Matthew Wills, Who Wrote The Declaration of Independence?, JSTOR, (July 2, 2016), https://daily.jstor.org/who-wrote-the-declaration-independence/

[24] Declaration of Independence: A Transcript, National Archives, (July 4, 1776), https://www.archives.gov/founding-docs/declaration-transcript

[25] Andrew Daniller, Americans take a dim view of the nation's future, look more positively at the past, Pew Research Center, (April 24, 2023), https://www.pewresearch.org/short-reads/2023/04/24/americans-take-a-dim-view-of-the-nations-future-look-more-positively-at-the-past/

According to Pew Research Center, the future of the nation seems dim in the eyes of the citizens. A conclusion to a recent study showed that Americans believe multiple factors of their society will steadily decline by the year 2050. Specifically, what is referenced in this Article is that there is already a general consensus among the public opinion that country is politically divided, and that sentiment and division will grow deeper by the year 2050, as will the divide in socio-economic terms which is known to be a a debated political issue in terms of taxation and over national wealth and debt. In this research analysis deduced by Daniller, the surveyed Americans also came to the conclusion that the economy will grow weaker in trend with the decline of the U.S.'s status as a powerful nation, also referred to as a super country, in international relations.

fairness comes in. The term fairness is completely subjective, and so is the concept of happiness– it is but an abstract concept, but the fair pursuit of happiness is the idealistic standard upon which society should revolve around– to work in an effort to reach that ineffable pinnacle.

Certainly, there are codified inalienable rights for all members of the country, but all of them, especially those that are taken away from those who are historically most vulnerable, must be continuously fought for at each strike against them in order to ensure a true representation of the people's will, alongside equal protection and opportunity. The sensibility of the founding fathers to include such a point in their beloved declaration of freedom, is to be interpreted contextually in an evolving manner, in which nowadays, that fair pursuit of happiness is expanded to everyone, not solely to those who they had in mind. For instance, since the conception of the happiness pursuit being coined in the Declaration of Independence, the United States' suffrage has expanded to include all free people and in consequence per the same rationale or logic, happiness is a commodity that should be afforded to all as well. That is truly the charm of the law, it is alive and ever-changing with the times, adapting to the needs of those who adhere to its societal contract. Affirmative action should be considered a new aspect of that clauses' scope afforded to all for the pursuit of happiness; it is fundamentally against the principles on which the nation was built on, to not implement certain measures to maximize general welfare, liberty, and consequently, happiness. The idea that *all men are created equal* calls for equality, but there must be equity first. There is an ongoing debate whether affirmative action does not in fact honor the idea of equality among men because of the differing treatment when in reality, equality among men is a goal we must still work towards reaching. Marginalized groups to this day still are not conceded the same prospects in rights as essential as education, and other vital areas of human development, such as employment.[26] Affirmative action focuses on equity and

[26] Harry J. Holzer, Why are employment rates so low among Black men?, Brookings, (March 1, 2021), https://www.brookings.edu/articles/why-are-employment-rates-so-low-among-black-men/
("For decades, a research literature by social scientists has documented earnings and employment gaps between Black and white Americans, and between Black men and other men more specifically,

balancing out historical injustices in order to truly honor the concept and ideal of all men being created equal.

II. The Constitution of the United States (1788), XIV Amendment (1866)

Advancing ahead to years later, the U.S. had gained their independence from the British monarchy claiming ill treatment by the Crown, and fighting for their lawful equality, thus the legendary *no taxation without representation*.[27] In consequence, after trial and error with their first constitution, The Articles of Confederation,[28] the people settled and ratified the arguably oldest Constitution in the world today, the U.S. Constitution.[29] As the father of the Constitution, James Madison carefully crafted the preamble with similar values presented in The Declaration of Independence.[30] The preamble of the supreme law of the land

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and analyzed their causes. In my view, the major causes of lower employment and earnings among Black men than other groups can be summarized as follows:
Proximate causes: Lower education, skills and work experience
Ultimate causes: Discrimination and social/spatial isolation
Mediating factors: Lower marriage/child custody rates and worse health
Reinforcing long-run factors: Crime/incarceration and child support")

[27] On this day: "No taxation without representation!", National Constitution Center, (Oct 7, 2022), https://constitutioncenter.org/blog/no-taxation-without-representation
The now DC-area license plate motto gains its origin from The Stamp Act Congress that led to the Colonies' declaration that it was fundamentally unfair for the Crown to tax American settlers who lacked proper representation in the British Parliament. This was in the midst of simmering disapproval from settlers against the Crown's blatant disregard for their natural rights.

[28] The Articles of Confederation, National Archives, (1774-1779), https://www.archives.gov/milestone-documents/articles-of-confederation#:~:text=The%20Articles%20of%20Confederation%20were,day%20Constitution%20went%20into%20effect.

[29] 10 Oldest Constitutions In The World (Updated 2023), Oldest, (2023), https://www.oldest.org/politics/constitutions/
With a wide range of time and territory to dive into, the U.S. boasts the arguably oldest Constitution in the world. The term arguably comes from the fact that it is the oldest one in existence which is completely codified; the one that is the oldest, but does not actually have all its papers fully codified is the Constitution of San Marino which was ratified on October 8th, 1600, as part of a unitary parliamentary dictatorial republic.

[30] About the Constitution, National Constitution Center, https://constitutioncenter.org/the-constitution/about-the-constitution-faqs#:~:text=WHO%20WROTE%20THE%20CONSTITUTION%3F,insights%20into%20the%20drafting%20process.

commences with a strong unification of all, "We the People" which continued to enumerate the principles which are aspired to be instilled in the document such as "establish[ing] Justice, insur[ing] domestic Tranquility, provid[ing] for the common defense, promot[ing] general Welfare, and secur[ing] the Blessings of Liberty to ourselves and our Posterity."[31]

This Article aims to establish the unconstitutionality of the latest affirmative action precedent in the United States, by examining case law, but also binding documents of legal nature. This is the first of those documents; the Constitution is the supreme law of the land which comprises the codification of those inalienable rights of the people; many of those which are found within the first ten Amendments of the Constitution, also regarded as the Bill of Rights.[32] The rights to be considered fundamental cornerstones to this Article's argument are those annexed during the Reconstruction Era.

The Reconstruction Era (1865-1877)[33] followed the Civil War period in which the fallout between states induced a necessary desegregation, while also accommodating newly freed people who were about to start their life still in disadvantaged circumstances. There was enactment of legislation which limited the ability of historically disadvantaged groups, in this case referring to recently-freed slaves, which now had the so-called opportunity to construct their own lives independent of others, for the first time in American history; however, this was scantily more than a hollow promise, an illusion of what should have happened but was still a faraways way from the reality. State and local legislatures passed the Black Codes and Jim Crow laws restricting these individuals,[34] but measures to counteract were also instituted, namely the Reconstruction Act of 1867.[35] In a

[31] We the People, National Constitution Center, constitutioncenter.org/the-constitution/preamble
[32] The Bill of Rights, National Archives, (1789), https://www.archives.gov/founding-docs/bill-of-rights-transcript
[33] Reconstruction, History, (April 24, 2023), www.history.com/topics/american-civil-war/reconstruction
[34] *Id* 33.
[35] The Reconstruction Acts of 1867, Facing History & Ourselves, (April 27, 2015), https://www.facinghistory.org/resource-library/reconstruction-acts-1867

historical way, enfranchised Black people were given a voice, which caused a violent reaction from what is now known as the *Klu Klux Klan*.[36]

This clear tug-of-war tensions which surged high during the Reconstruction era in the U.S. served as the catalyst for the ratification of what are now known as the Reconstruction Amendments. These amendments are composed of the Thirteenth, Fourteenth, and Fifteenth Amendments. Although all three of these constitutional amendments paved the way for the promulgation of gradual equality in the 1800's epoch of the U.S., the one that has been a sword and shield in jurisprudence is the Fourteenth Amendment, whose frequently litigated clause guarantees equal protection.[37] The Fourteenth Amendment was the piece of legislation that the Supreme Court Of The United States found was violated by affirmative action programs, thus overruling prior decades worth of precedent established in other SCOTUS decisions. In the 6-3 decision of the *Harvard* case, Justice Roberts wrote on behalf the majority, stating that the involvement of ambiguous measures and racial stereotyping cannot be reconciled with the notions of guarantees of the Equal Protection Clause since if it is used as a measure, the touchstones of an individual's skills and abilities is not the deciding factor, but their skin color, thus not based on merits.[38] The legal reasoning which uses the Fourteenth

[36] As defined by Merriam Webster, The *Klu Klux Klan* (hereinafter the KKK), is a violent secret fraternal society founded post the Civil War, in 1915 in southern region of the United States, to maintain white Protestant cultural and political power so in consequence to upend the Black political and social power that was being established during the Reconstruction era in which Jim Crow laws remained prevalent as well. For more information, please refer to: https://www.merriam-webster.com/dictionary/Ku%20Klux%20Klan

[37] 14th Amendment, Cornell Law School, https://www.law.cornell.edu/constitution/amendmentxiv

[38] However, it must be noted that in this sense, there would be an emphasis on merit and overall governing meritocracy over any other ideological social structure. Although at first glance, this implementation is equal and thus promotes opportunity for all, it falls short in the practical application as its utopic nature is fundamentally the issue. In order for a meritocracy to work, in the abstract sense, there needs to be a binding social contract in which there is absolute certainty that everyone would be solely and uniquely judged on skills and merits, and no consideration on factors such as skin color or ethnicity or socio-economic class. However, although perhaps cynical, the current state of modern society does not allow for the triumph of this idealistic mindset that is a meritocracy, thus–solely basing entrance to a higher education institution when the playing field has been uneven and unequal from the point of commencement, it consequently undermines the unfathomable and unattainable true essence of a meritocracy.

Amendment for the recent precedent is flawed. As Justice Sonya Sotomayor formulated in the dissenting opinion, the equal protection clause has been upheld time after time as "enshrin[ing] a guarantee of racial equality," but that would only be viable if this were in a society that was colorblind–which Sotomayor argues that the U.S. has not yet achieved this standard.[39]

III. Plessy v. Ferguson (1896)

To set the scene, succeeding the Reconstruction amendments previously detailed in this Article, *Plessy v. Ferguson*[40] is an influential case due to the societal reinforcement of segregation cemented in the country. This case is one of the most infamous cases in the U.S. which subsequently structured and defined an era of jurisprudence which restrictive laws were founded upon, but ultimately has gradually been the catalyst towards progress in the civil rights arena of the law. For context, this case is a landmark decision that comes about as the consequences of the Reconstruction Era's judicially and constitutionally validated segregation through the doctrine of "separate but equal."

In 1892, an African American man, Homer Plessy, a passenger on a train, refused to sit in the car strictly for Black people, claiming that his constitutional rights were violated. In the end, he was arrested by the onboard train conductor and a private detective. Backtracking, the Louisiana State Government had recently passed The Separate Car Act of 1890 that required all railway passengers to have

[39] Sonia Sotomayor, Oyez, https://www.oyez.org/justices/sonia_sotomayor (last visited June 9, 2024). ("Sonia Sotomayor–the fearless federal trial court judge who saved Major League Baseball from a ruinous 1995 strike–entered the record book as the first Hispanic and the third woman to serve on the High Court. Sotomayor was born in the Bronx on June 25, 1954 to Juan Sotomayor and Celina Baez, both native Puerto Ricans… [The Obama Administration] nominated Sotomayor on May 26, 2009 and, in what Democrats called an "easy one," the Senate confirmed her on August 6, 2009 on a 68-31 vote divided mostly along party lines. Hispanics celebrated her appointment to the Supreme Court as a first, and the working-class of the Bronx hailed the success of one of their own… Sotomayor has specifically fought for the protection of affirmative action programs. She wrote a 58 page dissent in Schuette v. Coalition to Defend Affirmative Action, which held that prohibitions to state universities from considering race in admission decisions was constitutional.")

[40] *Supra* note 21.

"separate but equal" accommodations and facilities for Black and White Americans.[41] This law was in trend with the general sentiment of White Americans at the end of the century towards African Americans. Although not nearly to the same degree, post-slavery U.S. was starting to see the gradual influence by these previously enslaved individuals in areas of society that were breaking previously pristine molds and limits. This unfamiliar circumstance prompted a strong desire to develop regulations to maintain the races separate, and on paper, equal. The justification of *Plessy v. Ferguson* is indicative of said particular social nature the U.S. was encircled by, since the decision became the justification for the stronger implementation of Jim Crow laws across the southern half of the country.[42] The incident that was the instigator to this case was the inclination by the Committee of Citizens[43] to test and ultimately re-appeal the Separate Car Act. According to Oyez, Plessy was recruited due to this special characteristic of seeming physically Caucasian; Plessy described himself as seven-eights Caucasian and solely one-eighth of color which was the reason he was asked to sit in the "whites only" car on a Louisiana train.[44] This was allegedly the strategy of the lawyer who was going to represent him since theoretically having "someone of mixed descent cause the infraction [would] only highlight further the arbitrary nature of the term 'colored.'[45]

The case embarked to answer the question if the previously mentioned Separate Car Act violated the Fourteenth Amendment. The SCOTUS rejected Plessy's argument of constitutional right violations, and instead ruled in the majority opinion that a law that "implies merely a legal distinction between the white and colored races–a distinction which is founded in the color of the two races

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[41] Plessy v. Ferguson, Georgia College & State University, https://www.gcsu.edu/sites/files/page-assets/node-2213/attachments/separate_but_equal_educational_resources.pdf

[42] *Supra* note 33.

[43] Fatima Shaik, Comité des Citoyens, 64 Parishes, (Nov. 16, 2022), https://64parishes.org/entry/comite-des-citoyens
("The Comité des Citoyens, or Citizens Committee, was an equal rights organization formed in September 1891 by a group of French-speaking men of African descent to resist the resurgence of white supremacy in Louisiana, codified by segregation after Reconstruction."

[44] *Plessy v. Ferguson*, Oyez, https://www.oyez.org/cases/1850-1900/163us537 (last visited Sep 1, 2023).

[45] *Supra* note 33.

and which must always exist so long as white men are distinguished from the other race by color–has no tendency to destroy the equality of the races,"[46] thus the distinction could not merit unconstitutionality even if its decision implied the inferiority of the African-American race. This cardinal affirmation that segregation was constitutional due to the creation and endorsement of the "separate but equal" doctrine which satisfied the requirements of the Fourteenth amendment, leading to further promulgation of the Jim Crow laws and legitimized the U.S. Segregation Era.[47] This doctrine proved to be inherently inaccurate for its purpose since these separate facilities only proved the economic disparities caused by the limitation of African Americans to begin with in many aspects of society. They have been a group historically underrepresented and underprivileged, which is a critical reason as to why disparities caused by race in the education system must be taken into account in the form of some variation of affirmative action in college admissions.

IV. Brown v. Board of Education of Topeka (1954)

Fast forward over half a century later, a unanimous ruling[48] in the landmark civil rights case began the path to reversing the *Plessy v. Ferguson*[49] doctrine of "separate but equal." On May 17th, 1954, Justice Earl Warren of the SCOTUS

[46] *Supra* note 21.

[47] Jim Crow Laws, History, (Aug. 11, 2023), https://www.history.com/topics/early-20th-century-us/jim-crow-laws ("Jim Crow laws were a collection of state and local statutes that legalized racial segregation. Named after a Black minstrel show character, the laws—which existed for about 100 years, from the post-Civil War era until 1968—were meant to marginalize African Americans by denying them the right to vote, hold jobs, get an education or other opportunities. Those who attempted to defy Jim Crow laws often faced arrest, fines, jail sentences, violence and death.")

[48] *See* note 50.
A rather interesting nuance to this case that could have created a decidedly different case law path was that the original Chief Justice Fred M. Vinson held the opinion that the verdict of *Plessy* should stand, thus the court was divided on how to rule in terms of school segregation. However, in September of 1953, shortly before *Brown* was going to be heard, Vinson passed away and was replaced by Earl Warren, the Chief Justice who wrote the unanimous opinion and thus shifted and paved the way for the new era of case law in terms of civil rights. See reference: https://www.history.com/topics/black-history/brown-v-board-of-education-of-topeka

[49] *Supra* note 21.

delivered the new reversing precedent of *Brown v. Board of Education of Topeka*[50] that stated that state-sanctioned segregation in public schools was indeed a violation of the Fourteenth Amendment's guarantee of equal protection and was thus declared unconstitutional.

Since *Plessy v. Ferguson,* racially segregated public facilities were validated legally as long as said facilities for both Black Americans and Whites were equal. However, since the 1950's, the National Association for the Advancement of Colored People (NAACP)[51] had been filing lawsuits to challenge segregation in schools on behalf of those restricted. In the case that became famous, the filing plaintiff, Oliver Brown, was the father of a young girl, Linda Brown, who was not allowed to attend school at an institution closer, safer, and better equipped than the one she was assigned to. Brown claimed in this class-action based lawsuit that the facilities for white students were not the same as those afforded to black students in the same area; instead the schools for African Americans were inferior to those offered to white students in terms of facility utility, teachers, and overall quality of education. Although those conditions were brought up during the case, the primary argument made by the NAACP was that the segregation present in these educational facilities was a violation of the Equal Protection clause found in the Fourteenth Amendment because regardless of the previously established "separate but equal" doctrine, the codified goal of the Fourteenth Amendment was to keep the social, educational, and overall quality of life between races equal but those were not the consequences present in the *Brown* case.[52] The corresponding district court heard the case in 1951 and determined that the conditions of the schools called into question were similar,

[50] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

[51] About NAACP, NAACP, https://naacp.org/about

[52] Brian Duignan, Brown v. Board of Education, Britannica, (Aug. 11 2023), https://www.britannica.com/event/Brown-v-Board-of-Education-of-Topeka

citing the precedent set by *Gong Lum v. Rice (1927)*[53] which upheld segregation in educational institutions.

By the time *Brown* headed to the Supreme Court of the United States, they consolidated *Brown* with three more class-action school-segregation based lawsuits filed by the NAACP including *Briggs v. Elliot (1951),*[54] *Davis v. County School Board of Prince Edward County,*[55] and *Gebhart v. Belton (1952)*[56] while *Bolling v. Sharpe (1951)*[57] was filed independently. Due to distinguishing circumstances surrounding

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[53]Gong Lum v. Rice, 275 U.S. 78 (1927), Page 275 U. S. 85.
This case faces the question whether a Chinese citizen of the United States is "denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black," in which the decision said that it is not a violation of equal protection of the law.

[54] Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951)
This cases faces the declaration that the educational facilities provided for African American children in a South Carolina school district are inferior to those provided to white children in that same distrcit which amounts to the denial thus violation of the "equal protection of the laws guaranteed them by the Fourteenth Amendment to the Federal Constitution, and further that the segregation of Negro and white children in the public schools, required by Article 11, section 7 of the Constitution of South Carolina and section 5377 of the Code of Laws of that state,[1] is of itself violative of the equal protection clause of the Fourteenth Amendment."

[55] Davis v. County School Board of Prince Edward County, 149 F. Supp. 431 (E.D. Va. 1957)
The corresponding U.S. district court decided against the plaintiff, ruling on the basis of *Plessy* citing that they had not been deprived of equal protection under the law because the schools in question were comparable to the all-white schools, or would at least be so by the time the ordered renovation were completed, as ordered by the district court.

[56] Gebhart v. Belton, 87 A.2d 862 (1952)
This case, as is the case with previously referenced ones called into question "whether the State of Delaware, through its agencies, has violated the plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Two actions were filed. They were consolidated for trial purposes and are here being decided." In this case, the minors sued on behalf of themselves and others in similar situations. The plaintiffs are African Americans who are residents of the Claymont Special School District in New Castle Country. They were refused admission into Claymont High School, a public education institution maintained by the government for exclusively white children only, solely based on the color of their skin and consequently, their ancestry. The plaintiffs are only allowed to attend Howard High School and Carver Vocational School, which are administered by the Wilmington School District which solely has an informal arrangement with the State Board. Both these institutions are also located approximately nine miles from the plaintiffs' residences. To further prove a severe issue, the plaintiffs and guardians belong to a class who are subject to taxes which incidentally are in connection to those used in the construction of Claymont High School, the facility-iwse superior school only for white students; the one they are not permitted to attend under *Plessy's* doctrine of "separate but equal."

[57] Bolling v. Sharpe, 347 U.S. 497 (1954)

each unique case, *Brown, Biggs,* and *Bolling* were appealed to and consolidated by the SCOTUS while *Gebhart* and *Bolling* were also considered during *Brown* because each were granted certiorari.

As he wrote for the court, Chief Justice Warren[58] argued beyond the scope of the "separate but equal" doctrine. Justice Warren cited previous SCOTUS rulings which recognized the inequalities between graduate level schools for both African Americans and all-white schools. Specifically, there was a social and pedagogical factor considered which was that the policy in place for the better half of a century which force-separated students wholly based on race created a sense of "inferiority that undermined their motivation to learn and deprived them of educational opportunities they would enjoy in racially integrated schools."[59] Justice Warren concluded that "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[60]

This milestone decision signaled the termination of legalized segregation in schools which slowly spread to other sectors of life in the U.S.. However, it would still be a long path to continue marching for further inclusion and promulgation of equal legislature for all citizens regardless of the color of their skin. This case fueled the civil rights movement; a year later, the mother of the civil rights movement, Rosa

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In this special and unique case, the U.S. district court ruled that school segregation did not violate the Fifth Amendment's due process clause.

[58] *Earl Warren*, Oyez, https://www.oyez.org/justices/earl_warren (last visited Jun 27, 2024).
("Warren was sworn in as the 14th Chief Justice on October 4, 1953. Since he was not attracted to national politics, however, his role as a "Republican" was not as predictive of his role on the Supreme Court as Ike had thought. Warren's position as Chief was one of courage and flexibility in carving new paths. Warren joined the Court in the midst of some of its most important issues – racial segregation in public schools and the expansion of civil liberties. The new Chief proved an effective leader as he brought the Court from division to unanimity in many cases.")

[59] *Supra* note 50.

[60] *Supra* note 37.

Parks,[61] would refuse to give up her seat on a bus in Alabama. This simple yet catalytic action would spark boycotts and demonstrations in the movement that would ultimately end the Jim Crow laws across the South, and later be the trigger for Martin Luther King Jr. to address the nation with the speech full of wishes that one day his dream of an equal society would come true. Many of us are still waiting for his words to one day ring true across all classrooms and workplaces, because, despite its impact, the historical verdict's reparations have arguably not been achieved. A continued debate over racial inequality in the U.S' school system is still largely at play and based on residential, resource, and economic patterns. Until then, one must wait with "all deliberate speed,"[62] as history unfolds into a stronger tomorrow.[63]

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[61] Rosa and Ramond Parks Institute, Rosa Parks–The mother of the modern day civil rights movement, Black History Month, (Jan. 2, 2023), https://www.blackhistorymonth.org.uk/article/section/civil-rights-movement/rosa-parks-the-mother-of-the-modern-day-civil-rights-movement/

[62] "With All Deliberate Speed," Smithsonian National Museum of American History, https://americanhistory.si.edu/brown/history/6-legacy/deliberate-speed.html#:~:text=The%20Brown%20decision%20declared%20the,the%20opportunity%20to%20organize%20resistance.
("The *Brown* decision declared the system of legal segregation unconstitutional. But the Court ordered only that the states end segregation with "all deliberate speed." This vagueness about how to enforce the ruling gave segregationists the opportunity to organize resistance. Although many whites welcomed the *Brown* decision, a large number considered it an assault on their way of life. Segregationists played on the fears and prejudices of their communities and launched a militant campaign of defiance and resistance.")

[63] Lonnie Bunch, The Little Rock Nine, The Smithsonian's National Museum of African American History and Culture, https://nmaahc.si.edu/explore/stories/little-rock-nine
Three years after the verdict of *Brown,* the event that came to be known as Little Rock Nine came to be known because of nine teens who were the first African American students to enter Little Rock's Central High School in Arkansas. The decision of *Brown* stipulating "with all deliberate speed" caused a very slow desegregation in public schools since the idea, across the South, was drenched in bitterness and anger by the community. The state governor Orval Faubus ordered the State's National Guard to block the students entrance on September 2, 1957 on that day and again until President Dwight Eisenhower federalized the National Guard and the students were escorted by the U.S. Army 101st Airborne and National Guard soldiers on September 25, 1957. ("However, their ordeal was far from over. Each day the nine teens were harassed, jeered, and threatened by many of the white students as they took small steps into deeper, more turbulent waters. That spring, on May 27, 1958, Ernest Green became the first African American graduated from Central High.")

V. The Civil Rights Act of 1964, Title VI

As the clock continued to tick, schools slowly became desegregated across the nation. Following the trend, pieces of legislation were slowly introduced into state legislatures and ratified, yet sometimes with resistance as a turbulent time of hate crimes and civil disobedience filled the streets of the Southern states, thus embarking upon a dark age which would lead to the Civil Rights Movement– a fight for equality. *Brown* became the partial catalyst for the civil rights movement across the country that sparked hot debate. Following that judicial decision, in the summer of 1955, there was a unique surge of anti Black violence coined racial terrorism and overall resistance to the desegregation of the races. Some of these violent attacks included the brutal lynching of Emmett Till[64] and white mobs setting upon African Americans[65] but were answered with widespread protests from both Black and White Americans along with civil disobedience; one of these particular instances included

[64] The Murder of Emmett Till, Library of Congress, https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/murder-of-emmett-till/ ("The murder of 14-year-old Emmett Till in 1955 brought nationwide attention to the racial violence and injustice prevalent in Mississippi. While visiting his relatives in Mississippi, Till went to the Bryant store with his cousins, and may have whistled at Carolyn Bryant. Her husband, Roy Bryant, and brother-in-law, J.W. Milam, kidnapped and brutally murdered Till, dumping his body in the Tallahatchie River. The newspaper coverage and murder trial galvanized a generation of young African Americans to join the Civil Rights Movement out of fear that such an incident could happen to friends, family, or even themselves… Two of Emmett Till's cousins, Wheeler Parker and Simeon Wright, witnessed Till's kidnapping on the night of August 28, 1955 at the home of Moses Wright… Parker describes the funeral in Chicago, which drew thousands of people: 'The solemn atmosphere there, you know, it's just–it's just unbelievable, I guess you could say. The air was filled with just, I guess, unbelief and how could it happen to a kid? People just felt helpless.'")

[65] ARCHIVE: Civil Rights Act: How South Responds, The New York Times, (July 12, 1964), https://www.nytimes.com/1964/07/12/archives/civil-rights-act-how-south-responds.html ("The change is taking place far more quickly and easily in urban areas than in rural ones and in those with smaller numbers of Negroes than in the 'Black Belt'... A lesser degree of obedience seems to be emerging in South Carolina, Georgia, Arkansas and Louisiana, while resistance is strongest in Alabama and Mississippi. Although the law has been in effect a little more than a week, one of the chief difficulties faced by Negroes is readily apparent. It was demonstrated by an incident at Americus, Ga., where an integrated group sought service successfully at a restaurant only to be set upon by a white mob after leaving.")

the bus boycott in Alabama in December of 1955, led by Reverend Martin Luther King Jr.[66]

As previously seen, after the Civil War, the Reconstruction Amendments were adopted to create a greater sense of equality but other measures were also in place to counteract them, such as poll taxes and literacy tests for African Americans. It took time to eventually pass actual legislation to help close the inequality gap since jurisprudence had taken the brunt of it. The Civil Rights Act's sixth section,[67] the one under security in the *Harvard case*, states that no one on the basis of race, religion or national origin can be excluded from activities or programs receiving financial assistance from the Federal government.[68]

The passage of The Civil Rights Act of 1964[69] is the nation's benchmark law paved the way for further promulgation of desegregation legislation that would create a lasting impact on the social fabric nationwide. It was first proposed by former President John F. Kennedy[70] but was heavily criticized by strong opposition; it was in the end signed by his successor, President Lyndon B. Johnson.[71] Kennedy

[66] Who was Martin Luther King, Jr.?, National Geographic, (Jan 12, 2023)
https://www.nationalgeographic.com/culture/article/martin-luther-king-jr#
("In the mid-1950s, King led the movement to end segregation and counter prejudice in the United States through the means of peaceful protest. His speeches—some of the most iconic of the 20th century—had a profound effect on the national consciousness. Through his leadership, the civil rights movement opened doors to education and employment that had long been closed to Black America… In 1964, King was awarded the Nobel Peace Prize for his civil rights and social justice activism. Most of the rights King organized protests around were successfully enacted into law with the passage of the Civil Rights Act of 1964 and the 1965 Voting Rights Act.")

[67] Public Law 88-352 (78 Stat. 241)

[68] The Civil Rights Act of 1964, Title VI, Sec. 601.

[69] Civil Rights Act of 1964; 7/2/1964; Enrolled Acts and Resolutions of Congress, 1789 - 2011; General Records of the United States Government, Record Group 11; National Archives Building, Washington, DC.

[70] John F. Kennedy, The White House,
https://www.whitehouse.gov/about-the-white-house/presidents/john-f-kennedy/
("John F. Kennedy was the 35th President of the United States (1961-1963), the youngest man elected to the office. On November 22, 1963, when he was hardly past his first thousand days in office, JFK was assassinated in Dallas, Texas, becoming also the youngest President to die.")

[71] Lyndon B. Johnson, The White House,
https://www.whitehouse.gov/about-the-white-house/presidents/lyndon-b-johnson/
("In the 1960 campaign, Lyndon B. Johnson was elected Vice President as John F. Kennedy's running mate. On November 22, 1963, when Kennedy was assassinated, Johnson was sworn in as the 36th United States President, with a vision to build "A Great Society" for the American people.")

was known to be skeptical about pushing forward a bill of this kind but in June of 1963, he proposed an extensive bill to which he proclaimed that the nation would "not be fully free until all of its citizens are free."[72] However, after Kennedy's assassination, President Johnson addressed Congress in his first State of the Union address stating "Let this session of Congress be known as the session which did more for civil rights than the last hundred sessions combined,";[73] Johnson's encouragement set wind in the sails of the representatives who moved forward with action.

The Act was later expanded to include other disadvantaged groups in the country such as collegiate-level women athletes and those of the third age.[74] More civil rights legislation soon followed with the Voting Rights Act of 1965 and the Fair Housing Act of 1968 which banned segregation in other aspects of life such as financing a home, which leads us back to the same road that not giving everyone the same opportunity, which in these cases needs to be done through taking into account past historical fallings on the basis of race, is *a failure to the fair pursuit of happiness.*

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[72] John F. Kennedy, RADIO AND TELEVISION REPORT TO THE AMERICAN PEOPLE ON CIVIL RIGHTS, JUNE 11, 1963, John F. Kennedy Presidential Library and Museum, (June 11, 1963) https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/civil-rights-radio-and-television-report-19630611

[73] Mae Bowen, This in History: President Lyndon B. Johnson Signed the Civil Rights Act of 1964, Obama White House Archives, (July 2, 2015), https://obamawhitehouse.archives.gov/blog/2015/07/02/day-history-president-lyndon-b-johnson-signed-civil-rights-act-1964

[74] In this respect, the groups aforementioned in the relevant sentence refer to those that have been disproportionately disadvantaged through policies enacted by the legislature. In terms of disadvantaged, it refers to the idea that their protected status or enshrined rights were not explicitly applicable to them prior to the Act being expanded to not only implicitly, but explicitly, include them within the scope. Women in sports were not taken seriously or regarded as to such a high standard that should be equally protected, which was a sentiment which changed their inclusion in the Act. In terms of those of the third age, it is a reference to senior citizens who potentially are not equally treated as their younger counterparts. As a potential manner to safeguard these groups and fight against potentially ableist or sexist legislation, the explicit inclusion of these groups within the scope of the Act served as a landmark to continue to grow the ideology of equality for all in the land of the free.

VI. Regents of the University of California v. Bakke (1978)

A bit over a decade passed before one of the modern era affirmative action cases reached the SCOTUS. Although Congress had ordered the desegregation of all public spaces through official legislation, there was a reluctance by the public to remedy the educational disparity. Due to this, higher education institutions adopted policies and admissions strategies that would compensate for unfair disadvantages of applicants. Allan Bakke, a white thirty-five-year-old man, in the early 1970s applied and was rejected twice to The Medical School of the University of California at Davis (hereinafter Davis). At this point in time, Davis had two separate admissions programs, a regular program and a special one, dedicated for the entering class which would be composed of solely one hundred students. For context, the system utilized was a quota system where, out of the one hundred spots available, sixteen of them were reserved for economically and educationally disadvantaged students who would typically apply through the special admissions program. The regular admissions process dismisses the applications of grade point averages that were no higher than 2.5 on a 4.0 scale while the special program did not need to meet nor comply with the 2.5 grade point average cutoff. However, beyond that, both admission collectives were evaluated similarly based on test scores, letters of recommendations, and extracurricular activities which would all constitute the applicant's overall benchmark score which would be used to determine the applicants ranking in the admissions selection process. Bakke's qualifications statistically exceeded those of any minority applicant who was ultimately admitted in the two years in which Bakke applied.[75]

The case of *Regents of the University of California v. Bakke (1978)*[76] came to the forefront of the debate surrounding affirmative action when Bakke, after his second rejection from Davis filed in the California State court an action for "mandatory, injunctive, and declaratory relief to compel his admission to Davis,

[75] *Regents of the University of California v. Bakke*, Oyez, https://www.oyez.org/cases/1979/76-811 (last visited Sep 7, 2023).
[76] Regents of the University of California v. Bakke, 438 U. S. 266 (1978)

alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides, *inter alia,* that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance."[77]

A deeply fractured SCOTUS affirmed the California State Supreme Court's ruling that Davis's admission criteria violated both the Equal Protection Clause enshrined within the Constitution but also the Civil Rights Act of 1964 thus favoring the respondent and ordering Davis to admit Bakke. There was no single majority opinion by the court; instead, four of the nine justices opinionated that any racial quota system was a violation of the Civil Right Act. A dissenting opinion issued by another four judges of the SCOTUS' composition argued that the use of race is constitutionally permissible in higher education admissions. The plurality opinion by Justice Powell agreed with both but also ironically dissented with both spectrums. The way the court reasoned the analysis is that any possible violation of the equal protection clause is inherently discrimination, and is thus prohibited by the Civil Rights Act. The principle of strict scrutiny[78] was applied in this case, which required the admissions process to fulfill and expand a true government interest in the least restrictive means possible. The court did not sense the fulfillment of strict scrutiny since they found that there needs to be other ways beyond a quota-system to achieve balanced representation of traditionally underrepresented minorities thus creating classroom diversity.

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[77] Regents of the University of California v. Bakke, 438 U. S. 266 (1978), Justia, https://supreme.justia.com/cases/federal/us/438/265/

[78] Strict Scrutiny, Cornell Law School, https://www.law.cornell.edu/wex/strict_scrutiny ("Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. Strict scrutiny is often used by courts when a plaintiff sues the government for discrimination. To pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest. Strict scrutiny is the highest standard of review which a court will use to evaluate the constitutionality of governmental discrimination.")

The aforementioned fragmented Court left many questions unanswered in the ruling which were then cleared up by the following case *Grutter v. Bollinger (2003).*[79] The door for the utilization of race as a factor of consideration in admission was left open, just not with a quota system like the one Davis had. In the long run,[80] the divided court managed to garner white sympathy by minimizing their opposition and extending gains for racial minorities through affirmative action, which would lead the country into a path of jurisprudence which helped define the place of race in admissions for higher education, until its eventual reversal in July 2023.

VII. Grutter v. Bollinger (2003)

Arguably the fundamental argument to dismantle the validity of the Harvard case, stems from the rationale established in *Grutter v. Bollinger (2003)*[81] (hereinafter *Grutter*). *Grutter* served to affirm the previous case of *Bakke* by holding that the use of an applicant's race as a factor of admissions policy of a public education institution is not a violation of the Fourteenth Amendment's Equal Protection Clause as long as said admissions' strategy is specific and promotes a compelling interest for the government such as a diverse student body by using a holistic criteria process and not a quota system like at Davis. Backtracking for context, over a decade before in 1992, the University of Michigan Law School (hereinafter Michigan) had implemented an admissions policy which created a greater chance for applicants belonging to racial minorities to be admitted; the stated purpose of Michigan's policy was to promote racial diversity—not only in their student body which would help foster better class dynamics and understanding, but also to ensure greater diversity and representation in the legal field. As one of country's top law schools holding number ten on the T14 list,[82] the policy to achieve

[79] *See* note 81.

[80] *Supra* note 75.

[81] Grutter v. Bollinger, 539 U.S. 306 (2003)

[82] David Merson, What Are The T14 Law Schools?, Juris Education, (Jan. 18 2023), https://www.juriseducation.com/blog/what-are-the-t14-law-schools#:~:text=The%20University%20of%20Michigan%20Law,the%20T14%20law%20school%20ranking.,

diversity focused on a variety of factors such as students' academic ability, talents, experiences, and overall potential along with letters of recommendation, an essay, personal statement, and test scores.

In 1996, the University of Michigan Law School, denied admission to Barbara Grutter, a white woman with a 3.8 undergraduate grade point average and an LSAT score of 161; Grutter filed a suit alleging that her named respondent, Bollinger,[83] had discriminated against her for being white, which was a violation to her rights under the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S. Code § 1981[84] which enshrines equal rights under the law for all persons within the jurisdiction of the U.S.. As ruled in the *Bakke* case, the binding precedent established that diversity was indeed a compelling governmental interest if and only the strategy was well-aligned and tailored for its diversity goal. The judicial sphere held an array of judicial decisions on this case starting with the District Court which concluded that Michigan's admissions process was not a compelling one, thus Grutter's rejection was based on unlawful criteria. However, the Court of Appeals held that Justice Powell's opinion in *Bakke* legitimized Michigan's policy regarding the use of race in admissions since Michigan's use of "critical mass" of representation in the legal field could not be considered a functional equivalent of a quota system as in Davis. The SCOTUS delivered an opinion in a 5-4 decision favoring Michigan, thus affirming the Court of Appeals prior judgment. Justice O'Connor gave the majority opinion that held that the Equal Protection Clause was not violated due to Michigan's narrowly tailored use of race which compelled an interest in obtaining educational benefits that would follow from such a purposefully crafted diverse collection of students. The Rehnquist Court reasoned that the individualized attention and review to each application ensured that there was no automatic

("The T14 law schools are the top 14 schools in the US based [] rankings. Among the T14, there isn't much movement in these rankings year after year. [The] list is ranked in order according to US News World and Report's ranking of Best Law Schools.")

[83] Lee Bollinger was at the time, the President of the University of Michigan. Grutter named him as the defendant since he had been a strong advocate for Michigan's existing affirmative action policies and strategies thus represented the school in the proceedings. For more information, reference: https://academickids.com/encyclopedia/index.php/Grutter_v._Bollinger

[84] 42 U.S. Code § 1981 - Equal Rights Under the Law

rejection or acceptance based on race thus it is simply a factor that contributes along with others, so as best said by Justice O'Connor, "the Law School's race-conscious admissions program does not unduly harm nonminority applicants."[85]

A quarter of a century after the precedent marked by *Bakke,* the *Grutter* case helped shape and redefine the place of affirmative action in higher education institutions; an important nuance is that the SCOTUS judgment names this as the main case but is followed by an *et al*. The US Supreme Court heard Grutter's case along with Gratz *v. Bollinger*[86] on the same day. *Gratz* challenged the University of Michigan's undergraduate affirmative action program. Both Jenniefer Gratz and Patrick Hammacher were white applicants, who were well qualified but were ultimately denied admission. The ensuing consequences to this rejection by the University of Michigan on the undergraduates manifested themselves in them filing the suit stating that Michigan's admission process was unconstitutional because of the point system being used at the University. The University ranked the applicants on a 150-point scale; if an applicant belonged to a historically discriminated against racial group or attended a predominantly disadvantaged high school, the applicant would receive an automatic twenty point boost.[87]

Gratz v. Bollinger was rendered in favor of the applicants and the admissions process was deemed unconstitutional due to its violation of the Equal Protection Clause. According to the evidence presented, virtually every member of minorities who applied for admission and was well qualified, was then admitted, which caused the Court to argue that "race a decisive factor for virtually every minimally qualified underrepresented minority applicant," the affirmative action program was not narrowly tailored enough as required by the precedent set by *Bakke*. Together, both of these landmark cases affirmed and helped to define the boundaries of affirmative action in the Supreme Court's position on it.

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[85] *Supra* note 81, page 309.
[86] Gratz v. Bollinger, 539 U.S. 244 (2003)
[87] *Id*.

VIII. Fisher v. University of Texas (2016)

Thirteen years later, the SCOTUS affirmed the previous holdings regarding affirmative action's role in higher education. Abigail Fisher, a white female, applied and was rejected for admission to the University of Texas at Austin. At this time, it is important to understand the current plan Texas had in place for higher education in their lone star state.

The mechanics of the strategy were that the Texas Top Ten Percent Plan guaranteed admission to the top 10% of every in-state graduating high school class. However, for the remaining spots, The University of Texas considered many factors in their admissions process, including race to fill the remaining spots of their incoming class.

Fisher sued the University arguing that the use of her race as a consideration, violated her equal protection clause under the Fourteenth Amendment since it put her and other Caucasian applicants at a disadvantage. The University of Texas had their admissions process adopted in 2004 after a year-long study following the two previous Supreme Court rulings which led the University of Texas to conclude that its prior race neutral system was not adequately supporting their educational goal of diversity for their students.

Fisher[88] went through the judicial systems for a long time before it was taken for full review to the Supreme Court per certiorari; however, it was then remanded back to the lower appellate court and then affirmed by the highest court of the Country. *Fisher I* held that the lower court had not appropriately applied the principle of strict scrutiny regarded in *Grutter*. In both times, the Fifth Circuit court found in favor of the University of Texas which caused Fisher to appeal and repeal to the Supreme Court; the Supreme Court heard *Fisher II* and upheld the admissions policy in a 4-3 opinion due to Justice Kagan being recused. The court agreed that the compelling interest of obtaining educational benefits from a diverse student body is a justification of race. *Fisher II* was able to demonstrate clear goals tailored to their

[88] Fisher v. University of Texas, 570 U.S. 297 (2013)

needs which encompassed ending stereotypes, encouraging cross-racial understanding, and preparing students for a diverse workforce were valid reasons for the inclusion of race as part of the admissions process. This passed the strict scrutiny standard because the court viewed no other alternative or available plan to ensure the compelling interest goal was met.

The case especially relevant to the validity of the current precedent set by the *Harvard case* comes from *Fisher II*; the dissenting opinions align with the current precedent of the *Harvard case* because of the same ideology of the oldest judges being present. Justices Roberts, Thomas, and Alito dissented[89] in the fact that they believe that the use of racial stereotypes is unnecessary because the admissions process could be race neutral–this was the deciding majority opinion in the following case which would fundamentally dismantle and undermine affirmative action, and with it, diversity that was forced onto society because historically, without it, there would be none present in education or the workforce.

IX. Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023)

Finally, in the timeline of affirmative action's life, one reaches its gutting through the infamous *Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023).*[90] In this case, the petitioner is an organization founded in 2014, Students for Fair Admissions (hereinafter SFFA), who describe themselves as a nonprofit membership group that believes racial classifications in college admissions are unconstitutional, thus have mounted several lawsuits challenging race-conscious admissions policies.[91] Recently, the cases in question regard SFFA suing two highly regarded universities, Harvard College (hereinafter Harvard) and the University of North Carolina (hereinafter UNC)— however, the outcome now

[89] *Fisher v. University of Texas*, Oyez, https://www.oyez.org/cases/2015/14-981 (last visited Sep 8, 2023).
[90] *Supra* note 2.
[91] Students For Fair Admissions, https://studentsforfairadmissions.org/about/

affects all universities and colleges nationwide that considered race as one of many factors in their objectively holistic admissions processes.

Honing in on the Harvard case which is the one this Article is about, SFFA claimed two matters: that the use of a students' race violated their rights enshrined in the Constitution's Fourteenth amendment and in the Civil Rights Act of 1964, and that specifically, Harvard deliberately discriminates against Asian Americans and White Americans due to their race. This comes after the corresponding U.S. District Court in Boston ruled in favor of Harvard's admissions policies, and the First Circuit Court of Appeals affirmed the judgment.[92] According to a statement by Harvard, "The Supreme Court has twice cited Harvard's admission process as a model for how other colleges and universities can consider race consistent with the law and the Constitution. Harvard's qualified, limited use of race is entirely consistent with more than four decades of Supreme Court precedent, established in *Bakke* (1978), affirmed in *Grutter* (2003), and reaffirmed in *Fisher I* (2013) and *Fisher II* (2016)."[93] The Supreme Court has upheld race-conscious admissions policies for over forty years by establishing and continuously affirming that race indeed can be used as one of many factors in admission processes as long as there was not a quota system. Nonetheless, the Roberts' presided Supreme Court in a 6-3 decision, with the minority liberal-leaning Justices being in the dissenting party, overturned all previous jurisprudence regarding the application of affirmative action thus eliminating its precedent and effect from practice.

As the timeline of this section of the Article progressed, one can observe the policies, doctrines, and judicial decisions that became binding were put in place to boost admission among historically underrepresented and discriminated against groups. However, in the *Harvard* case, the Supreme Court overturned *Grutter v.*

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[92] Christina Pazzanese, What to know about Harvard's case in Supreme Court, The Harvard Gazette, (Oct. 28, 2022), https://news.harvard.edu/gazette/story/2022/10/what-to-know-about-harvards-case-in-supreme-court/

[93] KEY FACTS: Students for Fair Admissions, Inc. v President and Fellows of Harvard College, Harvard University, https://www.harvard.edu/admissionscase/wp-content/uploads/sites/6/2022/05/FINAL_Key-Facts_FINAL.pdf

Bollinger's hold that race was able to constitute one of many factors; the previously upheld admissions process used at Harvard and UNC were deemed unlawful under the Equal Protection Clause. The admissions process presented and executed by Harvard had multiple stages in which all applications were given individualized attention by multiple parties. Harvard does admit that at the end, the stage as "Iop" allows for race to tip for a significant advantage when winnowing the final class; however this only happens after the substantial majority of the admissions process has been completed by the required admissions committees.

The Supreme Court ruled, Justice Roberts delivering the majority opinion, that Harvard's policy for admission was inherently unconstitutional and a direct violation of the student's rights because there were not sufficiently focused and measurable enough goals that warranted the use of race–something Harvard relents is not true. Roberts continued writing that "Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice."[94] However, this seemingly does not conform to the previously established courts' jurisprudence and legal reasoning–which has been a tendency by the Roberts court–, thus unraveling decades worth of legal discernment.

VALIDITY OF SCOTUS' OVERTURNED CASE DECISION

With the chronological compendium of jurisprudence recapitulated, it becomes relatively simpler to analyze the validity of the *Harvard judgment*. The fundamental central question of the *Harvard case* surrounds the constitutionality of the race factor in higher education, but its ripple effect will be visible in other areas as this

[94] Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023) 600 U.S. 181 No. 20-1199. Page 8.

judgment will affect diversity, equity, and inclusion (DEI) practices in potentially employment and grantmaking.[95]

The original and central aim of this Article is to interpret what is believed to be the true intention of the Fourteenth Amendment and the Civil Rights Act of 1964, and its relation to the method of the current chaos that is affirmative action. However, the scope of the legality and acceptability of the *Harvard judgment* extends beyonds this.

The Fourteenth Amendment's interpretation may vary; on one side of the coin, one may argue for it to be taken into consideration on a textual basis of what the words truly mean simply said and no more than that–, but on the flip side, their consideration can be objectively regarded through a societal and rhetorical framework; this arguably precludes to a much larger conclusion whose relevance to the adaptation and progress of the law is fundamental. The peculiar metamorphosis of the Fourteenth Amendment must be analyzed through the light that it itself came to fruition due to the aftermath of the Civil War, for no person to be denied equal protection under the law. After an unstable epoch of turmoil, a moment came to pass, where the inexpressible sense of hope was ever-present for all. The epiphany of the matter was that the present circumstance was nothing more than idealistic, as the tenacious paradigm of idiosyncrasy continued. The perplexity of equality amongst men which had been consistently written about in various treatises of men and declarations was but a commencement for the various movements of the struggle for verifiable equality. The disparate playing field based on the color of one's skin has been a fundamental cornerstone of American society from its inception, and simply due to that, there must be a remedy to ensure that future developments stray away from the previous trends and instead continue to progress.

The *Harvard* case has unraveled decades worth of jurisprudence in which generations of justices have ruled in favor of differing degrees of affirmative action

[95] Ami N. Wynne et al., Supreme Court Hears Oral Arguemnt In Challenge To Harvard and UNC Race-Councous Admission Programs, Morgan Lewis, (Nov. 01, 2022), https://www.morganlewis.com/pubs/2022/11/supreme-court-hears-oral-argument-in-challenge-to-harvard-and-unc-race-conscious-admission-programs

and the implications and application to modern day jurisprudence. Although it is reasonably within SCOTUS' legal scope and capabilities to do so, it must be rooted in legal merits. The explanation by SCOTUS that affirmative action is in reality a violation of the Fourteenth Amendment is valid as the reasoning stands to logic on face value; however, this is not true if seen from a sociological perspective.

Something interesting to note at this point in the Article is the absolute political nature of affirmative action in today's society. Education is a fundamental cornerstone of humanity– an eclipse of its availability would be an ultimate disservice to the individual, to the community, and to the country as a whole– not taking into consideration the implications it can have due to globalization. In recent years, topics regarding education have become increasingly polarized, seen in the book banning discussions to sexual education being part of the curriculum in public schools— the manifestation of this divide has been seen post-Covid-19 and its effects have drastically changed the atmosphere of Board of Education meetings.[96] Attributable to this, it is important to understand this topic beyond a simple political scope, but through an analytical framework– a more objective tool which in even economic terms can be argued for.

Although seemingly not compatible notions, the two merits of legality and sociological necessities must be both used simultaneously to ensure the proper upholding of the law; the law does not stand to reason if the society will not be bound by it as per the social contract. The social contract is a dual-faceted mechanism, which although allows for the prevalence of order, its complex nature additionally requires its application to not solely be the fairest, but aim towards achieving the harmonious yet utopian society that society would ideally desire. This is to say that if no sociological merit is taken upon consideration, an uproar which can divide the

[96] Hetrick, Christian, The next battleground in U.S. politics? School boards, (March 14, 2023), https://priceschool.usc.edu/news/school-boards-politics-covid-racism/
In the recent years, and from personal experience, it has been an incredible change in dynamic from local school board meetings taking place to approve curriculum, being carefully curated by educated professionals in the field of education, to a chaotic and politically charged battlefield in which political ideologies are struggling to make headway in progressing their values of education and its secular nature.

country even more is logical to ensue because the fundamental good of the people can be considered to be overlooked, and thus cause the citizens who are a party to the social contract that the justice system is cemented upon to claim and exercise their right to fight back. This type of sentiment, although sometimes necessary to uphold order, legality, and fairness of the rule of law, can be justified if the legality of statutes are unperceived of their compatibility with the good of the people and with their interests in mind.

Through this analytical framework, it can become possible to view affirmative action via an objective lens– one in which the actual balancing of the merits is rooted not upon bias, but upon the legal and sociological merits. Within this blueprint, one must analyze this issue through its efficiency, fairness, benefit, and the trade-off that must be made. Looking at this, it is a cost-opportunity analysis of sorts, an economic transaction. The implementation of affirmative action needs to take into consideration the sociological impact, the legality of the law, and its overall impact on the society we currently live in. Although the colorblindness argument that the SCOTUS presents is set to instill stability and neutrality, the benefits of such a reversal of previous jurisprudence may not easily outweigh the trade-off that such a declaration will make. In order to come to the most reliable conclusion, merits must be awarded where appropriate. Affirmative action may not allow, realistically, for the most efficient process in admissions– but the objective which it is trying to accomplish can outweigh this logistical issue. Many times, the biggest issue to overcome, as seen in previous jurisprudence, is finding a manner in which such a policy can be implemented in a way that it is coherent across the board, and allows for a stable and neutral holistic admissions process; neither taking race into account as a factor of many nor claiming to be colorblind are as simple as they seem to be. This opportunity-cost analysis is anything but, and its fundamental yet paradoxical conclusion can be seen as although we as a society need to sacrifice equality, we are aiming to work towards reaching equity– because equality only works when proportionally everyone started from the same or relatively similar point, whilst equity attempts to redistribute the previous inequality. The trade-off is simple in

general, but it comes down to an issue of principle and the value which society places upon it. This social conflict has been perpetrated unknowingly through structural violence, affecting previously marginalized groups in the United States within varying aspects of life–politically,[97] in education, and in healthcare, to name a few examples. The term of structural violence, although a bit thespian, does pinpoint the issue of the unequal access to different industries, which concoct disparities in resources, opportunities, and ultimately the oppression of rights; although a lack of access to these fundamental cornerstones of the social contract may be unperceivable without its discussion, the invisibility at first glance does not eliminate the effects that such a scenario will ultimately create. According to Barnett,[98] an American constitutional law professor, the law has evolved and with it, the scope of the Fourteenth Amendment. The Fourteenth Amendment has expanded its scope in becoming a fundamental political right– creating a "right floor," not a ceiling, upon which we can build since its implications does not limit the privileges and immunities that are entitled to along with it.[99] Forbye, in terms of constitutionalism, interpretations must change along with the political landscape– an unfortunate reality of life as ideally, political agendas would remain independent of the judicial interpretation of the supreme law of the country.

However, beyond this analytical framework, the Fourteenth Amendment proves to serve the ensuring that all citizens and people residing within the borders of the country of the free are afforded the same protection under the law–a protection which can be argued to be fundamentally biased and unfair due to past inequalities which still haunt the hollow halls of the American justice system. The equal protection under the law applies in a large scope– in the action to protect this right positively and negatively against a failure to act; inaction on behalf of the State

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[97] Gerrymandering & Fair Representation, Brennan Center for Justice at NYU Law, (2024), https://www.brennancenter.org/issues/gerrymandering-fair-representation
("Gerrymandering, the practice of drawing districts to favor one political party or racial group, skews election results, makes races less competitive, hurts communities of color, and thwarts the will of the voters. It leads many Americans to feel their voices don't matter.")

[98] Barnett, Randy E., and Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit*, Harvard University Press, (2021), https://doi.org/10.2307/jj.2131183.

[99] *Id.*

who is entrusted with upholding their end of the social contract, of ensuring equality, and in theory equity for all, is not solely based on prohibiting behaviors, but actively ensuring movement and exertion towards that aim.[100] Attempting to strike down affirmative action on the logic that its application is unfair to those who are not or have historically not been disproportionately marginalized or affected makes sense on paper, but not practically, as the playing field is already uneven from the beginning, disallowing anything but injustice to ultimately lead towards the achievement of justice. In terms of the Civil Rights Act of 1964, which bars and prohibits any discrimination of personal characteristics such as race, gender, etc–, it was a milestone for the desegregation and to champion the rights of marginalized and disadvantaged minorities. As acknowledged throughout the myriad of modern literature relating to the systematic oppression, a rather radical perspective regarding color blindness, the substantive argument made by the SCOTUS, uncovers that "Colorblind racism as a way of ignoring racial differences and white privilege," and unfortunately, it can be argued to be the current reality as "The nurturing of white innocence supports a lack of concern or empathy toward the injustices suffered by marginalized communities."[101] Analyzing the aforementioned Act in light of this raises the question regarding the application of the Act and whether it should continue linear in the sense that the aim should continue to afford protection, with an emphasis on the groups who were and arguably continue to after-the-fact be affected due to factors outside of their merits. Following the ideology of modern originalism,[102] there should be an evaluation of the facts and of the law through an interpretation of what the text was meant to mean or result in. The notion of colorblindness at this point in time is insensitive to the actual result intended by *Brown.* In *Brown,* the ultimate goal was to reach a pinnacle in which through the

[100] *Id.*

[101] Jayakumar, Uma M., and Annie S. Adamian. "The Fifth Frame of Colorblind Ideology: Maintaining the Comforts of Colorblindness in the Context of White Fragility." *Sociological Perspectives* 60, no. 5 (2017): 912–36. https://www.jstor.org/stable/26579842.

[102] Calabresi, Steven G.,On Originalism in Constitutional Interpretation, National Constitution Center, (2024), https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation

application or implication of this historical landmark case, race would no longer be a dividing factor, yet it still is in a negative way, thus it is the reasonability of the party to the social contract to uphold the goal of *Brown* in wanting to keep in mind the measures to be colorblind until it was possible to do so naturally, however, that is not at the point in which society currently finds itself.[103]

Moreover, the *Harvard case* functions as an essential and prime example of the politicization of courts and the implications of such a mechanism fundamentally altering the legal system, legal certainty, the rule of law, and overall, justice as we know it. In the modern era of media consumption, it has become clear as water to visually be able to understand the upheaval of the justice system due to political motivations, even in the highest courts. The justice system has a fundamental obligation to the people it defends and represents, to be unbiased and apolitical–Lady Justice carries both the balance and the sword blindly, a significant position to demonstrate the blindness to third-factors that is necessary to ensure the absolute closest to fairness that the system could possibly achieve. Creating and further promulgating this harsh and unequal playing field based on the color of one's skin only establishes the true inconsistency that current policies have with the Constitution and continue to have, and that is that in all reality, *there is no such thing as a fair pursuit of happiness.* Happiness, although subjective, is a reasonable and worthy attainment, that the justice system must continuously strive to protect and shield. As the politicization of the judicial system radicalizes the jurisprudence, as seen with the overturning of *Roe v. Wade*[104] and the current ongoing cases against the former President of the United States of America and his lawsuits,[105] both civil

[103] *Supra* note 101.

[104] Roe v. Wade, 410 U.S. 113 (1973)

[105] Former President of the United States of America, Donald J. Trump currently at the time of the editing of this Article has been deemed guilty to thirty-four civil counts, while the criminal charges regarding insurrection have yet to be judged. However, these cases have not deterred the Former President to postulate himself for the highest position of the country once more, thus perfectly showcasing the politcation of the judicial system, which does not aim to be fair subjectively, but to, whether one way or the other, push the political agenda aligning with personal beliefs, not the objective meter stick that is the law. For more information, please refer to: https://www.nytimes.com/article/trump-investigation-conviction.html

and criminal. Jurisprudence in the contemporary day tends to stray towards political ideologies and with political party motivation and obligations. In turn, it becomes necessary to keep trying to analyze and dictate the law through the relevant circumstances.

In the European Union, the European Consensus tends to be a marker used when judging a case, to keep the country's uniform and in line with each other in terms of social comparisons; in consequence, the concept of the living instrument doctrine, although mainly applicable to human rights law, it is an imperative tool to continue to visualize the intent to continuously evolve the law in line with that ideology of society to thus continue to renew and comply with the social contract entered upon by the citizens and government. Regardless of the margin of appreciation, the living instrument doctrine is a conceptually necessary mechanism to understand the need for a hand-in-hand approach towards innovation and progress.[106]

THE PHILOSOPHICAL BASIS FOR AFFIRMATIVE ACTION

In the final analysis, a last parameter which must be uniquely regarded is the philosophical justification for affirmative action. Affirmative action has time and time again been a scandalous theme in political discussions surrounding college admissions and race-conscious policies, used to remedy past injustices as aforementioned. Affirmative action is a complex policy due to the debatable contradictory nature of it. As expressed in the previous section, it becomes imperative for one not only to understand the legality of affirmative action but the moral and societal grounds upon which it is a necessity in the present moment.

Fundamentally, the notion of justice and fairness is contentious as the defining features become muddled from person to person due to their background

[106] For more information on the living instrument doctrine and the margin of appreciation, please refer to:
https://www.bihr.org.uk/get-informed/legislation-explainers/the-living-instrument-margin-of-appreciation-principles

and experiences in the society they know. For instance, fairness and justice may ring differently for an African-American in a southern state of the US versus a Venezuelan citizen living through endless political turmoil within their home country. The two situations are completely incomparable, and that is the exact issue one is faced with when analyzing the true meaning of justice and fairness, it is not completely possible to obtain that pinnacle for everyone, but a steady pursuit of it is a sure-enough way to continuously combat injustices which unequivocally exist in any society one finds themselves within.

Although the last paragraph may have sounded cynical–that as a society there is no easily viable solution for reaching fairness–the very nature of that sentiment seems contra-intuitive to the aim of affirmative action which is to alleviate that unfairness to a certain extent in college admissions. Although not easily reconcilable, both ideas are able to coexist as they are not mutually exclusive. The eternally optimist hope that one day the effort put in will lead to a utopian-esque world is not realistic, at least not in this lifetime, but arguably small-scale actions and enacted policies can lead to, at least on a progressive scale, that idealistic outcome.

Legislative policies, binding judicial decisions, and an overall will of the people are necessary instruments to enact change in the current social contract that citizens are subscribed to. Affirmative actions originate as a remedy, as a tool to seek equality of sorts for those who historically have been underrepresented in higher education. If everyone supported these policies, there would be a progression of more remedies being implemented to help solve all the injustices in the US educational system.

Although a dated example, it unfortunately still highlights the national disgrace that is the education system in the US: in the early 2000's, a social experiment was conducted in Chicago with two extremely different high schools, Harper High School in the low-income Chicago neighborhood of Englewood and Neuqua Valley High School in Naperville, IL, only thirty-five miles away.[107] Test students from each school switched classroom for a day and the difference astounded

[107] Failing Grade, OPRAH, (April 11, 2006), https://www.oprah.com/world/failing-grade/all

them; Neuqua's facilities at that point in time were valued at $65 million, complete with an olympic size swimming pool, award-winning fine arts department, and a course curriculum offering more than two dozen advanced placement courses compared to Harper, where they only offer two of these courses, have a pool which had not been filled in over a decade, and did not have enough musical instruments for everyone so they would improvise with the material they had, like banging on desks.

For context, public schools in the United States are funded by property taxes, paid by the citizens living in that school district. To further concrete this, according to a 2021 report, the average Englewood household income is $22,507 a year.[108] Meanwhile, the World Population Review calculated for their 2024 report that the average household income in Naperville is $171,081 a year.[109] The students who participated in this social experiment realized how disproportionate their access to resources really was, and that is something that the US education system still needs to address to this day. Neuqua is no longer open today, as its last graduating class consisted of less than twenty students and the facilities even resulted in students becoming hospitalized.[110] At Neuqua Valley at the point in time of the experiment, 78% of students achieve proficiency in reading according to Illinois standards, while 76% meet the science standards, and 77% meet the mathematics standards. In contrast, at Harper, only 16% of students meet the reading standards, 1.5% meet the science standards, and just 0.5% meet the mathematics standards. Such disparities of the education system stem from the first time students enter a classroom, and although race plays a factor, so does one's socio-economic status.

To be able to visualize this, imagine the following example: envision two students who have exemplary grades, but one of them goes to Neuqua Valley and the

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[108] Community Profile: Englewood, University of Chicago Medicine, https://www.uchicagomedicine.org/-/media/pdfs/adult-pdfs/community/chna-community-profiles/englewood-community-profile.pdf

[109] Naperville Illinois Population 2024, World Population Review, (2024) https://worldpopulationreview.com/us-cities/naperville-il-population

[110] We Need Outrage and Action Over Harper high School's Bloody Story, GOOD, (Feb. 22, 2013), https://www.good.is/articles/we-need-outrage-and-action-over-harper-high-s-bloody-story

other to Harper. The Neuqua Valley student has a vast amount of resources, extracurriculars, and well-connected and safe neighborhood to aid them in the creation of a college application, while the Harper student probably needs to work to help their parents make ends meet, and does not have time for extracurricular activities, provided that they even existed at their institution, and beyond that, they live in an unsafe area where gang violence prevails–yet they both have exemplary grades.

Affirmative action seeks to help give both students an equal opportunity to higher education, or level the field; one can assume that the Harper student is likely of color or at the very least of a low socioeconomic status. However, even if the race of the student was different, it still means that from the very start the playing ground was not even, not even close. Affirmative action seeks to even it, by including race as a factor; however, let this serve as a clarification, race may be a factor taken into consideration in college admissions, however it is not the only one nor the defining component of a student's application as universities and institutions also take into account the merit of each individual. Due to this, many scholars and political scientists are turning towards a more comprehensive approach to affirmative action, one that takes into account race, socioeconomic status, the context of each individual's family life, and their academic merit.

Furthermore, the theories of philosophers such as John Rawls and Rudolf von Jherring help illustrate the contradictory complexity for the necessity affirmative action holds in society. From the abstract mindset that in the face of legislation, policies would be enacted to counteract these injustices and ensure that regardless of the position one is in, a fair chance and opportunity to strive towards higher education would be a possibility. To do this, one can employ John Rawls's veil of ignorance, a cornerstone of his political philosophy enshrined in his 1971 *Theory of Justice*.[111] The veil of ignorance is a hypothetical thought experiment to guide the formulation of the principles which ideally would be employed in a just society–fundamental fairness and impartiality in the creation of social and political

[111] Philosopher John Rawls is well known for a crucial yet utopian thought experiment known as "the Veil of Ignorance" which is in depth explained in his 1971 book, Theory of Justice.

structures. Rawls envisions the following scenario: one is about to enter into a social contract[112] to establish basic principles by which society will be governed, however, in this scenario, one does not know absolutely anything about their life or themselves–their abilities, gender, race, talents, socioeconomic status, or any other particular attributes. That exact absence of knowledge is what constitutes the symbolic veil of ignorance. The argument Rawls makes is that the ignorance of those who hold the power to choose the principles of justice would ensure fairness and impartiality as they would be motivated to create a society that safeguards the interest of all, not just theirs, because they do not know where they themselves will end up. The veil of ignorance serves as a construct for individuals to think behind a blind perspective, preventing them from favoring particular positions or groups due to their personal circumstance, instead opting for a society that ensures fairness and justice for all as one's very human nature would not be willing to risk ending up in a disadvantaged position. The theory of the veil of ignorance guides the notion of the necessity in practice and morally of affirmative action.

Affirmative action refers to policies aimed at addressing historical and systematic inequalities; behind the veil, individuals would recognize the possibility of being born into a disadvantaged group who has been historically marginalized. These individuals would then theoretically understand that societal structures are not always just to certain groups who could be systematically oppressed. In choosing principles of justice by which to govern society, it would be a recognition that the playing field is not at an equal level and that corrective measures are needed to fulfill the principle of justice that individuals would choose behind the veil of ignorance. However, it becomes crucial to note that affirmative action should be carefully designed and implemented to avoid perpetuating new forms of injustice or

[112] In the seventeenth century, philosopher John Locke argued for the idea of a social contract, and ultimately its fundamental importance is the continuation of a just, transparent, and functional society where order is clear and allows for the well-being of the people. The people subjected to the social construct are under the obligation to comply with the authority of the government, but also in turn hold the power to overturn and rebel against the government who does not respect or fulfill their part of the social contract. For more information, please reference: https://plato.stanford.edu/entries/locke-political/

creating reverse discrimination, instead, to genuinely address historical and systemic injustices. Rawls' philosophical foundation for understanding the moral and practical need for affirmative action defends the need for diversity, to affirm opportunity, and reduce racial disparities present since the founding of the United States. There is difference between color blindness and racelessness, and at the core of the SCOTUS' ruling in Harvard, the colorblindness claimed is not truly blind at all in the way that Lady Justice has her vision taken away to ensure fairness– instead, colorblindness acknowledges the need to ignore systematic oppression associated with the color of one's skin, instead opting to wear another pair of rose-colored lenses to attempt to be blind to the differences that have been ingrained into American society and its people.

Affirmative action serves as a defense for diversity by recognising that a just and equitable society requires the deliberate promotion of historically marginalized groups. By embracing diversity, the effects of it enrich the work force consequently with a mosaic of perspectives, experiences, and talents as active inclusions of diversity fosters a more nuanced and holistic perspective to the understanding of societal challenges faced by different groups. Affirmative action affirms the principle of equal opportunity by acknowledging the historical injustices and systemic discrimination that have created invisible and impenetrable barriers that hinder certain groups from accessing the same opportunities as others. In the workplace, affirmative action profoundly impacts diversity as described by a Harvard alum, who emphasizes the vital role of affirmative action in shaping diverse learning environments; she underscored the impact that diversity and affirmative action had on her academic and career success.[113] A specific nuance to exemplify is that although affirmative action has served as an instrument to allow for marginalized groups to have an opportunity to access higher education, namely based on race, one of the demographics which has clearly and extensively benefited by affirmative

[113] 'Students will suffer': Harvard and UNC students, alumni react to 'disappointing' Supreme Court ruling rejecting affirmative action in admissions, CNBC, (June 29, 2023) https://www.cnbc.com/2023/06/29/scotus-affirmative-action-ruling-harvard-and-unc-students-alums-react.html

action throughout history is women, specifically white women.[114] The reversal of affirmative action in modern society does not stop short of no longer requiring or encouraging a diverse and equally distributed class. Historically, universities only accepted male students into higher education institutions and only into the 19th and 20th centuries allowed for women to share in the knowledge of their male counterparts.

This sentiment of striving, *reaching*, for a more inclusive and fairer tomorrow is an atemporal feeling, present in every moment. Whether it be for women's equality rights, the fight for rights for every man regardless of race, and thus the fight for education and knowledge. Jherring's "Struggle for Law" encapsulates the perpetual struggle for rights and justice, a timeless path narrated by women and racially marginalized communities. The struggle for women's rights is a vital aspect of this ongoing endeavor, encompassing the continuous effort to break down systemic obstacles–likewise while rights based on race address ingrained disparities within the very fabric of society, necessitating an ongoing challenge against discriminatory frameworks that endure despite societal advancements. At its core, Jherring's "Struggle for Law" accentuates the timeless verity that the pursuit of rights, be it grounded in gender or race, constitutes an unyielding force demanding unwavering dedication and persistent fight. Affirmative action, firmly entrenched within this philosophical paradigm, embodies a purposeful stride towards redressing historical injustices, ensuring a future characterized by equity for all. It astutely acknowledges that the pursuit of justice is an enduring narrative, intertwined into the very fabric of the human experience, where deliberate actions become threads weaving together a tapestry of equitable futures. In today's society, the United States' imposing nature of freedom and opportunity has been on the decline in the global sphere for some time now. It held the title for the country with the education system foreign students dreamed of because it meant something– it meant an opportunity for the fostering of their careers and lives. However, the facade is

[114] Impact of Affirmative Action on Women, NOW, (July 26, 2023), https://now.org/blog/the-impact-of-affirmative-action-on-women/

unfortunately only true for a limited number of students in a country that boasts such a dream.[115] The Fourteenth Amendment in itself represented a foundational principle that citizens had absolute equality and must not be discriminated against but the repetitively oppressive nature of the nation inherently requires discrimination for equality due to the past historical failing.

CONCLUDING REMARKS

As this Article comes to its finalization, it is 2024, and there is arguably still a long way to go to ensure a fair society in today's age. Although idealistic thinking, there must be a realistic and practical method to get there. The mesmerizing tapestry of American society is fundamentally ingrained with the threads of injustices spanning decades–however, it is the story of our country and something unchangeable, as the very shred of the identity that the country is founded upon is arguably anything but. The aspect that is still malleable is that which takes place now, as society collectively gravitates towards the necessity to move forward and learn from past inequities and thus remedy them. In the modern reading of jurisprudence, the *Grutter*[116] decision served as a benchmark for reevaluation of the societal progress in bridging distinctions and discriminatory measures put in place after the Civil War. As long as the country still needed this mechanism, it would stay in place; arguably, the United States is at a point, that although progress has been fundamentally made with the funding of HBCU schools[117] and other instruments, affirmative action is still required to further foster diversity in the educational

[115] Education Rankings by Country 2024, World Population Review, (2024), https://worldpopulationreview.com/country-rankings/education-rankings-by-country

[116] *Supra* note 81.

[117] FAST FACTS Historically Black Colleges and Universities, National Center for Education Statistics, U.S. Department of Education,
("Historically Black colleges and universities (HBCUs) are institutions that were established prior to 1964 with the principal mission of educating Black Americans. These institutions were founded and developed in an environment of legal segregation and, by providing access to higher education, they contributed substantially to the progress Black Americans made in improving their status.")

sphere which will ultimately benefit the diversity shared down the line in the career-oriented sphere.

The work force as of now has become accustomed to greeting not only a well-balanced group, but a diverse one, in order to create a workplace that enhances perspectives and problem solving. This much aftereffect of affirmative action is a positive step in the direction of inclusion and working against perpetuated trends which have been ingrained in the history of the United States. Whether it be by establishing affirmative action or creating an alternative mechanism with similar aims, such as class-based affirmative action which would expand those who fall under the groups identified as minorities,[118] it is necessary to examine the legality of affirmative action, objectively, apart from its politicizing nature.[119]

At a first glance, it is understandable that affirmative action can potentially go against The Civil Rights Act of 1964 and its enshrined protections, along with those embedded in the Constitution, however, it is undeniably a resource for the marginalized social groups to have a greater opportunity at higher education institutions. Universities taking the race of an applicant into account on a holistic approach with other factors based on merit is arguably a justified necessity due to past injustices, however, other factors such as socio-economic status of the applicants should be considered as a thorough review of the candidate to ensure that all those groups in the modern age which are disadvantaged or marginalized are judged on an equal playing field. Through the *Grutter* decision, race is solely one of many factors taken into consideration, and affirmative action's very nature is an instrument to harmonize contemporary society with equity.

Although of theoretical and philosophical nature, the necessity of creating potential injustices to cure past injustices may be a cynical approach to the

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[118] Julia Gelatt, et al., A Profile of Low-Income Immigrants in the United States, (Nov. 2022), https://www.migrationpolicy.org/sites/default/files/publications/mpi_low-income-immigrants-factsheet_final.pdf

[119] Margaret C. Simms, et al., RACIAL AND ETHNIC DISPARITIES AMONG LOW-INCOME FAMILIES, The Urban Institute, (Aug. 2009), https://www.urban.org/sites/default/files/publication/32976/411936-racial-and-ethnic-disparities-among-low-income-families.pdf

development of society and could be regarded as a sense of backtracking or lack of movement towards the new, but the fabric of American society is marked by that which construed the nation from its founding. Fairness is not real, however, that does not ever take away from the fact that it is worth fighting for and trying to achieve every single day. An impossibility is but a hindrance, when the true challenge and formative experience is the way to getting there, which in this case, will be what continues the legal system for the future and beyond the scope of affirmative action.

As the life of affirmative action has come to an end for the time being, it is of utmost importance to recognize its impact in society and the effects of its absence and barring. Consequently, because of its overturnal, it also becomes increasingly interesting to remain up to date with the latest developments regarding the backlash that ensues because of affirmative action's barring. As alluded to earlier, the very root and concept of fairness is unattainable, and the struggle for a just position in society will be forever lasting, simply because the world is far from perfect. That is the very reason to keep fighting, and through a legal lens, analyze social backlash in the judicial system manifest itself. Namely, how now after the reversal of affirmative action, legacy admissions at prestigious universities across the country are under fire for the fundamental injustices claimed in the *Harvard* case.[120] The law is rooted in the Hammurabi Code–an eye for an eye–a social backlash that is manifestly encountered in the legal and judicial system of the country that claims to be that of the free.

The legal and judicial system is not perfect; no one claims that it is–if they did, they would be wrong. The system is built off mistakes and prejudices, and that is not changeable unless the system as a whole is dismantled, piece by piece, law by law, idea by law. That is fundamentally against the rule of law and legal certainty, so in practical and abstract terms, it is not the most feasible, however, that simply means that ensuring that at the very least, the current laws and policies are read in light of society, an effective trade-off needs to be made and given thought to, as it

[120] The tradition of 'legacy' college admissions is under fire, The Washington Post, (July 28, 2023), https://www.washingtonpost.com/education/2023/07/28/legacy-admissions-explained-harvard-lawsuit/

helps avoid the necessity for a total reconstruction, instead, choosing redirection. Redirecting society to a better tomorrow, to a fairer society, to a path that will not be easy, but it will one day lead to the *fair pursuit of happiness*.

Can Cyber Operations Directed Against Electrical Infrastructure Be Considered War Crimes Under Article 8 of the Rome Statute? Special Insights from the Russo-Ukrainian War

Alexia Collot d'Escury Ariza

ABSTRACT

To determine whether cyber operations directed against electrical infrastructure can be considered war crimes, the Russo-Ukrainian conflict offers a practical application of theoretical debates. Notably, it is investigated whether state actors can face individual criminal responsibility under the Rome Statute for launching cyber attacks against Ukraine's power grid and infrastructure, which was also the target of conventional kinetic strikes.

First, although cyber operations are governed by the principles of International Humanitarian Law, for criminal responsibility to be engaged under Article 8 of the Rome Statute, they must amount to "*attacks*", defined as "*acts of violence*". Cyber attacks are not violent weapons. However, in effect, they cause violent consequences. Whereas destructive cyber operations generate similar effects to kinetic strikes, and thus can qualify as attacks, disruptive cyber operations against electrical systems will only be encompassed if the reverberating effects of electricity disruption on civilians are accounted for, and these effects are harmful.

Second, for a case investigating cyber operations against electrical systems to be admissible before the International Criminal Court (ICC), they must lead to sufficiently grave situations. To this end, they must display sufficient scale in attack, and thus impact. Furthermore, state hackers may not always be the ones who are most responsible for ensuing war crimes, in comparison to superior military commanders. Finally, attacks against electrical systems can constitute war crimes if they are widespread and indiscriminate, qualifying as an attack against civilian objects and/or a violation of the principle of proportionality. This observation is

independent of whether the cyber operations were launched alone, or in conjunction with kinetic weapons. However, the strength of this statement will be directly correlated to the benchmarks which the ICC applies to the assessment of targeting electricity.

Last, the war has uncovered gaps in existing law, endowing the ICC with an interpretative role before it can proceed to establishing a case. Notably, the prohibition of analogy entails that the Court will need to clarify whether cyber operations can be encompassed by the Rome Statute without necessitating amendment. Furthermore, the Court will need to determine the applicable benchmark for analyzing the legality of targeting electrical systems, and address their changing role in modern warfare.

BACKGROUND

Electrical systems have been the object of military operations since the First World War.[121] However the security of the energy sector has long been classified as vital, given that it powers every other critical infrastructure system, and therefore the security dogmas have shifted to encompass cybersecurity threats as well.[122]

On April 8th, 2022, Unit 74455 of the Main Directorate of the General Staff of the Armed Forces of the Russian Federation (hereinafter, GRU) launched malwares Industroyer2 and CaddyWiper against a regional Ukrainian energy provider. The cyber attack, however, was successfully detected whilst in progress.[123] Then, on October 6th, 2022, the very same unit launched a successful cyber attack on the Ukrainian power grid. Simultaneously, missiles struck against critical infrastructure across the country.[124] More recently, on September 4th, 2023, Unit 26165 directed malware against a critical energy infrastructure in Ukraine, although it was intercepted.[125]

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[121] *E.g.*, James W. Crawford III, *The Law of Noncombatant Immunity and the Targeting of National Electric Power Systems* 101 (1997), Fletcher Forum of World Affairs, https://dl.tufts.edu/downloads/xp68ks762?filename=ht24wv85w.pdf.

[122] *See generally*, Cybersecurity & Infrastructure Security Agency, *Energy Systems*, https://www.cisa.gov/topics/critical-infrastructure-security-and-resilience/resilience-services/infrastructure-dependency-primer/learn/energy (last visited Aug. 8, 2024); European Commission, *Critical infrastructure and cybersecurity*, https://energy.ec.europa.eu/topics/energy-security/critical-infrastructure-and-cybersecurity_en (last visited Aug. 8, 2024).

[123] ESET Research, *Industroyer2: Industroyer reloaded* (Apr. 12, 2022), https://www.welivesecurity.com/2022/04/12/industroyer2-industroyer-reloaded/

[124] Andy Greenberg, *Sandworm Hackers Caused Another Blackout in Ukraine - During a Missile Strike,* Wired (Nov. 9, 2023), https://www.wired.com/story/sandworm-ukraine-third-blackout-cyberattack/.

[125] Anna Ribeiro, *Ukraine's CERT discloses cyberattack on critical energy infrastructure by APT28 hacker group*, Industrial Cyber (Sept. 6, 2023), https://industrialcyber.co/industrial-cyber-attacks/ukraines-cert-discloses-cyberattack-on-critical-energy-infrastructure-by-apt28-hacker-group/.

Unit 26165, also named APT28, Fancy Bear, STRONTIUM, or Forest Blizzard,[126] is classified as an advanced persistent threat.[127] It has been known to attack high-value targets in various countries,[128] such as the German Bundestag,[129] the Bank of Africa,[130] the White House,[131] or the French President Emmanuel Macron's 2017 election campaign.[132] Unit 74455 is also more commonly known as Sandworm, Seashell Blizzard or IRIDIUM.[133] It is responsible for the 2017 NotPetya malware[134] and the country-wide cyber attacks in Georgia,[135] to name a few. Most notably, it had already triggered blackouts in 2015 and 2016 in Ukraine.[136]

Russian attacks against Ukrainian electrical systems have called into question, first, the status of energy provision vis-à-vis the victims of armed conflicts

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[126] Microsoft, *How Microsoft names threat actors*, https://learn.microsoft.com/en-us/defender-xdr/microsoft-threat-actor-naming?view=o365-worldwide (last visited Aug. 8, 2024).

[127] FireEye, *APT28: A Window into Russia's Cyber Espionage Operations?* 3 (2014), https://services.google.com/fh/files/misc/apt28-window-russia-cyber-espionage-operations.pdf.

[128] Emil Sayegh, *APT 28 Aka Fancy Bear: A Familiar Foe By Many Names*, Forbes (February 28th, 2023), https://www.forbes.com/sites/emilsayegh/2023/02/28/apt28-aka-fancy-bear-a-familiar-foe-by-many-names/.

[129] Reuters, *Germany Issues Arrest Warrant For Russian Suspect in Parliament Hack: Newspaper* (May 5, 2020), https://web.archive.org/web/20200505153531/https://www.nytimes.com/reuters/2020/05/05/world/europe/05reuters-russia-germany-warrant.html.

[130] Danielle Walker, *APT28 orchestrated attacks against global banking sector, firm finds*, SC Magazine US (May 13, 2015), https://web.archive.org/web/20180302225332/https://www.scmagazine.com/apt28-orchestrated-attacks-against-global-banking-sector-firm-finds/printarticle/414586/.

[131] Cory Doctorow, *Spear phishers with suspected ties to Russian government spoof fake EFF domain, attack White House,* Boing Boing (Aug. 28, 2015), https://boingboing.net/2015/08/28/spear-phishers-with-suspected.html.

[132] Eric Auchard, *Macron campaign was target of cyber attacks by spy-linked group*, Reuters (April 24th, 2017), https://www.reuters.com/article/us-france-election-macron-cyber-idUSKBN17Q200/

[133] Microsoft, *supra* note 6.

[134] Andy Greenberg, *The Untold Story of NotPetya, the Most Devastating Cyberattack in History*, Wired (Aug. 22, 2018), https://www.wired.com/story/notpetya-cyberattack-ukraine-russia-code-crashed-the-world/.

[135] Przemysław Roguski, *Russian Cyber Attacks Against Georgia, Public Attributions and Sovereignty in Cyberspace*, Just Security (Mar. 6, 2020), https://www.justsecurity.org/69019/russian-cyber-attacks-against-georgia-public-attributions-and-sovereignty-in-cyberspace/.

[136] Alex Hern, *Ukrainian blackout caused by hackers that attacked media company, researchers say*, The Guardian (Jan. 7, 2016), https://www.theguardian.com/technology/2016/jan/07/ukrainian-blackout-hackers-attacked-media-company.

and, second, the responsibility of state actors who launch operations through cyber means. President of the European Commission, Ursula von der Leyen, tweeted: "*Russia's attacks against civilian infrastructure, especially electricity, are war crimes.*".[137] The aforementioned attacks have encompassed both traditional kinetic force and the launching of cyber operations. Victor Zhora, Chief Digital Transformation Officer at the Ukrainian government's Special Communication and Information Protection Service, testified that there is "*some coordination between kinetic strikes and cyber attacks"*, therefore kinetic strikes' "s*upportive actions in cyber can be considered war crimes''* as well.[138]

[137] Ursula Von der Leyen, X (Oct. 19, 2022, 9:10 AM), https://x.com/vonderleyen/status/1582630271287021570?lang=en.
[138] Shannon Van Sant, *Kyiv argues Russian cyberattacks could be war crimes,* Politico (Jan. 9, 2023, 4:00 AM), https://www.politico.eu/article/victor-zhora-ukraine-russia-cyberattack-infrastructure-war-crime/.

LITERATURE REVIEW AND METHODOLOGY

First, the applicability of the norms of International Humanitarian Law (hereinafter, IHL) to cyber operations (hereinafter, COs) has been extensively researched. Recognised authorities, such as the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (hereinafter, Tallinn Manual 2.0), and the International Committee of the Red Cross (hereinafter, ICRC), have explored it. However, whether COs can fall within the definition of "*attack*" in accordance with Article 8 of the Rome Statute (hereinafter, RS), has not been dealt with directly by these practitioners and, where few academics have discussed it, the debate remains unsettled. Moreover, no Paper has dedicated its study to the specificities of electrical systems in this regard.

Second, whether COs can give rise to sufficiently grave situations to warrant investigation, and prosecution, by the International Criminal Court (hereinafter, ICC), has been explored by academics such as Marco Roscini[139] and Kai Ambos.[140] Command responsibility has specifically been explored as well, for instance in the Tallinn Manual 2.0. Again however, no Paper has yet analyzed this from the specific viewpoint of COs targeting electrical systems. Furthermore, the legality of attacking electrical systems has been extensively analyzed in relation to past

[139] Marco Roscini has published widely in the field of international law. He is the author of three monographs: *Le zone denuclearizzate* (Nuclear weapon-free zones, Giappichelli 2003), *Cyber Operations and the Use of Force in International Law* (Oxford University Press 2014) and *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles* (Oxford University Press 2024). He is also the co-editor of *Non-proliferation Law as a Special Regime* (Cambridge University Press 2012) and the author of several articles and chapters in important international peer-reviewed journals and edited books. Amongst other positions, Roscini is the Swiss Chair of International Humanitarian Law at the Geneva Academy of International Humanitarian Law and Human Rights.

[140] Kai Ambos centres his research on criminal law and procedure, comparative law, and international criminal law. He has various publications in these areas, and his most recent ones include: *Commentary of the Rome Statute of the International Criminal Court* (Beck/Nomos/Hart 2022), Treatise of International Criminal Law (Oxford 2013-2016), *The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights* (Human Rights Law Review 2017). Amongst other positions, Ambos acts as a Judge at the Kosovo Specialist Chambers in the Hague, Acting Director of the Institute for Criminal Law and Justice, and Advisor (*Amicus Curiae)* to the Colombian Special Jurisdiction for Peace.

conflicts, such as Iraq or Kosovo. However, the Russo-Ukrainian War has sparked the emergence of academia exploring whether widespread attacks against electrical systems can constitute war crimes, notably commented on by Michael N. Schmitt[141] and Charles J. Dunlap Jr.[142] Nevertheless, the studies are limited in their scope, and do not address the particularities of the participation of COs in the attacks.

Finally, whether the prohibition of analogy may impede the Rome Statute from encompassing COs in future prosecution has been very rarely explored by academia, citing here the work of Jennifer Trahan[143] and Roscini. The war has sparked debates on whether the text needs amendment, but the study is recent and incomplete. Furthermore, calls for revising the applicable assessments to targeting electricity systems have been made, yet very few academics, one being Francesca Capone,[144] have yet to assess it as well.

This Paper therefore presents an original take on the future of international criminal responsibility in the face of modern warfare tactics. It conjunctly analyzes

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[141] Michael N. Schmitt is a prolific scholar in the study of international humanitarian law, the use of force, and the international law applicable to cyber operations. He is internationally known for his work in directing the two Tallinn Manuals [cited above]. Amongst other positions, Schmitt is the G. Norman Lieber Distinguished Scholar at the Lieber Institute of the United States Military Academy (West Point), the Charles H. Stockton Distinguished Scholar in Residence at the US Naval War College, and serves as General Editor of Oxford University Press' Lieber Studies series. He is the author of more than 200 scholarly publications.

[142] Charles J. Dunlap Jr. totals more than 120 publications addressing a wide range of issues, including national security, the law of armed conflict, the use of force under international law, civil-military relations, cyberwar, airpower, military justice, and ethical issues related to the practice of national security law. Major General Dunlap retired from the Air Force in 2010, having most notably served as Deputy Judge Advocate General of the United States Army from 2006 to 2010. He is now a Professor of Law at Duke Law faculty.

[143] Jennifer Trahan is an internationally renowned expert on issues of international law and international justice. Amongst other notable positions, she serves as one of the US representatives to the Use of Force Committee of the International Law Association, and has served as an *amicus curiae* to the International Criminal Court on the appeal of the situation regarding Afghanistan, and on the Council of Advisers on the Application of the Rome Statute to Cyberwarfare. Her recent book, *Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge U. Press 2020), received the 2020 Book of the Year Award from the American Branch of the International Law Association.

[144] Francesa Capone has undertaken research on a wide range of topics, encompassing the law of remedies, the legal framework governing the response to CBRN events and the issues connected to international law and terrorism. She has been a visiting fellow and guest lecturer at several academic institutions across Europe, including Leiden University and the Max Planck Institute for Comparative Public Law and International Law.

the potential criminal responsibility of individuals launching COs, which has been limitedly explored (Ambos, in his study of the matter, denotes the existence of very few academia, with the Tallinn Manual 2.0 only dedicating two out of one hundred and fifty four rules to it), and the revised view on the status of electricity systems, only newly emerging, in a practical review. Where research exists in a particular field, or prosecutorial step, it has not analyzed the two points of contention together. Furthermore, findings are rarely applied to studying existing hacks. Thus, this Paper proposes an approach to constructing a successful prosecutorial process.

The Russo-Ukrainian War represents a unique opportunity to determine if the International Criminal Court could launch a successful investigation into, and prosecution of, those individuals responsible for launching cyber attacks against Ukraine's national energy grid. By applying legal theory to a case study, this Paper ultimately aims to determine whether cyber operations launched against electrical infrastructure can be considered war crimes under Article 8 of the Rome Statute. This investigation will be carried out in three Chapters, firstly ascertaining how the principles of *Jus in Bello* apply to cyber operations, secondly establishing whether attacks against electrical systems can be considered war crimes, and finally discerning what the war has underscored in regards to the ICC's role, and future obstacles, in addressing such crimes under the current texts.

To this purpose, this Paper draws on diverse sources for information on the war in Ukraine, including international news outlets like BBC News and The New York Times, specialized security and cybersecurity news reports, such as Mandiant and the Center for Strategic and International Studies, as well as human rights organizationsorganizations' take, like Amnesty International and the International Rescue Committee. Furthermore, views were extracted from assemblies and press releases of governmental and international bodies, like the ICRC and the United Nations Security Council. It also incorporates statements from officials of the State parties at stake. To supplement this information, this Paper has gathered data from

International Databases, like the CyberPeace Institute, and materials for their legal analysis, such as from the ICRC's IHL Databases on Rules and Practice.

AUTHOR'S NOTE

First, this Investigation focuses on the actions and policies of the Russian Government and Military, and it in no way seeks to attribute responsibility to Russian citizens as a nation. Whilst references to "the Russian Federation" or "Russia" appear throughout this Study, they should be understood as referring specifically to the decisions and conduct of the current Russian Government and its Officials exclusively. This distinction is crucial in maintaining an objective and fair analysis, particularly in a context where the actions of a State actor may have to be separated from the broader population which it governs.

Second, the temporal scope of this Investigation is confined to the cyberattacks which were launched by Sandworm and FancyBear against electrical systems in Ukraine up until September 2023, thereby deliberately excluding subsequent developments. For instance, on April 19th 2024, the Computer Emergency Response Team of Ukraine (CERT-UA) released a report declaring that, in March, they had uncovered a malicious plot of the Sandworm group, aimed at disrupting the stable operation of information and communication systems of about twenty energy, water and heating supply enterprises in ten regions. Whilst acknowledging that the latter events undoubtedly impact the broader context of the Investigation, such as by having the potential of shaping the Gravity Analysis contained in Chapter II Part I, it was necessary to establish a defined scope for this Paper to provide a coherent and focused analysis which is representative of the methodology applied by the International Criminal Court. These developments may thus warrant future further examination or inclusion in the considerations of this Study.

CHAPTER I. How do the principles of Jus in Bello apply to cyber operations?

Cyberspace operations, or in short, 'cyber operations', are defined as the "*employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace*".[145] Academia converges in that the principles of *Jus in Bello* govern, and limit, any use of COs by States in the context of an armed conflict.[146] However, the manner in which the existing framework should apply, and whether it is sufficient, remains the subject of controversy.[147] In this Chapter therefore, this Paper aims to, firstly, showcase the existing gap in the normative framework of IHL and, secondly, explore the different manners in which this gap may be filled. Particularly, there is dissent amongst academia and practitioners regarding which type of COs against electrical systems constitute an 'attack' within the meaning of IHL, and therefore fulfill the 'attack' requirement for Art.8 to be engaged. This Chapter will determine that different types of COs directed against electrical infrastructure can rise to the requisite level of 'attack', and therefore trigger international criminal responsibility.

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[145] Committee on National Security Systems, CNSSI No. 4009, *Glossary* (Apr. 6, 2015), https://www.niap-ccevs.org/Ref/CNSSI_4009.pdf.

[146] *E.g.*, NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn manual 2.0 on the international law applicable to cyber operations* 375 (Michael N. Schmitt ed., 2nd ed., 2017) [hereinafter, *Tallinn manual 2.0]*; Kubo Macák & Tilman Rodenhäuser, *Towards common understandings: the application of established IHL principles to cyber operations*, Humanitarian Law & Policy (Mar. 7, 2023), https://blogs.icrc.org/law-and-policy/2023/03/07/towards-common-understandings-the-application-of-established-ihl-principles-to-cyber-operations/.

[147] International Committee of the Red Cross, *International humanitarian law and cyber operations during armed conflicts ICRC position paper submitted to the Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security and the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security, November 2019*, 102 no. 913 International Review of the Red Cross 481, 482 (2020), doi:10.1017/S1816383120000478.

I. The Gap in the Geneva Conventions and its Protocols regarding cyber operations

When an armed conflict erupts, a legal threshold is crossed, and the international laws regulating the conduct of war (IHL, or *Jus in Bello*) are triggered.[148] The normative architecture of IHL is composed of treaties and customary law.[149] To this investigations' purpose, focus will be placed on the provisions of "Protocol Additional to the Geneva Conventions of August 12th, 1949, and relating to the Protection of Victims of International Armed Conflicts" (hereinafter, AP I). Ukraine and the Russian Federation are both parties to it, and thus bound by its obligations, although the latter withdrew its acceptance of the competence of the International Fact-Finding Commission in 2019.[150]

Cyber activities are not expressly regulated by the existing legal framework.[151] Yet, it is presumed that IHL applies to COs,[152] because "*the law of armed conflict [...] applies to all forms of warfare and to all kinds of weapons, those of the past, present, and future*".[153] In effect, the United Nations' Group of Governmental Experts has already concluded that international law including, where applicable, the principles of humanity, necessity, proportionality, and distinction, apply to the use of ICTs by States.[154] Accordingly, attacks against

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[148] Eliav Lieblich, *The Facilitative Function of Jus in Bello*, 30 no. 1 The European Journal of International Law 321, 322 (2019), doi:10.1093/ejil/chz015.
[149] Michael N. Schmitt, *Normative architecture and applied international humanitarian law*, 104 no. 920-21 International Review of the Red Cross 2097, 2098 (2022), doi:10.1017/S1816383122000662.
[150] Ministry of Foreign Affairs of the Russian Federation Press Release, *Press release on the withdrawal of the declaration to Protocol Additional to the 1949 Geneva Conventions and relating to the protection of victims of international armed conflicts (Protocol I) on Russia's acceptance of the competence of the International Fact-Finding Commission* (Oct. 22, 2019 6:41 PM), https://www.mid.ru/en/foreign_policy/news/1473198/.
[151] Tallinn manual 2.0, *supra* note 26.
[152] International Committee of the Red Cross, *supra* note 27 at 485.
[153] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95, ¶ 86 (July 8).
[154] U.N. GAOR 70th Sess., Item 93 *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, at 3, U.N. Docs. A/70/174 (22 July, 2015).

civilians and civilian objects, disproportionate attacks, and attacking, destroying, removing, or rendering useless objects indispensable to the survival of the civilian population, are prohibited, including when using cyber means of warfare.[155] Such conduct may therefore qualify as war crimes.[156]

II. Applicability of IHL by analogy

The war in Ukraine, and prominently the Russian attacks against the energy grid, have displayed a deployment of cyber capabilities in conjunction with conventional forces, thus amongst other possible references, a 'cyber-enabled warfare'.[157] In return COs encompass, inter alia, cyber espionage, cyber manipulation, and cyber attacks,[158] the latter being the strongest, most aggressive form of CO.[159] Notably, the COs which were launched by Fancy Bear and Sandworm against Ukraine's energy grid fall into the latter category.[160]

IHL provides specific protections regardless of the type of harmful operation.[161] For example, it is prohibited to make unauthorized use of the distinctive emblem of the United Nations, including in any type of cyber operation.[162] However military operations, including COs, must meet a requisite threshold to be encompassed by some of the norms of *Jus in Bello*, that is, they must qualify as "*attacks*" under IHL.[163] Although it will be explored in Chapter II, it may

[155] International Committee of the Red Cross, *supra* note 27 at 486-7.
[156] Tallinn manual 2.0, *supra* note 26 at 392.
[157] Trey Herr & Drew Herrick, *Military Cyber Operations: A Primer*, no. 14 The American Foreign Policy Council Defense Technology Program Brief 1, 1 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2725275.
[158] Kai Ambos, *Cyber-Attacks as International Crimes under the Rome Statute of the International Criminal Court?*, *in* Cyber Operations and Cyberwarfare Question *in* ICCForum (Mar. 7, 2022), https://iccforum.com/cyberwar.
[159] *Id.*
[160] CyberPeace Institute, *Energy*, *in* Impact & Harm: Sectors, *in* Cyber Attacks in Times of Conflict Platform #Ukraine (last visited Aug. 10, 2024), https://cyberconflicts.cyberpeaceinstitute.org/impact/sectors/energy.
[161] International Committee of the Red Cross, *supra* note 27 at 489.
[162] Art.38(2) AP I; *See also* Tallinn manual 2.0, *supra* note 26 at 99.
[163] International Committee of the Red Cross, *supra* note 27 at 489.

be advanced here that the accusations levied against the Russian Federation for targeting Ukrainian electrical systems encompass the prohibition of "attack[ing]" civilians[164] and civilian objects,[165] as well as the prohibition of carrying out disproportionate "attacks".[166] Therefore, for a CO to breach the norms of *Jus in Bello,* and engage responsibility under the specified provisions of the RS, it must first of all be an 'attack'. The latter was not defined in the RS, however Art. 49 AP I delineates them as *"acts of violence against the adversary*".

A. Can COs be termed "acts of violence"?

The plain text of Article 49 appears to require a 'violent act' for qualification of conduct as an 'attack'. Therefore non-kinetic operations, by strict textual interpretation, would be excluded.[167] This follows from the means-based approach to the definition, which focuses on the instrument used,[168] and thus poses a difficulty for COs in general to qualify as 'attacks'.[169]

However, there exist precedents advocating for IHL to limit certain actions due to their violent consequences, even without a conventional manifestation of physical force.[170] For example, IHL limited the use of chemical and biological weapons.[171] It is in fact consistent with the law of armed conflict's underlying

[164] Art.51(2) AP I and Art.8(2)(b)(i) RS.
[165] Art.52(1) AP I and Art.8(2)(b)(ii) RS.
[166] Art.51(5)(b) AP I and Art.8(2)(b)(iv) RS.
[167] Michael N. Schmitt, *Cyber Operations and the Jus In Bello: Key Issues,* 87 International Law Studies 89, 93 (Raul P. Pedrozo & Daria P. Wollschlaeger eds., 2011), https://digital-commons.usnwc.edu/ils/vol87/iss1/7/.
[168] Kai Ambos, *International Criminal Responsibility in Cyberspace, in* Research Handbook on Cyberspace and International Law 122 (Nicholas Tsagourias & Russel Buchan eds., 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412626.
[169] David Weissbrodt, *Cyber-Conflict, Cyber-Crime, and Cyber-Espionage*, 22 University of Minnesota Law School 347, 365 (2013), https://scholarship.law.umn.edu/faculty_articles/223/.
[170] Ido Kilovaty, *Virtual Violence - Disruptive Cyberspace Operations as "Attacks" Under International Humanitarian Law* 23 no. 1 Michigan Telecommunications and Technology Law Review 113, 118 (2016), https://repository.law.umich.edu/mttlr/vol23/iss1/3.
[171] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925.

humanitarian purposes to adapt its interpretation of 'attack' to encompass new kinds of weapons which negatively impact the safeguards afforded by AP I,[172] falling in line with the ICRC's reiterated concern regarding the humanitarian consequences of cyber-enabled warfare.[173] This in return stems from the contrasting approach, which is effects-based.[174] The latter has gained the most support amongst the international community, including by the ICRC,[175] and in the Tallinn Manual 2.0, thereby centering on the violent consequences, or the ensuing damage [of COs], and not on violent acts *per se*.[176] Therefore, COs in general may be viewed as 'acts of violence', if they cause the requisite damage or consequence.

B. Can COs targeting electrical infrastructure give rise to "violent consequences" or "damage"?

COs, or in this case, cyber attacks, against electrical infrastructure, cause three types of consequences in the physical world: primary, secondary, and tertiary. The primary effects regard the impact which the CO has on the information system operating the grid or infrastructure (hereinafter, IT). Secondary effects then refer to the impact on the grid or infrastructure itself. Finally, the tertiary effects encompass the repercussions for the population who relies on the targeted grid or infrastructure.[177] Destructive COs, like Sandworm's April 2022 attempt,[178] overwrite, erase, or physically destroy information so that it cannot be recovered.[179]

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[172] Tallinn manual 2.0, *supra* note 26 at 417.
[173] U.N. GAOR 66th Sess., Items 87 & 106 *General Debate on All Disarmament and International Security Agenda Items*, 1st Comm'n, Statement by the Int'l Comm. of the Red Cross (Oct, 2011).
[174] David Weissbrodt, *supra* note 49.
[175] International Committee of the Red Cross, *supra* note 27 at 489.
[176] Tallinn manual 2.0, *supra* note 26 at 415.
[177] National Research Council of the National Academics, *Technology, Policy, Law, and Ethics Regarding U.S. Acquisition and Use of Cyberattack Capabilities* 80 (William A. Owens, Kenneth W. Dam & Herbert S. Lin eds., 2009), https://nap.nationalacademies.org/read/12651/chapter/1.
[178] CyberPeace Institute, *supra* note 40.
[179] Elaine Barker & William C. Barker, *NIST Special Publication 800-57 Part 2 Revision 1, Recommendation for Key Management: Part 2 – Best Practices for Key Management Organizations* 9 (May, 2019), https://doi.org/10.6028/NIST.SP.800-57pt2r1.

This implies, thus, a directly destructive effect or violent consequence for the object, the damage to the IT system.[180] This is akin to the physical outcome which a kinetic military attack would have had.[181] A destructive cyber attack against the IT of an electrical system thus qualifies as an 'attack' within the meaning of Art.49 AP I.

However, disruptive COs, such as Sandworm's October 2022 cyber attack, solely cause the energy grid or infrastructure to be inoperable for a length of time.[182] There is therefore no directly destructive, primary effect on the IT system. Hence, experts have debated whether disruptive cyber operations (hereinafter, DCOs) can be deemed 'attacks' for the purposes of IHL.[183]

Should an overly physical approach to the assessment of 'violent consequences' or 'damage' be taken, the qualification of DCOs as 'attacks' would prove difficult.[184] A majority of the Experts who make up the working group responsible for the Tallinn Manual 2.0 were of the opinion that interference with the functionality of an electrical system qualifies as damage if restoration of functionality of the grid or infrastructure requires replacement of physical components. Some of the Experts in this majority further held that the notion of damage extends to situations in which reinstallation of the operating system or of particular data is required in order to regain functionality.[185] Whether Sandworm's October 2022 DCO, or Fancy Bear's September 2023 attempted malware launch, entailed such reparative needs has not been disclosed.

However, classifying destructive COs as 'attacks' due to their kinetic effect creates a 'kinetic effect equivalence' requirement which would exclude DCOs from

[180] Tallinn manual 2.0, *supra* note 26 at 415.
[181] Georgia Beatty, *War crimes in cyberspace: prosecuting disruptive cyber operations under Article 8 of the Rome Statute* 58 no. 2 The Military Law and the Law of War Review 209, 212 (Dec., 2020), https://doi.org/10.4337/mllwr.2020.02.17.
[182] Marianne Swanson et al., *NIST Special Publication 800-34 Rev. 1. Contingency planning guide for federal information systems* app. G-1 (May 2010), http://dx.doi.org/10.6028/nist.sp.800-34r1.
[183] Ido Kilovaty, supra note 50.
[184] Georgia Beatty, *supra* note 61 at 229.
[185] Tallinn manual 2.0, *supra* note 26 at 417.

the definition. This analysis has been challenged in that a 'true' effects-based approach would extend the notion of 'violent consequence' or 'damage' to the harm suffered by the population as a result of electricity disruption,[186] that is, the tertiary effect.

The ICRC and the Tallinn Manual 2.0 have both determined that the analysis of 'consequential violence' does not halt at the primary (IT impact), or secondary (infrastructure impact) effect, but in fact also encompasses any reasonably foreseeable consequential damage, destruction, injury or death (indirect or reverberating effects).[187] Therefore, DCOs targeting electrical systems which are expected to cause this result constitute 'attacks' under IHL.[188] More precisely, according to the ICRC, the foreseeable harm falling within the definition of Art.49 AP I extends for example to the death of hospital patients caused by a DCO on an electricity network that results in cutting off the hospital's supply.[189] The October 2022 Sandworm DCO may therefore be deemed an 'attack' under this lens, if and it may be presumed, the blackouts it contributed to impacted the livelihood of civilians, thus generating the requisite degree of 'consequential violence'. For instance, by October 20th, 2022, 40% of Ukraine's energy facilities had been damaged,[190] leaving 4.000 settlements in 11 regions without electricity, including for water and medical assistance purposes.[191]

Further encompassing, according to the Deputy Head of the Legal Division at the ICRC, Knut Dörmann, and as was supported by a minority of the Experts of the Tallinn Manual 2.0, the loss of usability of the grid or infrastructure in itself

[186] Georgia Beatty, *supra* note 61 at 233.
[187] Tallinn manual 2.0, *supra* note 26 at 416.
[188] International Committee of the Red Cross, *supra* note 27 at 489.
[189] *Id.*
[190] Amnesty International, *Ukraine: Russian attacks on critical energy infrastructure amount to war crimes* (Oct. 20, 2022), https://www.amnesty.org/en/latest/news/2022/10/ukraine-russian-attacks-on-critical-energy-infrastructure-amount-to-war-crimes/.
[191] Hugo Bachega & Yaroslav Lukov, *Ukraine war: Blackouts in 1,162 towns and villages after Russia strikes*, BBC (Oct. 18, 2022), https://www.bbc.com/news/world-europe-63297239.

constitutes sufficient 'damage' (the secondary effect).[192] According to this position, allowing a DCO directed at a civilian network such as electricity to fall outside the scope of IHL, just because it is reversible or does not cause structural damage, is an overly restrictive definition of 'attack', difficult to reconcile with the humanitarian purposes of *Jus in Bello*.[193] Some academics have deemed this more extreme alternative to be plausible, for it responds to concerns that the kinetic-equivalence approach, followed by most of the Experts in the Tallinn Manual, is under-inclusive.[194] Under this lens, any of the GRU's COs against electrical systems would constitute an 'attack' because the required threshold of 'consequential violence' would be reached already at the production of the secondary effect, the disruption, or attempted disruption, of electricity. On the other hand, foregoing the analysis of the tertiary effect may render the approach over-inclusive, allowing DCOs of which the impact is mere inconvenience to constitute an 'attack'.[195]

Finally COs, including DCOs, which unsuccessfully target electrical systems may be deemed 'attacks'. Indeed an attack that is successfully intercepted and does not result in actual damage is still an 'attack' under IHL, if it would have been likely to cause the requisite 'violent consequence'. The same applies to cyber attacks.[196] The April 2022 Sandworm destructive attack was halted, therefore it did not actually cause the requisite primary 'violent consequence' or 'damage' to the IT system. However, it was likely to,[197] and this is sufficient. Furthermore, if the tertiary effect is taken account of, it also rises to the level of 'attack'. According to

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[192] *See* Ido Kilovaty, *supra* note 50; *Accord* Tallinn manual 2.0, *supra* note 26 at 418.
[193] *See* Knut Dörmann, *Applicability of the Additional Protocols to Computer Network Attacks*, International Committee of the Red Cross, 4 (2004), https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/applicabilityofihltocna.pdf; *Accord* International Committee of the Red Cross, *International Humanitarian Law and cyber operations during armed conflict, ICRC position paper*, 8 (Nov., 2019), https://www.icrc.org/sites/default/files/document/file_list/icrc_ihl-and-cyber-operations-during-armed-conflicts.pdf.
[194] Georgia Beatty, *supra* note 61 at 233.
[195] Michael N. Schmitt, *supra* note 47 at 104.
[196] Tallinn manual 2.0, *supra* note 26 at 419.
[197] Andy Greenberg, *Russia's Sandworm Hackers Attempted a Third Blackout in Ukraine*, Wired (Apr. 12, 2022 10:44 AM), https://www.wired.com/story/sandworm-russia-ukraine-blackout-gru/.

Farid Safarov, Ukraine's Deputy Minister of Energy, the cyber attack was expected to impact an area where more than two million Ukrainians live.[198] Regarding the September 2023, attempted malware launch, no information has been disclosed by the authorities on the targeted infrastructure.[199] Therefore it cannot be assessed if, in primary effect, it would have been destructive, or if in reverberating effect, it would have led to injury or death. However, some sources describe the facility as critical,[200] which potentially indicates that the tertiary impact would have been significant.

III. Partial Conclusion

There are many challenges to COs being deemed 'acts of violence' for the purposes of the definition of 'attack' under IHL, and therefore to engage individual criminal responsibility under Art.8 RS. Even if the effects-based approach is followed, and 'violent consequences' are taken into account as opposed to instrumentality, COs targeting electrical systems pose a particular interpretative obstacle. Accordingly, if the 'kinetic-equivalence approach' is followed, only destructive COs may qualify as 'attacks'. Although this position has been criticized, and it has been deemed that DCOs should also be viewed as 'attacks' precisely because the disruption of electricity has a tertiary 'violent consequence' for civilians, again dissenting theories emerged amongst academia and practitioners. Therefore,

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[198] Sean Lyngaas, *Russian military-linked hackers target Ukrainian power company, investigators say*, CNN (Apr. 14, 2022, 11:04 AM), https://edition.cnn.com/2022/04/12/politics/gru-russia-hackers-ukraine-power-grid/index.html.

[199] Computer Emergency Response Team of Ukraine, *Кібератака APT28: msedge як завантажувач, TOR та сервіси mockbin.org/website.hook як центр управління (CERT-UA#7469)* [APT28 cyberattack: msedge as a downloader, TOR and mockbin.org/website.hook services as a control centre (CERT-UA#7469)], Gov. Ukr. (Sept. 4, 2023), https://cert.gov.ua/article/5702579?fbclid=IwAR3XlwoRXJ793jQf96FKqvcTE6rgQtQri--9_QnzH70ceeJtE2w6OcPxL-g.

[200] Kevin Poireault, *Russia-Backed APT28 Tried to Attack a Ukrainian Critical Power Facility*, InfoSecurity Magazine (Sept. 6, 2023), https://www.infosecurity-magazine.com/news/russia-apt28-attack-ukraine-power/.

even if COs are deemed 'attacks' by analogy, it may be that not all types of COs targeting electrical systems can be encompassed by the state of the normative framework, evidencing the existing gaps in IHL. Such a debate on the extent of civilian harm to be accounted for when considering the particular case of operations against electrical systems will be explored in further detail, and thereby brings us to Chapter II.

CHAPTER II. Can attacks against electrical infrastructure be considered war crimes?

Even when a CO targeting electrical systems amounts to an 'attack' within the meaning of Art.8 RS, it is yet to be determined whether the operation in question is encompassed by the prohibitions of Art.8. On admissibility, it must be ascertained whether COs targeting electrical systems can give rise to sufficiently grave situations to warrant investigation, and prosecution, by the Office of The Prosecutor (hereinafter, OTP). Thereafter, it must be established whether such attacks can constitute war crimes for the purposes of establishing the subject-matter jurisdiction of the Court. Hereby, academics and practitioners disagree on the applicable theories and interpretations. First, it is not clear whether in scale, nature, manner of commission, or impact, COs, and specifically those targeting electrical systems, can give rise to sufficiently grave situations. Second, debates arise in regards to whether members of hacking teams should be the objects of investigation, and prosecution, or whether their superior military commanders should be deemed 'the most responsible'. Last, the lawfulness of targeting electrical systems has not been settled under international law. Employing the Russo-Ukrainian War as a practical application of theoretical debate, this Chapter will determine that COs targeting electrical installations can give rise to sufficiently grave situations to warrant investigation into those 'most responsible' for the attack, and as well, engage the subject-matter jurisdiction of the Court as a war crime.

I. Do cyber attacks against electrical systems give rise to sufficiently grave situations for the ICC to investigate, and prosecute, alleged war crimes?

Gravity is an element of the crimes in the RS.[201] Art.5 refers to "*the most serious crimes of concern to the international community*". Regarding the alleged war crimes of interest to this Paper, Art.8(2)(b) refers to "*serious violations*". Additionally, gravity constitutes a non-discretionary admissibility threshold,[202] referred to as 'legal gravity'.[203] Finally, gravity also guides the discretionary decision of the OTP on the selection and prioritization of admissible cases to investigate and prosecute, the 'relative gravity'.[204]

According to case law, the assessment is two-fold. The Court carries out a quantitative and qualitative assessment in relation to the nature, scale, manner of commission, and impact, of the alleged crimes, and it examines whether the persons who will likely be the object of investigation and prosecution are the "*most responsible*" for the alleged crimes.[205] COs, particularly when they target electrical infrastructure, pose a particular challenge.

A. Can alleged war crimes targeting electrical systems, perpetrated through cyber means, give rise to sufficiently grave situations?

[201] Art. 17(1)(d) & Art.53 RS.
[202] Marco Roscini, *Gravity in the Statute of the International Criminal Court and cyber conduct that constitutes, instigates or facilitates international crimes,* 30 Criminal Law Forum 247, 253 (2019), https://doi.org/10.1007/s10609-019-09370-0.
[203] *E.g.*, Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure* 292 (2016).
[204] Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 Fordham International Law Journal 1400, 1405 (2009).
[205] *The Prosecutor v. Bahar Idriss Abu Garda,* ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 31 (Feb. 8, 2016).

Regarding the first element of the gravity assessment, doubts arise with respect to whether COs targeting electrical systems are capable of amounting to 'serious violations' within the meaning of Art.8(2)(b) RS.

With respect to the quantitative analysis, that is, 'scale', it inter alia centers on the number of victims, the extent of the damage caused, in particular the bodily or psychological harm, or their geographical or temporal spread.[206] As was already posited in Chapter I, in comparison to traditional kinetic force, COs do not directly cause fatalities or damage. However, again, this analysis may be analogically adapted to encompass injury or death indirectly caused by COs (tertiary effect). This may hold particularly true in regards to COs which target electrical systems, when they entail the deprivation of electricity to a large sector of the population, and thus ensuing risk to livelihood. For example, it has been proposed that a cyber attack that shuts down an electrical power station in the middle of a harsh winter, with consequent deaths among the civilian population due to the low temperatures, causes significant damage for the purposes of the Court's gravity assessment.[207]

Regarding qualitative factors, 'nature' refers to the specific elements of the offence, such as rape, crimes against children, or notably, the imposition of conditions of life on a group, calculated to bring about its destruction.[208] Psychological suffering may also be taken into account.[209] As regards COs targeting electrical systems, following Title II of this Chapter explores Russia's potential liability under Art.8(2)(b)(xxv), for attempting to cause starvation through long-term and widespread electricity deprivation. It may be advanced that critical services to civilians, such as water pumping, hospital services, and food production, depend on energy to function. Nevertheless, although the argument that there is a

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[206] The Office of the Prosecutor ICC, *Policy paper on preliminary examinations* 15 (Nov., 2013), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf.

[207] Marco Roscini, *supra* note 82 at 261.

[208] The Office of the Prosecutor ICC, *supra* note 86.

[209] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, ¶ 78-9 (Sept. 27, 2016).

hierarchy of crimes has been deemed controversial,[210] the characteristics of COs do not entirely fit the definition of a particularly serious 'nature'. With respect to 'the manner of commission', whilst it is doubtful that ICTs constitute an aggravating factor insofar as the means of execution are concerned,[211] COs targeting electrical systems may evidence a particularly malicious intent when they are specifically carried out during winter time, like Russia did.[212] Elements of cruelty are of significance to this assessment.[213] Finally regarding 'impact', considered here are, among others, the suffering of the victims, the terror instilled, or the socio-economic damage inflicted on the community.[214] It is generally accepted that COs which target national critical infrastructures like electricity, disrupting the provision of critical services, have a more significant impact on the broader community than those on other infrastructures.[215]

Therefore, although COs targeting electrical systems have the potential to give rise to sufficiently grave situations, their particularities nevertheless pose a challenge. Whereas the legal gravity threshold is not very high,[216] still an isolated cyber attack against protected objects which results in negligible damage and little impact would not cross the threshold.[217] Insofar as the relative gravity threshold is concerned, the OTP applies a stricter test.[218] When individual COs, such as those

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[210] William A. Schabas, *An introduction to the international criminal court* 81 (June 2020), https://doi.org/10.1017/9781108616157.
[211] Marco Roscini, *supra* note 82 at 266.
[212] Andriy Yermak, *In Ukraine, Russia is trying to freeze us into submission or death. It will fail*, The Guardian (Dec. 1, 2022, 5:00 PM), https://www.theguardian.com/commentisfree/2022/dec/01/ukraine-russia-freeze-power-starvation-holodomor-terror (head of the Ukrainian presidential office, commenting that he feared that Russia was now seeking '*death by freezing*').
[213] The Office of the Prosecutor ICC, *supra* note 86 at 15-6.
[214] *Id.* at 16.
[215] Marco Roscini, *supra* note 82 at 268-9.
[216] Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection* 352 (2011), ISBN-13 978-3428133505.
[217] *Id.*
[218] The Office of the Prosecutor ICC, *Policy paper on case selection and prioritisation* 13 (Sept. 15., 2016), https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

launched by Sandworm and Fancy Bear, are scrutinized, they run the risk of falling short from this assessment.

However in the context of a cyber-enabled warfare against electrical systems, like in the Russo-Ukrainian conflict, evidence may be found of the existence of a plan or policy within the meaning of Art.8(1) RS: "*the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes*". Although this will be further explored, it may be underlined that, the day that Sandworm launched its cyber attack, missiles struck critical energy infrastructure across Ukraine.[219] To the day of the writing of this Paper, in early 2024, the strikes have not halted.[220] Although Art.8(1) only constitutes statutory guidance,[221] when COs form part of a cyber-enabled warfare, they may become an integral part of an operation which constitutes an attack,[222] thereby facilitating success under the gravity assessment. For example, a significant geographical and temporal spread for the purposes of the quantitative criterion is then found. Meanwhile, for one or various COs alone to qualify, they would have to evidence a particular great scale in electricity disruption, and thus also impact. Regardless, all of these observations are subject to the assessment being expanded to take into account reverberating effects.

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[219] Mandiant, *Sandworm Disrupts Power in Ukraine Using a Novel Attack against Operational Technology*, Google Cloud (Nov. 9, 2023), https://cloud.google.com/blog/topics/threat-intelligence/sandworm-disrupts-power-ukraine-operational-technology/?hl=en.

[220] *E.g.*, Ukrinform, *Russian missile strike destroys electric substation in Lviv* (Feb. 15, 2024 4:30 PM), https://cloud.google.com/blog/topics/threat-intelligence/sandworm-disrupts-power-ukraine-operational-technology/?hl=en.

[221] The Office of the Prosecutor, *Situation on Registered Vessels of Comoros, Greece and Cambodia. Article 53(1) Report* (Nov. 6, 2014), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf.

[222] Tallinn manual 2.0, *supra* note 26 at 420.

B. Which level of the chain of command should be deemed "most responsible" in relation to crimes perpetrated through cyber means?

A particular challenge arises regarding whether hackers should be the ones bearing responsibility for COs which constitute war crimes, or whether "*military commanders*" or "*other superiors*" should be the ones investigated, and prosecuted.[223] In the *Mavi Marmara* situation, the OTP equated those most responsible with the "*most senior*".[224] However, the Pre-Trial Chamber subsequently ruled that seniority or hierarchy has no bearing on the identification of the individuals 'most responsible'.[225]

On the one hand however, a case may be more effectively established against a 'superior', or 'commander', who plans and orders multiple cyber attacks, than against individual hackers themselves.[226] From this perspective, when COs are launched against energy systems together with kinetic strikes, or when various COs target the same infrastructure or sector, responsibility extends throughout the chain of command or control to subordinate commanders, and superior orders.[227] In practical terms, the argument holds. Sandworm and Fancy Bear are individual Units, themselves part of one of the fifteen directorates which make up the GRU.[228] In cyber-enabled warfare, kinetic and cyber weapons may converge against single targets or sectors like electricity, and this presumption of a common plan or policy in return places the coordinating, higher ranking officials under the investigative

[223] Art.28 RS.
[224] *Situation in the Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, ICC-01/13, Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute, ¶ 62 (Mar. 30, 2015).
[225] *Situation in the Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, ICC-01/13, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ¶ 23 (July 16, 2015).
[226] Dan Saxon, *Violations of International Humanitarian Law by Non-State Actors during Cyberwarfare: Challenges for Investigations and Prosecutions*, 21 no. 3 Journal of Conflict and Security Law 555, 564 (2016), https://doi.org/10.1093/jcsl/krw018.
[227] Tallinn manual 2.0, *supra* note 26 at 398.
[228] Congressional Research Service, *Russian Military Intelligence: Background and Issues for Congress* 4 (Nov. 15, 2021), https://fas.org/sgp/crs/intel/R46616.pdf.

lens.[229] Thereby, hypothetically,[230] the head of the GRU Kostyukov Igor,[231] may be 'more responsible' for directing the cyber attacks. Alternatively Sergei Shoigu, General Staff and Defense Minister,[232] may be 'more responsible' for the overall plan since the GRU acts under his command. This proposal is not affected by the fact that a CO fails, as in the case of the April 2022 and September 2023 launches, since responsibility also applies to crimes attempted pursuant to an order.[233]

On the other hand, the fact that hackers may be merely obeying orders does not relieve them of responsibility.[234] Particularly regarding the technical complexity of COs, hackers may have a better understanding of the operation, and should therefore be the ones who are aware of the illegality of the attack.[235] To this extent commanders are allowed to rely on the knowledge of their subordinates.[236] In the Russo-Ukrainian context however, this consideration does not hold much weight, in light of the hypothesis regarding the existence of a common plan or policy. Nevertheless, should hackers like Sandworm or Fancy Bear be deemed 'most responsible', an additional layer of difficulty must be considered insofar as individuals play different roles in COs, ranging from the design of the malware to executing the payload.[237] Therefore, on an individual level, the members of a hacking Unit may be viewed to hold different degrees of responsibility.

In either case, the requisite *mens rea* is crucial when analyzing COs. The RS adopts a fairly restrictive approach to the requirements of "*intent*" and "*knowledge*",[238] the standard for the foreseeability of events which would constitute

[229] Tallinn manual 2.0, *supra* note 26 at 397.
[230] Congressional Research Service, *supra* note 108 (the true structure of the GRU is not known).
[231] Open Sanctions, *Igor Olegovich Kostyukov* (last accessed Aug. 10, 2024), https://www.opensanctions.org/entities/Q59021350/.
[232] Congressional Research Service, *supra* note 108.
[233] Tallinn manual 2.0, *supra* note 26 at 398.
[234] *Id.* at 396.
[235] *Id.*
[236] *Id.* at 399.
[237] Marco Roscini, *supra* note 82 at 257.
[238] Jennifer Trahan, *Criminalization of Cyber-operations Under the Rome Statute*, 19 no. 5 Journal of International Criminal Justice 1133, 1150 (Nov. 8, 2021), https://doi.org/10.1093/jicj/mqab066.

war crimes being virtual certainty.[239] Academia has underlined that hackers, due to their absence of proximity to the targeted infrastructure, in comparison to traditional troops, may be deprived of the ability to assess the situation in the targeted area, especially in regard to proportionality.[240] On the other hand however, in the case of COs being launched by state actors, it appears difficult that infamously notorious groups, such as Sandworm or Fancy Bear, lacked *mens rea.*[241]

Therefore, the nature of COs poses an additional challenge to determining the identity of those individuals who are the 'most responsible', and their respective responsibility. In the case of the Russo-Ukrainian conflict, a presumption is posited in favor of that superior commanders were most responsible, insofar as a common plan is found. This, however, does not bar the possibility of finding that hackers should be the ones investigated, and ultimately, prosecuted.

II. Are attacks against a nation's energy grid or electrical infrastructure war crimes in accordance with Article 8(2)(b) of the Rome Statute?

Should COs directed against electrical systems give rise to sufficiently grave situations for a case to be admissible, it nevertheless remains to be determined whether the subject-matter jurisdiction of the ICC can be engaged. Specifically, it must first be ascertained whether attacks against electrical systems fall under the specified prohibitions of Art.8 RS and, second, whether COs thus constitute new means of perpetrating, or otherwise contributing to, war crimes, in accordance with Article 25(3) RS.

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[239] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 A 5, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ¶ 447 (Dec. 1, 2014).
[240] Tallinn manual 2.0, *supra* note 26 at 396.
[241] Art.30 RS; *Also see* Tallinn manual 2.0, *supra* note 26 at 392.

Given that the Russo-Ukrainian War evidences the particular characteristics of cyber-enabled warfare, that is, kinetic and cybernetic attacks being launched conjunctly against a set target, this analysis will center on the premise that the COs must thus be considered part of an overall attack. Responsibility would then be engaged in accordance with Art.25(3)(d) for contributing to the commission of war crimes. However this Paper acknowledges that COs, in determined cases, may in and of themselves give rise to sufficiently grave situations. Therefore, if these attacks against electrical systems are deemed unlawful, COs would constitute new means of perpetrating war crimes.

Furthermore, since electrical systems have been the object of military operations since the First World War,[242] there is no straightforward answer under Public International Law. The Russo-Ukrainian conflict represents an occasion to draw a path for the future of international criminal prosecution, by acknowledging evolving changes in warwaging. Particularly, it showcases the practical application of a historical theoretical debate, and is the catalyst for reconsidering existing benchmarks. In this analysis, this Paper aims at highlighting existing gaps, dissent, and considerations for other circumstances, to offer a realistic overview of the case to be made against attacks targeting electrical systems. However, it acknowledges that this exploration only opens the gates for reconsidering the *status quo*, therefore it is not a universally definite answer. It may be advanced that the latter may only proceed from the Court defining the applicable legal standards, as a result of the war, which will be explored in Chapter III.

Proceeding, the Russian Federation's repeated and widespread targeting of electrical infrastructure has sparked numerous accusations of war crimes.[243] Research is now centering on demonstrating that the ICC could possess subject-matter jurisdiction, that is, that the operations could fall under the

[242] *E.g.*, James W. Crawford III, *supra* note 1.
[243] *E.g.*, Amnesty International, *supra* note 70; Gregory P. Noone et al., *Are Russian Attacks on Ukraine's Electrical Grid a War Crime?,* Center for Civil Liberties (Aug. 10, 2023), https://ccl.org.ua/en/positions/are-russian-attacks-on-ukraines-electrical-grid-a-war-crime/.

prohibitions set out in Article (8)(2)(b)(i), (ii), (iv), and (xxv) RS.[244] It must be underlined here that Chapter I already determined that these prohibitions encompass their transgressing through kinetic and cybernetic means,[245] because the principles of necessity, proportionality, and distinction, also apply to the use of ICTs by States.[246]

Art.8(2)(b)(i) bars "*intentionally directing attacks against the civilian population*". AP I establishes that "*acts or threats of violence the primary purpose of which is to spread terror among the civilian population*" are specifically prohibited.[247] It has repeatedly been emphasized that these infringements of IHL also constitute war crimes against civilians.[248] The international community has denounced that Russia's attacks against electrical infrastructure appear primarily designed to instill terror.[249] Human rights experts,[250] researchers,[251] and industry actors,[252] have all clearly stressed that there appears to be a correlation between an increase in strikes, and the onset of winter, thus labeling the acts as deliberately cruel.[253] Statements by Russian government officials, such as requesting for their

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[244] Michael N. Schmitt, *Ukraine symposium – attacking power infrastructure under international humanitarian law*, Liber Institute West Point (Oct. 20, 2022), https://lieber.westpoint.edu/attacking-power-infrastructure-under-international-humanitarian-law/.
[245] International Committee of the Red Cross, *supra* note 27 at 486-7.
[246] U.N. GAOR, *supra* note 34; Tallinn manual 2.0, *supra* note 26 at 420 & 470.
[247] Art.51(2) AP I.
[248] International Committee of the Red Cross, *Practice Relating to Rule 2. Violence Aimed at Spreading Terror among the Civilian Population*, *in* International Humanitarian Law Databases (last accessed Aug. 10, 2024), https://ihl-databases.icrc.org/en/customary-ihl/v2/rule2.
[249] *E.g.,* Human Rights Watch, *Ukraine: Russian Attacks on Energy Grid Threaten Civilians* (Dec. 6, 2022, 12:01 AM), https://www.hrw.org/news/2022/12/06/ukraine-russian-attacks-energy-grid-threaten-civilians.
[250] *E.g.*, *Id.*
(*See* Yulia Gorbunova, senior Ukraine researcher at Human Rights Watch).
[251] *E.g.*, Ben Tobias, *Is attacking Ukraine's power grid a war crime?*, BBC (Dec. 1, 2022), https://www.bbc.com/news/world-europe-63754808 (Doctor Maria Varaki, King's College War Studies Department).
[252] *E.g.*, Daryna Antoniuk & Alexander Martin, *Life during wartime: Ukraine 'has to be ready for new more powerful and complex' cyberattacks*, The Record (Jan. 11, 2023), https://therecord.media/life-during-wartime-ukraine-has-to-be-ready-for-new-more-powerful-and-complex-cyberattacks.
(DTEK, Ukraine's largest private sector company).
[253] Amanda Macias, *Pentagon says Moscow's deliberate targeting of Ukrainian energy grids is a war crime*, CNBC (Nov. 16, 2023, 5:03 PM),

demands to be met to "*end all possible suffering of the local population*",[254] and wishing for citizens to "*freeze and rot*",[255] further support this hypothesis. Furthermore for some academics, the intensity and frequency of the strikes, as will be further expounded on below, render the verification of the legitimacy of each target impossible. Consequently, this would demonstrate that Russia's main motivation, at least in some attacks, is to terrorize.[256]

To qualify as a 'terror attack', the victims must "*suffer grave consequences (...) which may include (...) death and/or serious injury*", also encompassing "*trauma and psychological damage*".[257] It is not required that civilians have actually been terrorized, for it is sufficient that terror was specifically intended.[258] This purpose may be inferred from the nature of the attack,[259] hereby of closest analogy, indiscriminate and widespread shelling.[260] Again tactical similarities in this reference may be found, insofar as Russia has been accused of striking electrical

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https://www.cnbc.com/2022/11/16/targeting-of-ukrainian-energy-grid-is-a-war-crime-pentagon-says.html.
(*See* Statement by U.S. Defence Secretary, Llyod Austin).

[254] Humanitarian Research Lab at Yale School of Public Health & Ukraine Digital Verification Lab, *Remote Assessment of Bombardment of Ukraine's Power generation and Transmission Infrastructure* 14 (Feb. 29, 2024), https://hub.conflictobservatory.org/portal/sharing/rest/content/items/d4cc5cda5be1443ea1fc1ff52cc89e45/data, (Referring to the Press Secretary of the President of the Russian Federation, Dmitri Peskov).

[255] Francis Scarr, X (Nov. 26 2022, 9:17 AM), https://x.com/francis_scarr/status/1596417788616536064.
(Re-posting critically the televised interview given by Boris Chernyshov, a Deputy Speaker of the State Duma of the Russian Federation. Chernyshov holds in his interview that Ukrainians should "freeze and rot" in their homes.)

[256] *E.g.,* Michael N. Schmitt, *Ukraine Symposium – Further thoughts on Russia's campaign against Ukraine's power infrastructure*, Lieber Institute West Point (Nov. 25, 2022), https://lieber.westpoint.edu/further-thoughts-russias-campaign-against-ukraines-power-infrastructure/.

[257] The Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 461 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

[258] The Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgment, ¶ 104 (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 30, 2006).

[259] Eirini Giorgou & Abby Zeith, *When the lights go out: The protection of energy infrastructure in armed conflict*, Humanitarian Law & Policy (Apr. 20, 2023), https://blogs.icrc.org/law-and-policy/2023/04/20/protection-energy-infrastructure-armed-conflict/.

[260] U.N. GAOR 53rd Sess., Item 110(c) G.A. Res.*53/164* at 2 (Feb., 1999).

systems regardless of any military advantage, across widespread Ukrainian territory.[261]

However, there are two central issues to this conjecture. First, the primary purpose or *mens rea* of the adversary in targeting electrical systems can only be hypothesized. Whereas some academics, initially reticent to call the strikes 'terror' attacks,[262] modified their analysis after the start of large-scale operations in October 2022,[263] others remain firm in asserting that, although a purpose to terrorize may be identified, it cannot be firmly established as primary, or established at all.[264] Secondly, when comparing the targeting of electrical systems to the international case law on terror attacks, it appears to fall short from the grave attacks previously categorized. For instance, past cases have regarded directly shelling civilians,[265] or rocket attacks against civilians.[266]

In view of that it is unlikely that the ICC would be able to able to proceed on the basis that the operations fall under the prohibition of Art.8(2)(b)(i) RS, focus may be placed on the second accusation that Russia's strikes infringe upon the prohibition of attacking "*civilian objects*" within the meaning of Art.8(2)(b)(ii).

Not defined in the RS, civilian objects are however generally understood as those objects normally used by, or dedicated to, civilians and civilian purposes.[267] Energy provision systems are a prime example of infrastructure now deemed critical to civilians.[268] Furthermore, the categorisation of objects as civilian is made in the negative, that is, all objects which are not military objectives (hereinafter,

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[261] *E.g.*, Gregory P. Noone et al., *supra* note 123; Michael N. Schmitt, *supra* note 136.
[262] Michael N. Schmitt, *supra* note 124.
[263] Michael N. Schmitt, *supra* note 136.
[264] Charlie Dunlap, *Is attacking the electricity infrastructure used by civilians always a war crime?*, Lawfire (Oct. 27, 2022), https://sites.duke.edu/lawfire/2022/10/27/is-attacking-the-electricity-infrastructure-used-by-civilians-always-a-war-crime/.
[265] *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgment, ¶ 912 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007).
[266] *The Prosecutor v. Milan Martić*, Case No. IT-95-11, Decision, ¶ 31 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 8, 1996).
[267] Eirini Giorgou & Abby Zeith, *supra* note 139.
[268] *See generally, e.g.,* Human Rights Watch, *supra* note 129.

MOs).[269] According to State practice, the latter refers to whether, to begin with, by its nature, location, purpose, or use, the electrical system makes an effective contribution to military action and, then, whether its total or partial destruction or neutralization offers a definite military advantage.[270]

Academia has underlined that those components or parts of electrical systems which enable the provision of services to civilians benefit from a presumption of civilian status. This means that, in case of doubt as to whether a piece of infrastructure is being used to make an effective contribution to military action, the object must be presumed to be civilian.[271] Following from the above hypothesis that the Russian Federation has not been able to, or has not carried out, the required due diligence to differentiate between electrical systems which qualify as MOs, and civilian objects, the current state of evidence does support a presumption in favor of that, at least some of the targeted infrastructure, were civilian objects.[272]

Indeed on the one hand, those planning and deciding upon attacks against electrical systems must do so on the basis of robust, multidisciplinary intelligence assessments, which comprehensively map the effects on civilians and the impact on the adversary's military capabilities.[273] On the other hand, Russia has been striking the Ukrainian electricity grid and infrastructure on a widespread scale, geospatially across the country, and temporally since the beginning of the invasion. A study, published during the writing of this Paper in late February 2024, highlights that the aforementioned scale in attack is "*consistent with a widespread and systematic effort to cripple vital power generation*" for civilians.[274] It uncovers that the 223

[269] Art.52(1) AP I.
[270] Art.52(2) AP I.
[271] Art.52(3) AP I.
[272] Michael N. Schmitt, *supra* note 136.
[273] Thomas E. Griffith Jr., *Strategic Attack of National Electrical Systems*, Air University Press 45 (Oct. 1994), https://media.defense.gov/2017/Dec/29/2001861964/-1/-1/0/T_GRIFFITH_STRATEGIC_ATTACK.PDF .
[274] Humanitarian Research Lab at Yale School of Public Health & Ukraine Digital Verification Lab, *supra* note 134 at 14.

attacks against electrical systems which could be identified spun across 23 out of 24 oblasts.[275] It is important to note as well that, out of the 216 they could spatially locate, 128 occurred in oblasts that did not have a frontline running through them at the time.[276] Again, to the day of the writing of this Chapter, Russia is still strongly striking against the power grid.[277] Having highlighted above that academics are highly skeptical that Russia conducted the due diligence of status verification with each target,[278] on this ground they conclude that the sweeping classification of the entire electrical grid of a country as a MO must violate the norms of IHL. Notably, it infringes upon the principle of distinction by carrying out indiscriminate attacks.[279]

Nevertheless, doubts arise regarding whether the conduct identified falls under the scope of this prohibition. Electrical systems are typically categorized as "*dual-use*" or "*dual-purpose*" objects, meaning that the grid or infrastructure is being used by, or can equally serve the purposes of, civilians and the military, in accordance with the first prong of the definition of MO.[280] Electrical systems have indeed numerous times been deemed MOs,[281] either because they power military installations, equipment, or activities (the "*use*" criterion), or because they may be used to do so in the future (the "*purpose*" criterion).[282] In either case, it must make an "*effective contribution to military action*," that is, there must be a proximate

[275] *Id.* at 8.
[276] *Id.* at 4.
[277] Max Hunder & Tom Balmforth, *Russia pounds Ukrainian power facilities, Zelenskiy seeks air defences, 'political will',* Reuters (Mar. 23, 2024, 12:35 AM), https://www.reuters.com/world/europe/ukraine-says-russian-strike-hit-ukraines-largest-dam-during-mass-strike-energy-2024-03-22/ (On March 22nd, 2024, the Russian Federation launched the largest airstrike on energy infrastructure to date in the Russo-Ukrainian War).
[278] Ben Tobias, *supra* note 131 (BBC interviewing Michael N. Schmitt).
[279] *E.g.*, Michael N. Schmitt, *supra* note 136; Eirini Giorgou & Abby Zeith, *supra* note 139.
[280] *E.g.*, Human Rights Watch, *supra* note 129; U.S. Department of Defense, *Law of War Manual* § 5.6.1.2 (July 31, 2023), [hereinafter, DoD Manual].
[281] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 632 (1987); DoD Manual, *supra* note 160 at § 5.6.8.5.
[282] Michael N. Schmitt *supra* note 124; International Committee of the Red Cross, *supra* note 161 at 635.

nexus between the infrastructure and the fighting.[283] Regarding electrical systems, this requirement typically relates to use or purpose for tactical or operational activities, such as a power station providing electricity to barracks or communication systems, or even strategic uses or purposes, such as diminishing air-defense capabilities by denying radars' use.[284] According to the prevailing military doctrine, modern warfighting is dependent on electricity for effective action,[285] and Ukraine's defenses are in effect reliant on the commercial power grid to fend off Russia's attacks.[286] If the Russian Federation can demonstrate that each of the targeted sites was being used by the Ukrainian military for, or could serve the purpose of, effective defensive or offensive action, the first step for categorisation as MO would be satisfied.

Regarding the second prong of the definition, targeting the electrical system must additionally offer a "*definite military advantage*" for the attacker, that is, beyond potential or indeterminate.[287] Although Russian officials claim that they attack electrical infrastructure in furtherance of their military objectives,[288] an informed analysis on whether the adversary obtained such an advantage is difficult to construct. This matter will be further explored below. It is however possible that this second step is fulfilled, especially since the threshold is lower than that which

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[283] ICRC Delegation to the EU, NATO and the Kingdom of Belgium, 18th Bruges Colloquium, *The Additional Protocols at 40: Achievements and Challenges* 140 (Luis B. García et al. eds., 2017), https://www.coleurope.eu/sites/default/files/uploads/page/collegium_48_webversie.pdf.

[284] Eirini Giorgou & Abby Zeith, *supra* note 139.

[285] Francesa Capone, *The wave of Russian attacks on Ukraine's power infrastructure: An opportunity to infuse meaningfulness into the notion of "dual-use objects"*, 8 no. 2 European Forum 741, 746 (Nov. 2023), doi: 10.15166/2499-8249/684.

[286] Charlie Dunlap, *supra* note 144 (Citing Dunlap, "For example, experts say the Starlink, a privately-owned system that provides internet service—and is obviously dependent upon electrical power—has "become an essential tool for the Ukrainian military to coordinate across thousands of kilometres of combat theatre.").

[287] International Committee of the Red Cross, *supra* note 161 at 635.

[288] U.S. Dep't of State, *FPC Briefing – Russian Attacks Targeting Ukraine's Energy Infrastructure* (Mar. 4, 2024, 11:00 AM), https://www.state.gov/briefings-foreign-press-centers/russian-attacks-targeting-ukraine-energy-infrastructure, (Interview with Nathaniel A. Raymond, Executive Director and Researcher at the Yale Humanitarian Research Lab, and with Caitlin Howarth, Director of Operations for the Conflict Observatory Team of the Yale Humanitarian Research Lab).

is applied in the proportionality test ["*concrete and direct military advantage*"].[289] Consequently, the system would no longer be classified as civilian but military,[290] and military action against these objects would not be precluded. Instead, it would be subject to the test of proportionality.

Reiterating, in view of the temporal and geographical spread of the attacks, it appears unlikely that Russia each time legitimately targeted MOs exclusively, falling under the scope of the prohibition of Art.8(2)(b)(ii) RS. However, even if some of the attacks fell under the scope of this prohibition because the infrastructure qualified as a civilian object exclusively, given that electrical systems are most often dual-use, the targets may also in other instances have been MOs. The Russian Federation's attacks may thus additionally fall under this prohibition. Namely, Art.8(2)(b)(iv) encompasses the RS's proportionality analysis, prohibiting "*intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects* (...) *which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*".

To begin with, based on publicly available information, pinpointing the advantage which Russia sought to obtain from the destruction of electrical systems is not straightforward. Moreover, even if such data was available, contrasting stances emerge regarding the applicable benchmark. According to the ICRC, "*concrete and direct*" refers to a substantial and relatively close advantage.[291] Meanwhile, the U.S. Department of Defense's Manual (hereinafter, DoD Manual) assesses "*the full context of the war strategy*", a much broader scope.[292] A further example is that the Study Group on the Conduct of Hostilities in the 21st Century agreed that the notion of 'concrete and direct' does not include advantages that are

[289] Francesa Capone, *supra* note 165 at 745.
[290] International Committee of the Red Cross, *Rule 8. Definition of Military Objectives*, *in* International Humanitarian Law Databases (last accessed Aug. 10, 2024), https://ihl-databases.icrc.org/en/customary-ihl/v1/rule8; DoD Manual, *supra* note 160 at § 5.6.1.2.
[291] International Committee of the Red Cross, *supra* note 161 at 684.
[292] DoD Manual, *supra* note 160 at § 5.6.7.3.

only moral in nature,[293] whereas the DoD Manual holds that diminishing morale constitutes an advantage.[294] In any and all cases, the Kremlin has sought to justify the attacks using the language of AP I,[295] for instance stating that the targeted infrastructures "*support the functioning of the (...) military industrial complex*".[296]

Traditional military orthodoxy supports this contention.[297] Drawing from known facts, in relation to past conflicts such as NATO's Campaign in Kosovo, or the War in Iraq,[298] targeting electrical systems was concluded to wield extensive military advantages. For instance, it has long been accepted that the nullification of electricity can provide a short-term or tactical military advantage with respect to the degradation of air-defense systems.[299] The latter are crucial in the case of Ukraine.[300] However it must be nuanced that, in regards to these very same conflicts, whereas some experts praised the achievement of "*remarkably little collateral damage*",[301] contrasting academia emerged to underline the numerous civilian deaths which result from the systematic elimination of electrical power in the aftermath of the war. Thereby, they question whether the usefulness of the tactic is not based on unsubstantiated presumptions.[302]

Electrical systems indeed represent a point of contention amongst academia and practitioners insofar as the scope of the notion of 'military advantage' is

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[293] International Law Association Study Group on the Conduct of Hostilities in the 21st century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 International Law Studies U.S. Naval War College 322, 363 (2017), ISSN 2375-2831
[294] DoD Manual, *supra* note 160 at § 5.6.7.3.
[295] Humanitarian Research Lab at Yale School of Public Health & Ukraine Digital Verification Lab, *supra* note 134 at 13.
[296] *Id.* (Statement by the Russian Federation's Ministry of Defense).
[297] James W. Crawford III, *supra* note 1 at 102; Thomas E. Griffith Jr. *supra* note 153 at 15.
[298] James W. Crawford III, *supra* note 1 at 109.
[299] James W. Crawford III, *supra* note 1 at 113.
[300] Olivia Yanchik, *Ukraine needs enhanced air defences as Russia expands missile arsenal*, Atlantic Council (Mar. 2, 2022), https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-needs-enhanced-air-defenses-as-russia-expands-missile-arsenal/.
[301] Eliot A. Cohen et al., *Gulf War Air Power Survey. Volume II. Operations Effect and Effectiveness* Part II at 343 (Jan. 1, 1993), https://apps.dtic.mil/sti/citations/ADA279742.
[302] James W. Crawford III, *supra* note 1 at 102 (Extends to other conflicts, including World War II, Korea and Vietnam).

concerned, both for qualification as MO, and for the application of the proportionality test. This debate has not been settled and, due to the extensive nature of the dispute, it will not be further explored for the purposes of this Chapter. Nevertheless, the outcome of this analysis will be predominantly influenced by the ICRC's position, which affords heightened protections to civilians due to its advocacy for a narrow definition of MO and, as will be explored below, for the inclusion of reverberating effects in the assessment of harm. This interpretational decision is based on the interaction between the ICC's interpretations and the ICRC's position, which are more closely aligned in comparison to the American military standpoint.[303] Regardless, even when drawing from past conflicts, not much at this stage can be determined regarding whether the Russian attacks on the Ukrainian electricity grid truly yielded them a concrete and direct military advantage for the purposes of Art.8(2)(b)(iv).

In contrast, prominent military,[304] political,[305] and academic figures,[306] have characterized the Russian attacks as a deliberate targeting of civilian power generation facilities, causing excessive collateral damage and unnecessary suffering. The key to this assessment, however, is the extent of collateral damage which must be accounted for in the proportionality test,[307] or else, which repercussions on civilians were foreseeable byproducts of the attack.[308] Regarding

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[303] *See generally* International Committee of the Red Cross, *ICRC and ICC: Two separate but complementary approaches to ensuring respect for international humanitarian law*, (Mar. 3, 2009), https://www.icrc.org/en/article/icrc-icc-international-humanitarian-law. (Interviewing Anne-Marie La Rosa, legal adviser and focal point for the ICRC on issues related to international criminal justice).

[304] Interview Transcript with Secretary of Defense Lloyd J. Austin III, and Army General Mark A. Milley, Chairman, Joint Chiefs of Staff, *Press Briefing Following Ukrainian Defense Contract Group Meeting*, U.S. Department of Defense (Nov. 16, 2022), https://www.defense.gov/News/Transcripts/Transcript/Article/3220910/secretary-of-defense-lloyd-j-austin-iii-and-army-general-mark-a-milley-chairman/.

[305] U.N. SCOR, 9256th mtg., U.N. Doc. S/PV.9256 (Feb. 8, 2023, 10:00 AM) (Briefing by Izumi Nakamitsu, Under-Secretary General and High Representative for Disarmament Affairs).

[306] Human Rights Watch, *supra* note 129 (Referring to Yulia Gorbunova, senior Ukraine Researcher at Human Rights Watch).

[307] Michael N. Schmitt, *supra* note 124.

[308] Michael N. Schmitt, *supra* note 124.

electrical systems, extensive research has also already been carried out,[309] albeit without reaching an agreement on how to best factor the civilian element in the calculus.[310] The discussion spans out very similarly to the academic views explored in Chapter I, regarding the scope of the consequences which must be accounted for, that is, direct and/or indirect effects.[311] For instance, although the DoD Manual only accounts for "*immediate or direct harms*", it expands its construction to that "*the destruction of a power plant would be expected to cause loss of life (...) very soon after the attack due to the loss of power at a connected hospital*".[312] The ICRC goes a step further, prescribing that parties to an armed conflict are obliged to take into account the reasonably foreseeable reverberating effects of an attack.[313] The latter has gained the most support amongst academia.[314] Yet, doubts also emerge regarding the scope and nature of this duty, including the necessary degree of causation, or when reverberating effects should be deemed too remote to be considered a consequence of the attack.[315]

In the case of Ukraine, the strikes have not only led to direct civilian deaths in the vicinities of the target,[316] but over the course of the war thousands of towns and cities have faced rolling blackouts,[317] depriving civilians of heating in average territorial temperatures of -2 to -4.8 degrees Celsius, with some regions regularly reaching -21.6.[318] Regional Director of the World Health Organization for Europe,

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[309] *See generally, e.g*, Michael N. Schmitt, *The Principle of Discrimination in 21st century warfare,* 2 Human Rights and Development Law Journal 143, 168 (1999), http://dx.doi.org/10.2139/ssrn.1600631.
[310] Francesa Capone, *supra* note 165 at 752.
[311] Michael N. Schmitt, *supra* note 124.
[312] DoD Manual, *supra* note 160 at § 5.12.1.3.
[313] Isabel Robinson & Ellen Nohle, *Proportionality and precautions in attack: The reverberating effects of using explosive weapons in populated areas,* 98 no. 901 International Review of the Red Cross 107, 112 (Apr., 2016), https://doi.org/10.1017/S1816383116000552.
[314] *Id.* at 112 n.30.
[315] *Id.* at 117.
[316] Hugo Bachega & Yaroslav Lukov, *supra* note 71.
[317] *E.g.*, Hugo Bachega & Yaroslav Lukov, *supra* note 71.
[318] International Rescue Committee, *What Ukrainians need to survive winter* (Nov. 8, 2023), https://www.rescue.org/eu/article/what-ukrainians-need-survive-winter.

Dr. Hans Henri Kluge, emphasized that "*cold weather can kill*".[319] Civilian testimonies and reports further depict the wide range of difficulties which are associated with the prolonged lack of secure access to electricity: a grandmother melting snow for water,[320] surgeons operating with flashlights,[321] cancer patients dependent on oxygen trying to charge their concentrator,[322] or a mother trying to cook for her children as food continues to perish,[323] are a few select stories. Widespread reverberating impacts on the provision of basic necessities such as food, water, and medical assistance, particularly affecting vulnerable groups such as children, the elderly, and the sick, may thus account for the purposes of the proportionality assessment.

Although it is highly plausible that the operations also fell under the prohibition of Art.8(2)(b)(iv), if the ICRC's stance is adopted, this conclusion is not definitive. A comprehensive review will depend on the obtention of evidence regarding the advantage Russia sought to obtain, and weighing the latter against a qualitative and quantitative analysis of the civilian impact. However, based on the information gathered regarding the significant effects of electricity deprivation on civilians' livelihood, it must lastly be explored whether Russia's attacks could fall under the scope of the prohibition encompassed in Art.8(2)(b)(xxv).

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[319] World Health Organization [WHO], *Statement – Winter in Ukraine: people's health cannot be held hostage* (Nov. 21, 2022), https://www.who.int/europe/news/item/21-11-2022-statement---winter-in-ukraine--people-s-health-cannot-be-held-hostage, (Statement by Hans Henri P. Kluge, WHO Regional Director for Europe).

[320] Reliefweb, *Heating bricks and melting ice: Creative ways Ukraine families are surviving this winter* (Jan. 26, 2023), https://reliefweb.int/report/ukraine/heating-bricks-and-melting-ice-creative-ways-ukraine-families-are-surviving-winter.

[321] Yuras Karmanau et al., *Surgeons work by flashlight as Ukraine power grid battered*, AP News (Nov. 28, 2022, 4:40 PM), https://apnews.com/article/russia-ukraine-health-europe-covid-duda-c84f2292b25ce67724adf8ade78f2f45.

[322] Human Rights Watch, *supra* note 129.

[323] Amnesty International, *Ukraine: Devastating power cuts undermining civilian life as Christmas approaches* (Dec. 21, 2022), https://www.amnesty.org/en/latest/news/2022/12/ukraine-devastating-power-cuts-undermining-civilian-life-as-christmas-approaches/.

The latter refers to "*intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival*". According to Art.54(2) AP I, the mentioned objects include foodstuffs, agricultural areas for food production, crops, livestock, drinking water installations and supplies, and irrigation works. In such a case, even if the objects directly support military action, targeting is nevertheless prohibited if it is expected to leave the civilian population with such inadequate quantities of food or water as to cause its starvation.[324]

Accordingly, although electrical systems are not specifically mentioned, Russian attacks have been denounced to cause a peril of starvation.[325] More precisely, basic human survival is thought to be severely impacted,[326] as the power outages continuously result in entire regions, and millions of civilians, having impaired access to drinking water.[327] The aforementioned list of objects being nonexhaustive,[328] the disruption of electrical infrastructure may indeed be the necessary corollary to this prohibition. Military academia and international organizations have recognised that energy is now indispensable to the functioning of the objects that are necessary to the survival of civilians.[329] To this end, the ICRC has extensively stressed that damage to components of an electricity network may

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[324] Art.54(3)(b) AP I.

[325] *E.g.,* Human Rights Council, 52nd Sess. Item 4, *Report of the Independent International Commission of Inquiry on Ukraine* 7*,* U.N. Doc. A/HRC/52/62; Michael N. Schmitt, *supra* note 136; Human Rights Watch, *supra* note 129.

[326] Sec'y of Def. Lloyd J. Austin III & ARMY Gen. Mark. A. Milley, *Transcript: Secretary of Defense Lloyd J. Austin III and Army General Mark A. Milley, Chairman, Joint Chiefs of Staff, Hold a Press Briefing Following Ukrainian Defense Contact Group Meeting*, US Dep't of Def. (Nov. 16, 2022), https://www.defense.gov/News/Transcripts/Transcript/Article/3220910/secretary-of-defense-lloyd-j-austin-iii-and-army-general-mark-a-milley-chairman/.

[327] Michael N. Schmitt, *supra* note 136; Human Rights Council, *supra* note 205.

[328] International Committee of the Red Cross, *supra* note 161 at 655.

[329] *E.g.*, Michael N. Schmitt, *supra* note 136; Security Council Report, *Arria-formula Meeting: Protection of Water-related Essential Services and Infrastructure During Armed Conflicts* (Mar. 21, 2023), https://www.securitycouncilreport.org/whatsinblue/2023/03/arria-formula-meeting-protection-of-water-related-essential-services-and-infrastructure-during-armed-conflict.php; Henry Shue & David Wippman, *Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions*, 35 no. 3 art. 7 Cornell International Law Journal 559, 573 (2002), http://scholarship.law.cornell.edu/cilj/vol35/iss3/7.

affect water purification, storage, and distribution systems.[330] Again, in lack of comprehensive data-based reports on the matter from Ukraine, past conflicts offer an illustration. In Iraq, the strikes impeded the refrigeration of vaccines, limited the capability to purify water, and dispose of raw sewage, thereby increasing the number of victims of waterborne diseases, and decreasing crop yields due to reduced irrigation capabilities.[331] According to the ICRC, these factors also account for the purposes of the proportionality test, especially insofar as a reasonable military commander is expected to foresee that destroying electricity facilities will cut off the civilian fresh water supply.[332] Moreover, if this very same commander knows that water distribution or treatment is already operating at a low capacity, he should know that the effects on civilians caused by further damage to the plant will be more significant than if the plant was fully functioning.[333] In Ukraine, already before the war, 40% of its water supply networks were in a critical condition.[334] Thus, Russian strikes have significantly further hampered the ability to maintain distribution.[335]

Nevertheless, although this analysis reinforces a presumption in favor of the Russian attacks falling under the prohibition of Art.8(2)(b)(iv), regarding the conduct being encompassed by Art.8(2)(b)(xxv), it appears unlikely. As was already posited in the commentary under Art.8(2)(b)(i), demonstrating the intention to starve civilians is perhaps an insurmountable obstacle, because the impact of the

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[330] Isabel Robinson & Ellen Nohle, *supra* note 193 at 132.
[331] James W. Crawford III, *supra* note 1 at 110.
[332] Isabel Robinson & Ellen Nohle, *supra* note 193 at 121.
[333] *Id.* at 125.
[334] World Bank, *Ukraine Water Supply and Sanitation Policy: Toward Improved, Inclusive, and Sustainable Water Supply and Sanitation Services* 3, (last accessed Aug. 11, 2024), https://documents1.worldbank.org/curated/en/844681624034932176/pdf/Ukraine-Water-Supply-and-Sanitation-Policy-Note-Toward-Improved-Inclusive-and-Sustainable-Water-Supply-and-Sanitation-Services.pdf.
[335] Angus Soderberg, *Navigating Russia's Attacks on Water and Energy in Ukraine*, American Security Project (Mar. 10, 2023), https://www.americansecurityproject.org/navigating-russias-attacks-on-water-and-energy-in-ukraine/.

attacks on basic necessities may be considered a remote consequence for the purpose of proving *mens rea.*

III. Partial Conclusion

Attacks against a nation's energy grid can be considered war crimes, since they may give rise to sufficiently grave situations to cross the admissibility threshold, and may fall under the scope of the specified provisions of Art. 8 RS. This Paper however has determined that numerous challenges arise in the way of deeming this conclusion definitive.

First, whether COs targeting a nation's energy grid give rise to sufficiently grave situations depends on the tactics employed in attack. Although a standalone attack, cybernetic or kinetic, may not reach the threshold, when there is a conjunct deployment of COs and conventional weapons, as in Ukraine, or COs alone, which rise to the sufficient level of scale, and thus impact in attack, the test may be satisfied. This is in any case dependent on reverberating effects accounting for this test. Furthermore, demonstrating that those who will likely be the object of investigation are the 'most responsible' remains the subject of contention. COs' particular technical characteristics confront mixed theories on the respective knowledge which hackers possess, as opposed to superior military commanders, regarding the attack and the battlefield.

Second, several obstacles still stand in the way of demonstrating that such attacks fall under the scope of specified prohibitions. It may however be generally drawn that widespread and indiscriminate targeting of a nation's electrical grid and infrastructure can be encompassed by provisions of Art.8(2)(b)(ii) and (iv). The latter observation is weapons-neutral since, although the Russo-Ukrainian War exemplified a case of cyber-enabled warfare, insofar as COs alone could impede electricity production or distribution in the same manner as kinetic strikes, they thereby also attack objects and, in effect, can disproportionately impact civilians.

However, the difficulties highlighted in regards to the assessment criteria which should apply to targeting electrical systems, including by means of COs, underpinned obstacles which have not been provided for in current texts or interpretations, bringing us to Chapter III.

CHAPTER III. The ICC in the context of the Russo-Ukrainian War: role and challenges ahead in facing cyber operations against electrical infrastructure

The Russo-Ukrainian War has shaped the Western perception of armed conflicts and IHL more than any other since the Second World War.[336] Notably, it has uncovered that even when a case is sufficiently grave to be admissible before the ICC, and even where the specified conduct falls under the scope of the prohibitions of Art. 8 RS as a war crime, gaps in existing texts and interpretations need to be filled in order for the Court to engage a case. First, academics disagree on whether the Rome Statute necessitates amendment to afford the Court jurisdiction over cyber-enabled crimes. Second, academia has emerged to suggest that the Court needs to clarify the applicable benchmarks to assessing the legality of targeting electrical systems. This Chapter will thus establish that, subject to that the CO can be technically attributed to a specified hacker or team, and the latter's connection to a Party can be identified, the prohibition of analogy represents a challenge to encompassing cyber-enabled crimes. Therefore the ICC will need to pronounce its stance on the appropriateness of the current writing of the RS. Furthermore this Chapter will uncover that, because electrical systems now power infrastructure critical to civilian survival, the Court will need to take this change into account in what is now a necessary specification of the applicable assessment. The ICC will have to address this latter point in its jurisprudence.

[336] Marco Sassòli, *New Challenges and old problems for international humanitarian law,* Lieber Institute West Point (Apr. 3, 2024), https://lieber.westpoint.edu/new-challenges-old-problems-international-humanitarian-law/.

I. The challenge before the ICC and the Rome Statute to encompass cyber-enabled crimes

To delineate the ability of the Court to investigate, and prosecute, COs against electrical systems which fall under a prohibition of Art. 8 RS, it still remains to be determined whether the RS, as it is currently written, affords the Court jurisdiction over the crime, that is, cyber-enabled crimes. Particularly, it must be ascertained whether those individuals 'most responsible' for the COs launched against Ukraine's electrical systems could be the object of a prosecutorial process.

This question will be of notable importance in the coming months. Indeed last October 2023, the ICC's lead prosecutor Karim Khan announced that The Hague would for the first time inquire into, and prosecute, hacking crimes which violate international law.[337] Then, on January 22nd, 2024, the Court hosted a conference on addressing cyber-enabled crimes through the RS, although the results of this meeting are yet unknown.[338]

To begin with, Art.8 RS comes into play whenever there is an international armed conflict.[339] Therefore, there must be employment of armed force, and that force must be attributable to one of the parties to the conflict.[340] Regarding the first criterion, although acknowledging that in other cases fulfillment may be complex when in regards to COs, such a question was not the object of this investigation. This Paper having centered on an already active battlefield, the requirement is fulfilled because, where a cyber attack is conducted as part of an ongoing, conventional armed conflict, the armed force threshold is satisfied.[341] On the second

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[337] Yola Verbruggen, *Cybercrimes under consideration by the ICC,* International Bar Association (Oct. 13, 2023), https://www.ibanet.org/cybercrimes-under-consideration-by-the-ICC.
[338] Statement by Karim A. A. Khan on conference addressing cyber-enabled crimes through the Rome Statute System, International Criminal Court (Jan. 22, 2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-conference-addressing-cyber-enabled-crimes-through.
[339] Art.8(2)(b) RS.
[340] Kai Ambos, *supra* note 48.
[341] *Id.*

prong, the discussion may also be of interest in other circumstances. Notably, whereas in the case of a kinetic strike it may be clear that a particular Party is responsible for it, COs can pose a challenge to technical attribution as the identity of perpetrators is more easily shielded in cyberspace.[342] However, the COs of interest to this study have forensically been attributed to Sandworm and Fancy Bear.[343]

Even if the CO can be attributed to a particular hacker or team, a further challenge arises in comparison to the traditional course of analysis. In effect, for said force to be attributable to a Party, an additional step is necessary, which is linking the hacker or team to a State. Again, this is of noteworthy importance in regards to COs, as States may resort to "hackers-for-hire" or "proxies". Yet, in the case of Sandworm or Fancy Bear, they are recognised units of the GRU. Thereby, this Paper further acknowledges that the particularities of cyberspace may warrant further investigation in this regard in other circumstances, and may represent an obstacle for the Rome Statute to encompass cyber-enabled crimes in practical terms.

Proceeding however with the usual course of analysis, although neither Russia nor Ukraine are parties to the RS, the ICC may exercise jurisdiction if a State has accepted it with respect to the crime in question, by means of a declaration.[344] Ukraine exercised this prerogative, to begin with, on April 17th, 2014, when it accepted the ICC's jurisdiction with respect to alleged crimes committed by the Russian Federation from November 21st, 2013 to February 22nd, 2014.[345] Then again, Ukraine extended its acceptance of the ICC's jurisdiction on

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[342] Amply studied and debated, including by *e.g.*, the United Nations Office for Disarmament Affairs (*see generally,* Anastasiya Kazakova et al., *'Unpacking' technical attribution and challenges for ensuring stability in cyberspace. Submission to 2021–2025 UN Open-Ended Working Group (OEWG) on security of and in the use of information and communications technologies* (May, 2022), https://documents.unoda.org/wp-content/uploads/2022/05/Unpacking-technical-attribution-and-challenges-for-ensuring-stability-in-cyberspace_Submission-to-the-UN-OEWG.pdf).

[343] CyberPeace Institute, *supra* note 40.

[344] Art.12(3) RS.

[345] International Criminal Court, *Press Release. Ukraine accepts ICC jurisdiction over alleged crimes committed between 21 November 2023 and 22 February 2014,* ICC-CPI-20140417-PR997 (Apr. 17, 2024),

September 8th, 2015, when it recognized the Court's jurisdiction for an indefinite duration over all crimes against humanity and war crimes perpetrated by the Russian Federation on or after February 20th, 2014.[346]

However, the COs in return may fall under the jurisdiction of the Court either because they constitute new means to commit a crime over which the ICC has jurisdiction under its Statute, or because they aid, abet, or otherwise assist or contribute to the commission of such a crime.[347] Should COs be considered new crimes, and not new means of committing or contributing to war crimes, their investigation and prosecution would be impossible, for it would contravene the *nullum crimen sine lege* principle in accordance with Art.22(1) RS. This appears unlikely. Meanwhile the impermissibility of analogy, contained in Art.22(2), does pose a considerable issue insofar as it prescribes that "*the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted*". Given that COs are not addressed by the RS, nor IHL,[348] this prohibition is of concern.

The ICC will therefore need to consider whether the RS needs amendment to provide for this gap in the text.[349] Particularly, it may require from the Court to 'fit' COs into the Statute's existing structure for "*directing attacks [against the civilian population, civilian objects etcetera]*".[350] The challenge of aligning COs as "*attacks*" has been explored in Chapter I, however dissenting academia has specifically

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https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-between-21-november-2013-and-22.

[346] International Criminal Court, *Press Release. Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014,* ICC-CPI-20150908-PR1146 (Sept. 8, 2015), https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014.

[347] Art.25(3) RS.

[348] Tallinn manual 2.0, *supra* note 26 at 375.

[349] As remains evident from the International Criminal Court [ICC] Forum "Invited Experts on the Cyberwarfare Question" (*See generally supra* note 38), and the January 2024 Conference abovementioned, the question has already been posed by the ICC.

[350] Jennifer Trahan, *supra* note 118 at 1152.

emerged on the appropriateness of the RS to encompass COs. On the one hand, some academics advocate that the RS can be directly applied to COs, but only to a limited subset of them, that is, destructive COs.[351] On the other hand, some academics posit that the RS does not need to be amended to encompass COs, whether they are destructive or disruptive, if sufficient reverberating damages ensue.[352]

Academia has generally been in favor of viewing Treaties as living documents, "*to be interpreted in the context of the time in which they are being applied, and not as they would have been interpreted at the time of their drafting*".[353] Regarding the RS specifically, it has already been posited that "*the world today is very different than that which existed when the Rome Statute was drafted and that, to remain effective, the Court must recognize certain conduct that was unforeseen in 1998*". Thereby, where the wording of the Statute can tolerate a proposed meaning, the principle of *nullum crimen sine lege* is not necessarily offended by the ascribing of such meaning, COs, to the provision.[354]

Concludingly, the ICC is now tasked with delineating the future of prosecution in the face of modern warfare. It will specifically need to clarify whether the Rome Statute needs amendment for the ICC to have jurisdiction over cyber-enabled crimes, and thereby successfully prosecute individuals responsible for COs which can qualify as war crimes.

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[351] *See generally,* Jennifer Trahan, *supra* note 118.
[352] *See generally*, Marco Roscini, *Cyber Operations Can Constitute War Crimes Under the ICC Jurisdiction Without Need to Amend the Rome Statute*, *in* Cyber Operations and Cyberwarfare Question *in* ICCForum (Mar. 7, 2022), https://iccforum.com/cyberwar.
[353] Beth Van Schaack & Ronald C. Slye, *International Criminal Law: Essentials* 92 (Nov. 14, 2008), ISBN-13 978-0735565531.
[354] Leena Grover, *Interpreting crimes in the Rome Statute of the International Criminal Court* 184 (Nov., 2014), https://doi.org/10.1017/CBO9781107705586.

II. The role of the ICC in defining the legality of targeting electrical systems in twenty-first century warfare

Even if the Rome Statute were able to encompass the prosecution of cyber-enabled crimes, the Russo-Ukrainian War has also uncovered further gaps in existing interpretations by reigniting the debate on the legality of attacking a nation's power grid and electrical infrastructure. Particularly, the civilian impact of the invasion has called into question the status of IHL, sparking diverging commentaries such as that the "*Geneva Conventions are still too generic*",[355] or that reinvention is necessary, although "*less with the principles [themselves], and more with the sanction, because right now we are failing to sanction those who violate rules".*[356]

The debate on the applicable benchmarks and theories will need to be considered by the Court, for it to provide a unified interpretation in its jurisprudence. This will in return allow attacks targeting electrical infrastructure to be encompassed by the scope of the prohibitions. Without a fixed crux of analysis, their encompassment is not definite. In this, the Court will further need to address concerns that the status of electrical systems needs to be revised to account for their emerging interconnection with infrastructure that is essential to civilian survival and,[357] in this exercise, various interpretive challenges to defining the applicable standards arise.

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[355] Mircea Geoană, North Atlantic Treaty Organisation [NATO] Deputy Secretary General, Conference at the Instituto de Empresa of Madrid [IE University], *NATO in the New Era of Strategic & Industrial Transformation* (Feb. 29, 2024).

[356] Agnès Callamard, Secretary General of Amnesty International, Conference at IE University, *Human Rights advocacy in the XXIst century* (Mar. 13, 2024).

[357] *See generally*, most recently International Committee of the Red Cross, *Ukraine: Thousands of families near the frontline receive heating materials to protect against harsh winter conditions* (Jan. 22, 2024), https://www.icrc.org/en/document/ukraine-thousands-families-near-frontline-receive-heating-materials-protect-against-harsh-winter-conditions.

First, the ICC may wish to refine, or redefine, the definition of MO, insofar as academics have criticized the repeated, automatic classification of electrical systems as MOs.[358] The argument in favor of a narrower definition of MOs finds support in the 1956 ICRC Draft Rules for the Limitations of Dangers incurred by the Civilian Population in Times of War. The latter refers to electrical systems as "*industries of fundamental importance for the conduct of war*" when the infrastructure is "*mainly for national defence*".[359] A higher threshold for qualification as MO would in return facilitate encompassing attacks against electrical infrastructure under the umbrella of Art.8(2)(b)(ii)'s prohibition. Currently, it would also strengthen the case against Russia that, in view of the geographical and temporal spread of the attacks, Russia has not verified the legitimacy of each target.[360]

Alternatively, the ICC can consider the application of a more stringent proportionality regime. The ICRC's position, which broadly encompasses the reverberating effects of electricity disruption, already constitutes a stronger standard in comparison to opposing orthodoxies,[361] like the DoD Manual. However, further protective options have been brought forward as plausible solutions to the conundrum of electrical systems.[362] To illustrate, Shue & Whipman's first proposed reading of the assessment, "*enhanced proportionality*", prescribes for the inclusion of the long-term effects of disruption.[363] Their second reading, ("*protective proportionality*"), goes a step further, emphasizing the indispensable nature to civilians of some dual-use objects.[364] Particularly, it calls for the targeting of such infrastructure to be impermissible, unless the incidental civilian harm would not be excessive in relation to an anticipated military advantage that is "*compelling*".[365]

[358] Francesa Capone, *supra* note 165 at 745-51.
[359] International Committee of the Red Cross, *supra* note 161 at 632.
[360] Francesa Capone, *supra* note 165 at 748.
[361] Francesa Capone, *supra* note 165 at 752 (In her Paper, Capone proposes the adoption of the International Committee of the Red Cross' stance, although acknowledging that it is already a widely accepted standard).
[362] Francesa Capone, *supra* note 165 at 751-3.
[363] Henry Shue & David Wippman, *supra* note 209 at 570-2.
[364] Francesa Capone, *supra* note 165 at 753.
[365] Henry Shue & David Wippman, *supra* note 209 at 574.

This option, at least so far, has been the least preferred by academics.[366] In all cases, these propositions underscore a willingness for the ICC to potentially, either, broaden the scope of the effects which it accounts for as having been caused by electricity disruption, or, heighten the benchmark of proof for a State to demonstrate that it wielded an advantage in the attack. This would also facilitate encompassing attacks against electrical systems under the scope of Art.8(2)(b)(iv).

This question will be of prime importance in the coming months. Whilst finishing the writing of this Paper, the ICC issued arrest warrants for Sergei Ivanovich Kobylash, who at the relevant time was Commander of the Long-Range Aviation of the Aerospace Force, and Viktor Nikolayevich Sokolov, who was the Commander of the Black Sea Fleet. The OTP stated that these individuals bear responsibility for attacks on critical infrastructure in Ukraine, including power plants, which may have constituted war crimes within the meaning of Art.8(2)(b)(ii) and (iv).[367]

Concludingly, the ICC will need to take a stance on emerging academic debates which, regardless, have in common their advocacy for setting out a higher standard of protection which takes into account the changing role of electrical systems vis-à-vis civilians in armed conflict. Consequently, only then may the ICC be able to successfully engage the individual criminal responsibility of individuals launching attacks against electrical systems, and thereby also concretise the case against the Russian Federation for their cyber attacks.

[366] Francesa Capone, *supra* note 165 at 753.
[367] Statement by Prosecutor Karim A. A. Khan on the issuance of arrest warrants in the Situation in Ukraine, International Criminal Court (Mar. 5, 2024), https://www.icc-cpi.int/news/statement-prosecutor-karim-aa-khan-kc-issuance-arrest-warrants-situation-ukraine.

III. Partial Conclusion

The Russo-Ukrainian conflict has placed the ICC under the spotlight to take a stance on the future of international criminal responsibility. First, the Court will need to clarify whether the Rome Statute needs amendment to address immediate concerns that state actors in cyberspace have been shielded from responsibility, and thereby determine if it has jurisdiction over cyber-enabled crimes. Second, it will need to disentangle the applicable approach to the analysis of the legality of targeting electrical systems, in order to clarify its stance on their evolving status. This interpretative endowment will unfold in the months and years to come, and this Chapter has highlighted the gaps it will need to address before it can bring a case. However, this Chapter has established that a successful prosecutorial process could be commenced against individuals launching COs on a nation's electrical grid, starting with the Russo-Ukrainian War, if these steps are addressed by the Court.

CONCLUSIONS

Cyber operations directed against electrical infrastructure can be considered war crimes under Article 8 of the Rome Statute and, thereby, the Russian Federation's 'most responsible' actors could be investigated, and prosecuted, as war criminals, for attacking Ukraine's energy infrastructure. However, numerous challenges stand in the way of this conclusion.

To begin with, although cyber operations targeting electrical systems are bound by the norms of *Jus in Bello*, for criminal responsibility to be engaged under specified paragraphs of Article 8, the operations must rise to the level of attack. To this end, an effects-based approach will need to be followed by the International Criminal Court. For all cyber operations to be encompassed by the definition of attack, the reverberating effects of electricity disruption will need to account for the purposes of this assessment. Then, any cyber operation targeting electrical systems which harms, or attempts to harm, civilians, can cross the threshold. Otherwise, it is most likely that only destructive cyber operations qualify.

In addition, cyber operations targeting electrical systems can give rise to sufficiently grave situations to become an admissible case before the Court, yet only if they display sufficient scale and impact in attack, and if the reverberating effects of the attack are taken into account. Furthermore, this statement will be dependent on the fact that those who will likely be the object of investigation are the 'most responsible', and it is not immediately clear whether it is hackers, or their superior military commanders, the ones who bear the most responsibility. Regardless, these attacks can fall under the scope of the provisions of Article 8, notably the prohibition of attacking civilian objects, and the prohibition of carrying out disproportionate attacks, insofar as the operation is widespread and indiscriminate. This conclusion applies, equally, to cyber operations being launched alone, or in conjunction with kinetic weapons, because they may either constitute new means of committing, or otherwise contributing to the commission, of war crimes. However,

the ease with which subject-matter jurisdiction is engaged will be directly correlated to the approach which the Court takes in regard to the applicable benchmarks and interpretations.

Lastly therefore, the Court has been endowed with an interpretative role to shape the future of international criminal prosecution in the face of modern warfare. To construct a case, the Court will first need to clarify whether it can have jurisdiction over cyber-enabled crimes, or whether the Rome Statute needs amendment to get around the prohibition of analogy. Furthermore, the Court will need to ascertain the applicable standard to analyze the legality of targeting a nation's electrical systems, and this exercise will specially need to be carried in view of addressing the changing role of electricity vis-à-vis civilians' ability to survive in armed conflict.

Making It Right: The Place Of Restorative Justice In The Criminal Justice System

Carolina Gisela Franco Herrera

ABSTRACT

Restorative Justice (RJ) brings offenders, victims, and the community together as an alternative to the traditional criminal justice system. However, this paper contends that RJ does not have to be implemented in isolation from established criminal justice systems. Recognizing the growing focus on social rehabilitation within European penal policy, the paper explores how RJ can contribute to penal reform by being incorporated at critical stages—specifically during sentencing and post-sentencing. Such integration allows RJ to play a significant role in the rehabilitative process by addressing the consequences of the offense after guilt has been established. Additionally, through a case study, the paper illustrates how RJ provides offenders with opportunities to actively participate in their own rehabilitation, thereby enhancing the overall efficacy of social rehabilitation measures within the criminal justice system.

I. INTRODUCTION

In her memoir *Dreams from the Monster Factory*, Sunny Schwartz illustrates the common reality of society's punitive institutions to incarcerate people who commit crimes. She describes the supermax prison system in California and showcases how likely it is that the people the criminal justice system incarcerates will offend again. With the imagery she provides, it is hard not to draw the same conclusion she does. Her message is straightforward: systems that solely punish offenders are unlikely to aid in positive behavioral change. Thus, the communities outside of prison remain unsafe, there will be further victims, and those previously marginalized remain excluded and likely to relapse into a life of crime.

With the aid of other prison staff, Schwartz started a prison program embracing the principles of Restorative Justice (RJ). The program aimed to prompt incarcerated individuals to confront their actions, take accountability, and ultimately strive to "make it right." The common response from participants after being in the program for some months was a collective desire for redemption through restitution. Altogether, Schwartz's compelling initiative underscored the potential of RJ to catalyze meaningful individual change. While the program she installed represents just one approach through which RJ has been conceptualized and integrated into the present criminal justice system, its introduction represents the entrance of RJ into current criminal justice frameworks. Nonetheless, RJ's position remains subject to debate because of the uncertainties regarding its objectives and compatibility with the existing criminal justice processes.

Against this backdrop, this paper analyzes the qualification and place of RJ in criminal legal systems, with a focus on Europe. Initially, the paper endeavors to demonstrate that integrating RJ within criminal justice proceedings is a viable mechanism for facilitating the rehabilitation of offenders, thereby aiding them in their successful reintegration into society and the adoption of law-abiding lifestyles. Through restoration, the causes and effects of crimes can be addressed, and

punishment can be constructive and rehabilitative. As such, RJ can reduce recidivism, help victims achieve closure through dialogue, and overall decrease violence in the community.

Furthermore, the paper delves into the growing importance of the principle of social rehabilitation in European penology and displays how such a justice goal can be achieved through the implementation of RJ. Afterward, the paper analyzes how RJ has been implemented in Spain as a case study to analyze best practices and provide evidence that RJ generates better outcomes for all stakeholders.

Ultimately, the paper seeks to offer insights to reform the traditional criminal justice framework. By adding it to the existing system, RJ can prioritize the inclusion of victims, implement constructive punishment, and break cycles of violence. RJ presents a way to meaningful resolution. By "making it right," offenders can contribute to the healing process of victims, reintegrate into society, and facilitate social cohesion, safety, and solidarity.

II. METHODOLOGY

This paper employs a mixed-methods approach to advocate for the integration of RJ into criminal justice systems in Europe, aiming to enhance social rehabilitation. This hybrid methodology combines doctrinal, comparative, and empirical elements. The doctrinal analysis examines legal texts, including European Union directives, soft law from the Council of Europe, the case of *Vinter and Others v. UK*, and numerous law journal articles outlining the legal framework for social rehabilitation and RJ in Europe. This foundational understanding supports a structured proposal for incorporating RJ into the criminal justice system. In parallel, the comparative method entails the analysis of reports and law articles from different countries to assess RJ practices and outcomes across various jurisdictions, identifying best practices that highlight RJ's potential as a tool for social rehabilitation. This includes empirical research, which adds quantitative and

qualitative depth to my analysis and illustrates the positive relationship between RJ and social rehabilitation. This comprehensive approach not only deepens the understanding of RJ's theoretical and practical dimensions but also underpins recommendations for RJ's role in sentencing and post-sentencing processes in Europe.

III. STATE OF THE ART: Restorative Justice Theories and Practices

Restorative Justice is an alternative approach to the traditional criminal justice system that brings together offenders, victims, and the community.[368] It is not a recent practice, as it has been historically used in Indigenous communities to deal with crime. Nowadays, RJ is viewed as an alternative way to serve justice and to understand crimes and punishment.

Howard Zehr was the first author to highlight the difference between RJ and retributive justice: whilst retributive justice understands crime as an offense against the state, under RJ, "crime is a violation of people and relationships." Thus, justice is served when all parties search together for a solution that promotes repair, reconciliation, and reassurance. In its purest form, RJ represents an alternative to traditional criminal proceedings. Furthermore, in the traditional retributive system, the victim is the state, even though the harm is caused to a third person. This is evidenced by the fact that the state takes criminal proceedings against the accused. Hence, the real victim and the community are alienated from the process, only partaking as witnesses when necessary. The defendant's interest and voice are only heard through their defense attorney and virtually excluded from the proceedings. The concept of guilt is commonly perceived in binary terms within the legal framework, wherein defendants are compelled to either plead guilty or not

[368] Gerry Johnstone & Daniel W. Van Ness, Introduction, in HANDBOOK OF RESTORATIVE JUSTICE 5, 5 (Gerry Johnstone and Daniel W. Van Ness ed., 2007).

guilty. As noted by Zehr, the legal construct of guilt that underpins the justice system is characterized by its technical nature, often abstracted from lived experiences. This abstraction can inadvertently enable offenders to evade personal accountability for their actions.[369] Conversely, another inadvertent consequence of this conception of guilt is that offenders might, when confronted with the prospect of severe sentences, feel pressured to admit guilt (as a strategy in negotiation with the prosecution) as a means of avoiding trial or mitigating the severity of their punishment. This outcome occurs because the system in certain jurisdictions rewards defendants for pleading guilty by reducing sentences before the trial begins or during the trial proceedings, even if the defendant did not commit the offenses charged. Consequently, our conventional understanding of guilt may not promote genuine accountability. Moreover, the narrow definition of guilt, which focuses primarily on individual behavior, tends to overlook the broader societal and economic factors that contribute to criminal behavior when this context should be addressed to prevent future harm. In the best jurisdiction, they will be considered only as aggravating or mitigating circumstances.

Conversely, RJ seeks to address crime as conduct that harms people and their relationships, whose aftermath creates obligations and liabilities.[370] Consequently, the state does not take a protagonist role, and the concept of guilt is understood differently; it is not absolute but comes in degrees and can be removed through restoration and accountability.[371] The resolution of the offense and its consequences are informed by the context of the situation.[372] Moreover, RJ prioritizes the victim by involving them in the justice process and enabling them to express their needs. These needs can be addressed either by the offender making restitution or by the community supporting the victim and assisting them in their

[369] HOWARD ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES 72 (4TH ed., 2015).
[370] Tony Ward, Kathryn J. Fox & Melissa Garber, *Restorative Justice, Offender Rehabilitation and Desistance*, 2 RESTORATIVE JUST. 24, 25 (2014) (discussing RJ core values).
[371] Zehr, *supra* note 2, at 203.
[372] Zehr, *supra* note 2, at 187.

well-being after the harm suffered. The latter generates multiple responsibilities: upon the offender to repair them, upon the community to support both victim and offender in their dialogue, and upon the state to create the opportunity for victim and perpetrator to meet and facilitate healing and reconciliation.[373] Seeking retribution is not the goal. Rather, the goal is restoring the balance and addressing the various interests at stake. The victim has an opportunity to articulate and express their needs. Hence, the offender and community are encouraged to take action to help them fulfill these needs. Altogether, RJ is a system that relies on consent, accountability, and voluntariness to succeed.[374]

Howard Zehr maintains that one of the dimensions of the injuries created by the harm is to the offender. He holds that the offender can take accountability if they, too, can access healing; thus, their needs must be considered as well. In this sense, RJ values the relevance of the social context of the crime, but without diminishing a person's responsibility for its commission.[375] Rather, such contextualization enables more empathy between the stakeholders and concludes the dialogue in reparation and, ideally, reconciliation.[376] Thus, there is an agreement among all the parties that is restorative in nature, enabling closure and increasing the chances for the offender's re-acceptance in society.[377]

The goals of RJ include supporting the victim, repairing relationships, upholding community values, denouncing criminal behavior, addressing the responsibility of offenders, achieving restorative-looking outcomes, and preventing recidivism through reintegration.[378] Moreover, RJ also aims at providing the victim

[373] Grazia Mannozzi, Social Rehabilitation Through Restoration?, in SOCIAL REHABILITATION AND CRIMINAL JUSTICE, 53 (Federica Coppola & Adriano Martufi ed., 2024); *See* also Jennifer L. Sawin & Howard Zehr, The ideas of engagement and empowerment, in HANDBOOK OF RESTORATIVE JUSTICE 41, 49-53 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).
[374] YVON DANDURAND, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES 6 (2nd ed. 2020); Council of Europe regulation 2018, 8).
[375]Zehr, *supra* note 2, at 190-202.
[376] Mara Schiff, Satisfying the Needs and Interests of Stakeholders, in HANDBOOK OF RESTORATIVE JUSTICE 228, 231 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).
[377] Gordon Bazemore & Sandra O'Brien, The Quest for a Restorative Model of Rehabilitation, in RESTORATIVE JUSTICE AND THE LAW 71, 76-84 (Lode Walgrave ed., 2002).
[378] Dandurand, *supra* note 7, at 14.

with the opportunity to have a say and be heard in the process, as well as encouraging a dialogue between the victim and the perpetrator to foster mutual empathy, the possibility for reparation for the victim, the facilitation of recovery, the reduction of frequency and severity of reoffending, the active involvement of the community, and ultimately more trust with police and authority officers.

Within Europe, RJ has been implemented for some time in certain areas of the criminal justice system. Norway, for example, a pioneer country in this area, started to implement RJ by introducing its use for juvenile offenses.[379] Notwithstanding, RJ faces a pervasive lack of support, which has slowed down its wider application overall. Indeed, RJ lacks a systematic arrangement in Europe; some countries have RJ processes being led by offender support organizations and others by victim support organizations.[380] In Finland, RJ programs are normally led by child support services.[381] Different countries have expanded or limited their use of restorative programs and have enacted legislation with the aim of institutionalizing RJ practices.[382] Nonetheless, the existing legislative framework in these Nordic countries may prove insufficient to fully accommodate the implementation of RJ principles.

Furthermore, obtaining information regarding the actual implementation of RJ within individual systems is not always readily accessible, presenting a challenge to the systematic adoption of RJ practices.[383] Many of the groups advocating for the use of RJ are non-governmental agencies such as Victim Rights organizations or Probation and Offender Organizations.[384] As such, these

[379] Malini Laxminarayan & Emanuela Biffi, Accessibility and Initiation of Restorative Justice, EU FORUM OF RESTORATIVE JUSTICE 15-16 (2012), https://www.euforumrj.org/sites/default/files/2019-11/accessibility_and_initiation_of_rj_website_0.pdf (last visited April 22, 2024).
[380] *Id.*
[381] *The Idea of Restorative Justice and How it Developed in Europe*, EU FORUM OF RESTORATIVE JUSTICE, https://www.euforumrj.org/en/idea-restorative-justice-and-how-it-developed-europe (last visited April 22, 2024).
[382] *Id.*
[383] Laxminarayan, *supra* note 12.
[384] *Id.*

organizations might lack the resources to bring about benefits to offenders, victims, and the community on a wider scale. Despite legislative efforts, states often encounter notable hurdles in achieving effective implementation of restorative programs due to unclear and undetailed legislation. These challenges are further compounded by variations in practices and the absence of comprehensive guidelines. As a result, the accessibility of RJ programs is impeded.[385] Both the EU Commission and the United Nations have stated explicitly that, ideally, RJ processes would be available to both victims and offenders at all stages of the criminal process. Nonetheless, making RJ available has so far proven problematic on a wide scale.

IV. DIFFERENCES BETWEEN RESTORATIVE JUSTICE AND CRIMINAL JUSTICE

A. The Goals of Restorative Justice and Retributive Justice

Early academic analyses of RJ depicted this paradigm as an alternative to the criminal justice system. Hence, the literature supported a dichotomy between the two systems, in which a system can be either retributive or restorative. Accordingly, the incongruence between criminal justice and RJ was such that the criminal justice could not accommodate RJ in any plausible way. In his famous book "Changing Lenses", Howard Zehr depicted the key differences between the two systems. Notably, Zehr emphasized that the goals of the RJ system are different from those of the current criminal justice system, which is grounded on retributive justice principles.

In the RJ system, the main goal is to repair the trust that diminishes when an offender harms another person, as the victim stops trusting for their safety, and members of the community stop trusting one another.[386] The other main goal is to

[385] *Id.*
[386] Zehr, supra note 2, at 37.

restore the imbalance caused by the offense. Conversely, the retributive system envisions the goal of punishing those who harmed society. The idea of punishing those who have done wrong in order to uphold the moral order is strictly tied to pain delivery or consequences considered unpleasant.[387] Thus, from a retributive perspective, restoration is perceived as being accomplished through inflicting harm upon the perpetrator.[388] This approach involves a balancing of moral scales; the pain inflicted by offenders results in a moral imbalance that will only be rectified through the state administering an equivalent level of pain, thereby offsetting the consequences of the offense.[389] Thus, the pain of punishment can only be commensurate or proportionate to the harm that the offender caused.[390] The judicial process through which the punishment is handed out in Western society is handled by the state, with the perpetrator enjoying certain protections, including procedural rights that place limits on the punitive power of the state.[391]

In contrast, RJ views the victim and the offender as playing pivotal roles in a dialogue that would end with the restorative agreement in which the offender repays their debts by performing actions aimed at re-balancing the victims' losses.[392] In a sense, in lieu of achieving such a balance through the infliction of pain, RJ attempts to achieve it through a different pathway. Philosophically, retributive justice and RJ are incompatible in their means but not in their goals. For retributive justice, the suffering of the offender is appropriate to have them pay their debts to society; for RJ, the perpetrator pays such debts upon acknowledging their responsibility and meeting the needs of the victims and the community.

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[387] Michael Wenzel et al., *Do Retributive and Restorative Justice Processes Address Different Symbolic Concerns?,* 20 CRITICAL CRIMINOLOGY , 25–44 (2011).
[388] H. L. A. Hart, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 232-233 (2d ed. 2008).
[389] *Id.*
[390] *Id.*
[391] Ann Skelton & Makubetse Sekhonyane, Human Rights and Restorative Justice, in HANDBOOK OF RESTORATIVE JUSTICE 580, 581 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).
[392] *Id.*

B. The Apparent Incompatibility

A pure RJ system is incompatible with the traditional criminal process. The informality inherent in the RJ process undermines the traditional criminal proceedings because the solution is provided by the members of the dialogue and not the courts. The restorative process would replace state courts with private actors, thereby posing significant risks to fundamental procedural rights.

This inherent pursuit of different approaches results in a "tug of war" situation: RJ will loosen procedural requirements and become a hazard to the rights of the defendants. [393] Also, RJ rests upon the parties' consent, which means that RJ processes will not be available when the parties are not willing to interact or are unable to find a common solution.[394] In addition, a pure RJ system poses concerns regarding the need for state intervention to safeguard freedoms in addition to the state's duty and monopoly to maintain order and peace.[395]

C. From Retribution to Social Rehabilitation: The Evolution of the Criminal Justice in Europe

Considering growing concerns surrounding recidivism and public safety, there is a pressing need to reevaluate traditional punitive measures within the criminal justice system, potentially paving the way for the integration of RJ as an alternative approach.[396] The benefits of retributive approaches to crime are no longer evident insofar as they do not address the root causes of crime and ignore the victims whilst perpetuating more violence and pain.[397] The failures of retributivism

[393] Derek R Brookes, Restorative Justice and Criminal Justice: the Case For Parallelism 9 (Estelle Zinsstag & Tinneke Van Camp eds., 2023).
[394] Yvon, *supra* note 7, at 16.
[395] Declan Roche, Retribution and Restorative Justice, in Handbook of Restorative Justice 75, 86-87 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).
[396] Jenna Lopes, *There's Got to Be a Better Way: Retribution vs. Restoration*, Osprey J. Ideas & Inquiry 52, 59-60 (2002).
[397] Molly J. Walker Wilson, *Retribution as Ancient Artifact and Modern Malady*, 24 Lewis & Clark L. Rev. 1339, 1345-1357 (2020).

are also evidenced by the commitment to rehabilitation in different European countries and the explicit mention of rehabilitation in European Penal Policy as a matter of human dignity or a means to increase safety and reduce recidivism rates.[398]

Indeed, the evolving criminal justice system is being increasingly informed by the pursuit of human dignity, leading to a reevaluation of the justifications of punishment and possibilities for reform.[399] From a deontological point of view, in the past, punishment and retributive justice were a way to preserve the offender's dignity as a rational and autonomous human being. As offenders choose to offend, they need to receive the same amount of harm as the one inflicted. More recently, the concept of human dignity has been strongly associated with social rehabilitation. A system that respects human dignity is one that provides offenders with the possibility to change and the tools to do it. Within this line of reasoning, prisons should provide inmates with rehabilitation opportunities in respect of prisoners' "capacity to act morally and rationally and to assist prisoners in exercising their own autonomy."[400]

Social rehabilitation is a type of rehabilitation with its roots in criminological research and is strongly guided by a non-paternalistic approach to the self-determination and dignity of those who are punished.[401] This paradigm revolves around providing offenders with opportunities to change and return to society with increased chances to conduct crime-free lives and be provided with socially rich experiences. With successful reintegration as its ultimate outcome, social

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[398] Adriano Martufi, *The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal?,* 25 MAASTRICHT J. EUR. & COMP. L. 672 , 673–688 (2018).

[399] Sonja Meijer, *Rehabilitation as a Positive Obligation*, 25 EUR. J. CRIME CRIM. L. & CRIM. JUSTICE 145, 148–162 (2017), https://brill.com/view/journals/eccl/25/2/article-p145_4.xml (last visited Feb 22, 2024).

[400] *Id.*

[401] Social Rehabilitation is a subtype of rehabilitation, thus distinct from it. *See* FEDERICA COPPOLA, THE EMOTIONAL BRAIN AND THE GUILTY MIND NOVEL PARADIGMS OF CULPABILITY AND PUNISHMENT 168-180 (2021) (specifically holding that "[s]ocial rehabilitation is a non-paternalistic type of rehabilitation that aims for the social reintegration of people facing conviction").

rehabilitation mandates that the social problems that lead to reoffending must be addressed through crime responses.[402] Moreover, social rehabilitation is grounded in a situational understanding of criminal offending and values the importance of the social context to inform the rehabilitation process.[403] Consequently, social rehabilitation relies upon the principle of self-determination, asserting that though individuals exercise volition in their engagement with criminal behavior, this does not imply perpetual criminality; rather, it affirms an intrinsic belief in the human capacity for transformation, thereby renouncing the static view of a person's nature.[404]

Social rehabilitation is a goal and has been construed as such by soft law and constitutional texts, such as Art. 25 of the Spanish constitution.[405] Notwithstanding, there is a lack of legislative efforts in what constitutes the meaning and process to achieve social rehabilitation, including what is needed to allow for their successful reintegration into society as law-abiding citizens. The most popular practices to achieve this goal include work, education, and therapy (when needed)[406]. As mentioned previously, social rehabilitation entails a transformative process aimed at facilitating the reintegration of offenders into society. The offenders embrace change and actively participate in rehabilitative endeavors to reintegrate into the community, leading to their desistance from criminal behavior.[407] Understandably, change is a highly personal experience, one in which responsibility and accountability can play a part, and thus, achieving social rehabilitation is difficult to conceptualize.[408]

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[402] *Id.*
[403] *Id.*
[404] *Id.*
[405] *See* CE, B.O.E. n. 311, 29 de diciembre de 1978 (ES) ("Punishments entailing imprisonment and security measures shall be aimed at rehabilitation and social reintegration.").
[406] Mannozzi, *supra* note 6, at 55.
[407] Coppola, *supra* note 34.
[408] *Id.*

Additionally, social rehabilitation emphasizes the power of social relationships to achieve reintegration.[409] Indeed, social support can give the offender a sense of belongingness, psychological stability, and positive social influence, as well as enhance their belief that they can change and facilitate access to social resources.[410] Such social support can decrease the pervasive stigma against returning citizens, thereby increasing employment opportunities and other forms of social inclusion and thus increasing the chances of crime desistance.[411] This framework aids in the shift away from criminal behavior by rebuilding trust and relationships within the community. Alongside this, social rehabilitation programs must be available to offenders regardless of the crime committed because of their intrinsic nature as human beings.

As it will be argued over the next sections, when a country envisions social rehabilitation as a goal of criminal justice, it can provide an arena for RJ programs. In this context, RJ must be viewed as a complementary component and not as a replacement for the existing criminal justice system. Notably, RJ complements the criminal justice system by providing means for reparative actions that are necessary for achieving the goals of social rehabilitation and reintegration.[412]

V. SOCIAL REHABILITATION & RESTORATIVE JUSTICE IN EUROPE

A. Social Rehabilitation

Presently, within Europe, many countries prioritize social rehabilitation as a goal of their criminal justice systems. Scholars have indicated that the emphasis of

[409] *Id.*
[410] Bazemore & O'Brien, *supra* note 10, at 96.
[411] *Id.*, at 98-107.
[412] *Id.*

European penal law is now transforming to aim towards a rehabilitative end.[413] Penal law is undergoing reform across distinct levels—international, European, and national—underscoring the rising importance of social rehabilitation as a fundamental concept.[414]

From a soft law perspective, the growing support for social rehabilitation and its focus on reintegration is noticeable. The Council of Europe recommendations 2003/22 and 2003/23 clearly state that reintegration shall be an important duty of the prison system. Additionally, *the United Nations Standard Minimum rules for the treatment of prisoners* also ensure that there should be resources for the return of offenders to society, having "express references to rehabilitation" throughout the rules.[415] This wording displays that there is a need to help prisoners rejoin society fruitfully. Moreover, Art. 10 of the International Covenant on Civil and Political Rights also expresses a similar opinion by stating that "the penitentiary system shall comprise the treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation."[416] This provision also emphasizes the importance of human dignity, a principle further elaborated upon in the European Court of Human Rights' evolving rationale for rehabilitation. All the aforementioned soft laws are mentioned and analyzed in the case *Vinter and others v UK* as relevant legal sources to advocate for the rehabilitation of the defendants.[417]

In reference to hard law, several countries in Europe have developed similar laws to guarantee the aim of social rehabilitation through the criminal justice system. Italy and Spain have constitutional provisions pertaining to the aims of reintegration and rehabilitation. The Netherlands and Germany, on the other hand, refer to these goals in their penitentiary laws. Moreover, there is an explicit

[413] Martufi, *supra* note 31. *See* also Meijer, *supra* note 32 at 145.
[414] *Id.*
[415] Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1060-1061 (1987).
[416] *Id.*
[417] Vinter and Others v. United Kingdom (No. 148), 33-34 Eur. Ct. H.R. (2012).

mention of social rehabilitation in Council framework decision 2008/909/JHA; these guidelines' goal is to "facilitate the social rehabilitation of convicted persons by allowing them to serve their sentence in their home country."[418] Hence, social rehabilitation is gaining prominence at every legal level.

B. Restorative Justice

RJ is also gaining visibility in Europe, as the creation of one directive and one council recommendation shows the trend of including more stakeholders in the criminal justice process. These are Directive 2012/29/EU ("the Victim's Directive") and Council recommendation (2018)8.

Within the Victim's Directive, RJ is mentioned to emphasize that member states should make RJ practices available. The directive mentions RJ in four different instances: in the recital, in the definition provided for in article 2.1.d, in the provisions for the right to be informed of available programs under article 4J, and finally, in article 12, which outlines safeguards that must be upheld throughout the RJ process.[419] The directive does not call upon the explicit obligation of member states to have RJ programs in their respective jurisdictions and treats RJ as a complementary process or an alternative system.[420] Moreover, the directive presents RJ from the victim's point of view and mentions that RJ can be "of great benefit to the victim."[421] However, it places less emphasis on the benefits of RJ for the community and the offender.

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[418] *Detention and transfer of prisoners*, EUROPEAN COMMISSION, https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/detention-and-transfer-prisoners_en (last visited Mar. 8, 2024).

[419] Brunilda Pali, Research and Actions on Restorative Justice in the Victims' Directive, EUROPEAN FORUM FOR RESTORATIVE JUSTICE (Feb. 23, 2017), https://www.euforumrj.org/sites/default/files/2019-12/plenary-brunilda-pali-vd-rj.pdf.

[420] Theo Gavrielides, *The Victims' Directive and What Victims Want from Restorative Justice*, 12 VICTIMS & OFFENDERS 21, 23 (2015).

[421] Directive 2012/29 of the European Parliament and of the Council of 25 October 2012 on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 O.J. (L 315) 57.

By contrast, Council Recommendation (2018)8 emphasizes the integration of RJ into the criminal justice system to accommodate the needs of victims, offenders, and the community.[422] Recommendation (2018)8 specifically mentions that RJ can be a tool for rehabilitation and healing, promoting its application. In comparison with the directive, the recommendation calls for "all victims and offenders to have access to a Restorative Justice process."[423] Beyond proposing more availability of information on restorative processes, the recommendation argues more broadly "for cultural change towards a more restorative approach to crime and criminal justice at all levels of policy and practice."[424] Thus, this recommendation advocates for the implementation of RJ in the member states and for installing RJ programs when they are not available. Later, in 2021, the Council of Europe member states further emphasized the importance of RJ with the drafting of the Venice Declaration in which the states were called upon to "develop national action plans" for the implementation of Council Recommendation 2018(8) and stimulate wide implementation of RJ practices.[425]

The transition from the tentative language of the directive to the subsequent recommendation from the COE and finally to the heightened emphasis in the Venice Declaration, underlines the significant evolution of RJ in Europe. This progression reflects an increasing dissatisfaction with the conventional criminal justice system.[426] The latter is further evidenced by the growing number of RJ

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[422] Council of Europe, *Recommendation CM/Rec (2018)8 of the Committee of Ministers of the Council of Europe concerning restorative justice in criminal matters*, COUNCIL OF EUROPE (Oct. 3, 2018), https://search.coe.int/cm?i=09000016808e35f3.

[423]Tim Chapman, Edit Törzs, & Ian Marder, *Council of Europe Recommendation 2018 Concerning Restorative Justice in Criminal Matters A Briefing For Europe*, EUROPEAN FORUM FOR RESTORATIVE JUSTICE (2019), https://www.euforumrj.org/sites/default/files/2020-05/EFRJ_Policy_Brief_CoE_Rec.pdf (last visited April 15, 2024).

[424] *Id.*

[425] Council of Europe, *Declaration of the Ministers of Justice of the Council of Europe Member States on the Role of Restorative Justice in Criminal Matters,* COUNCIL OF EUROPE (Dec. 14, 2021), https://rm.coe.int/0900001680a4df79.

[426] Ian Marder & Tim Chapman, *Developing Restorative Justice across Europe*, CONFEDERATION OF EUROPEAN PROBATION, https://www.cep-probation.org/developing-restorative-justice-across-europe/ (last visited April 30, 2024).

practices within Member States procedures. Particularly, this increase is owed to the need for restitution and the healing nature of RJ to its communities.[427]

C. The Overlapping Aspects of Social Rehabilitation and Restorative Justice

Building upon the increasing regulation of social rehabilitation and RJ in Europe, it becomes apparent that these two approaches share overlapping aspects. RJ is compatible with the goal of social rehabilitation to the extent that it can be a tool to encourage social rehabilitation. Foremost, both paradigms rest on the idea that offenders are capable of change and that the involvement of the community in fortifying social links is a vital component to activating change and desistance from crime. Also, and relatedly, both paradigms envision reintegration and crime desistance as the ultimate outcome for the offender.

RJ is inherently tied to the possibility that the offender can change their attitudes and relies upon the ability to foster empathy between the parties.[428] The offender, within a scheme of RJ, can understand the consequences of the offense. Likewise, social rehabilitation is centered around the fact that individuals can "shift away from crime and live as positive members of the community."[429] This shift is synergic with the changes that RJ achieves through dialogue. Influential RJ accounts state that offenders should be encouraged to change. Likewise, social rehabilitation emphasizes the dynamic nature of personhood. While social rehabilitation relies on this principle, RJ aims to facilitate such transformations through conferencing and dialogue between all involved parties. This process

[427] Ivo Aertsen, *The Idea of Restorative Justice and How it Developed in Europe*, EUROPEAN FORUM FOR RESTORATIVE JUSTICE, https://www.euforumrj.org/en/idea-restorative-justice-and-how-it-developed-europe (last visited April 30, 2024).
[428] Mannozzi, *supra* note 6, at 60.
[429] Coppola, *supra* note 34, at 172.

enhances empathy through the act of making amends.[430] Moreover, RJ contextualizes the offense, and this creates an environment that fosters change; this supportive environment is consistent with Coppola's understanding of individual change within the context of social rehabilitation and Manozzi's idea on the transformative effects of RJ through dialogue.[431] Moreover, according to Bazemore and O'Brien, Restorative Justice programs influence offender transformation, thereby facilitating cognitive and behavioral changes that support desistance from crime.[432]

Secondly, social rehabilitation centers around the idea of social support and human connection.[433] By fostering dialogue between the victim, the offender, and the community, the RJ process is inherently balanced upon social relationships. However, RJ does even more to increase the socialization skills of the offender and to prevent social exclusion. In fact, it enhances human connection and social relationships through earned redemption.[434] RJ fosters a sense of community responsibility within the offender, encouraging the development of prosocial behavior.[435] This facilitates a more restorative approach, as the offender seeks to repair the harm inflicted upon the community. By strengthening the relationship between the offender and the community, the offender can earn a place in society and foster their own reaffirmation in the community.[436] Conversely, some scholars have mentioned that if not by participating in restorative practices, reintegration can be burdened by the appearance of the failure to make things right and not contributing to community peace.[437] All of these ideas are also described by Schiff

[430] Bazemore & O'Brien, *supra* note 10, at 88.
[431] Mannozzi, *supra* note 6, at 56-60; *see* also Coppola *supra* note 34, at 174.
[432] Bazemore & O'Brien, s*upra* note 10, at 96-102.
[433] Coppola, *supra* note 34, at 172.
[434] The theory of earned redemption states that offenders can actively partake in their process of rehabilitation and reintegration into society by giving back and thus earning a positive standing within the community. *See* Gordon Bazemore*, Restorative Justice and Earned Redemption: Communities, Victims, and Offender Rehabilitation,* AM. BEHAV. SCI. 41, 789 (1998).
[435] Mannozzi, s*upra* note 6, at 60-61.
[436] *Id.*
[437] Bazemore & O'Brien, *supra* note 10, at 91.

and Bazemore's depiction of a Restorative Relational Model, in which repair is seen as the vehicle through which relationships are built between offenders, communities, and victims. [438] As such, RJ, through redemption, seeks to bring society closer in a way that punishment would not.[439]

Thirdly, and related to the previous point, RJ aids in reintegration and desistance, outcomes encompassed within the concept of social rehabilitation. Unlike conventional non-restorative systems, RJ encourages a situation through which the offender can take responsibility and repair the harm. By acknowledging the victim's suffering, an offender will be able to understand the consequences of their action and decide to take a reparative approach.[440] Ward, Fox, and Garber argue that restorative practices make it more likely for the offender to accept responsibility and can create supportive relationships that result in diminished reoffending. The restoration through accountability will communicate to the offender and the community that all members exist within the same moral universe and thus send the message of inclusion.[441] RJ includes offenders in the community by treating them as both the problem and (part of) the solution. As such, offenders have to be "eligible for care and concern," spreading the message of belongingness that aids in desistance.[442] Through accountability, the offender will likely be able to promote social support, contribute to reduced reoffending, and embark on the road to reintegration.[443]

Similarly to social rehabilitation, RJ enhances the process of desistance from crime. The latter concept refers to processes leading to the ceasing of criminal

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[438] Gordon Bazemore & Michael Dooley, *Restorative Justice and the Offender: The Challenge of Reintegration*, in RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES 101, 115 (Gordon Bazemore & Mara Schiff Eds., 2001).
[439] Bazemore & O'Brien, *supra* note 10, at 91.
[440] Shadd Maruna, *Desistance and Restorative Justice: it's Now or Never* 4, RESTORATIVE JUSTICE: AN INT'L J. 289, 296 (2016).
[441] Ward, Fox & Garber, *supra* note 3, at 30-35.
[442] *Id.*
[443] Bazemore & O'Brien, *supra* note 10, at 93-97; *See* also: Bazemore, *supra* note 67, at 789.

activity; it is associated with the adoption of a pro-social lifestyle.[444] Desistance is a complex process influenced by both social and individual factors, such as employment, social support, and personal agency in narrative shifts. Thus, individuals who were previously engaging in criminal behavior manage to break offending cycles and resolve to reintegrate successfully into society.[445] To understand why desistance happens, scholars have been conducting research into the lives of individuals that have interrupted criminal activity to understand the underlying changes that might have resulted in such an outcome.[446] Importantly, crime desistance has been significantly linked with RJ in that RJ processes appear to significantly impact individuals' decisions to stop committing crimes because the desistance process is intertwined with ideas of social support and successful reintegration into society. RJ contributes to social support and reintegration because it enables offenders to take responsibility and make amends through direct communication with victims, fostering empathy and moral rehabilitation. RJ serves as a catalyst in desistance processes, as participation in RJ facilitates cognitive and social transformations, fostering the development of a pro-social identity.[447]

VI. HOW RJ CAN BE IMPLEMENTED IN THE CRIMINAL JUSTICE SYSTEM

The UN Handbook on RJ states that RJ could ideally be implemented at any moment of the criminal justice process, including pretrial, trial, sentencing, and post-sentencing. Likewise, Council Recommendation Rec (2018)8 also emphasizes the applicability of RJ at any point. However, depending on the stage at which it is

[444] Ward, Fox, & Garber, s*upra* note 3, at 93-97.
[445] Maruna, *supra* note 73, at 291-296.
[446] *Id.*
[447] Katrien Lauwaert & Ivo Aertsen, *Desistance and Restorative Justice Mechanisms for Desisting from Crime within Restorative Justice Practices*, EUROPEAN FORUM FOR RESTORATIVE JUSTICE (2015), https://www.euforumrj.org/sites/default/files/2019-11/research-report-desistance-and-rj-total-doc-24-11-final_0.pdf (last visited April 30, 2024).

employed, RJ would aim to achieve different outcomes. For example, at the sentencing stage, RJ can be highly beneficial in exploring the different needs that should be addressed when the court metes out the punishment and the consequences of the offense. Moreover, post-sentencing programs can focus more on the successful reintegration and rehabilitation of offenders rather than on the consequences of the offense since they are implemented when the offender is already complying with their sentence.

Thus, the following question arises: at which stage(s) should European countries provide RJ programs to best facilitate social rehabilitation processes? Addressing this question requires careful consideration of the possible practical implications. RJ has been criticized for its informality, which poses significant challenges to the criminal justice system's foundational principles, such as the presumption of innocence and the right to remain silent.[448] These protections risk being compromised when an offender discusses the offense in RJ settings, where participation often requires a prior admission of guilt. This requirement presents a dilemma for those who assert their innocence, as consenting to RJ may appear as an implicit admission of guilt.[449] Consequently, RJ can only occur between stakeholders when the offender has taken "at least some responsibility" for the offense to attempt genuine reconciliation.[450] Therefore, the integration of RJ into the criminal process necessitates careful consideration of these rights.

In view of these concerns, RJ should optimally take place post-conviction after the determination of guilt.[451] The placement of RJ after post-conviction follows the Hybrid Model of RJ, an approach that introduces RJ after a specific stage (such as after conviction) in the criminal justice process.[452] Unlike penal mediation, the

[448] Skelton & Sekhonyane, *supra* note 24, at 81.
[449] Lode Walgrave, Introduction, in RESTORATIVE JUSTICE AND THE LAW 15, 17 (Lode Walgrave ed., 2002).
[450] Joanna Shapland et al., *Situating Restorative Justice within Criminal Justice,* 10 THEORETICAL CRIMINOLOGY 505, 507 (2006).
[451] *Id.*
[452] DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE 153-154 (Pam Chester & Ellen S. Boyne eds., 5th ed. 2013).

Hybrid Model integrates RJ into existing legal frameworks to function successively after a determined point in proceedings.[453] Integrating RJ post-conviction implies its use at sentencing and post-sentencing phases, which can overcome the limitations of traditional punitive measures by promoting social rehabilitation and community engagement while ensuring that defendants' rights are protected.

In the upcoming discussion, the place of RJ at sentencing and RJ post-sentencing will be discussed. As for the former, the involvement of multiple stakeholders in sentencing determinations in order to facilitate a deeper understanding of the background of the offense and address the needs of all parties involved in the criminal matter shall be examined. This collaborative process aims to develop a comprehensive plan to mitigate harm and promote healing for both the victim and the community. This resulting plan can influence the judicial sentencing decision, providing an alternative to relying solely on the court's judgment.[454] Following this analysis, there will be an examination of how RJ has been implemented across different jurisdictions.

As for post-sentencing, the use of RJ in prison settings shall be discussed. Although prison may not be a place that is compatible with the pure spirit of RJ, RJ can still be used to offer incarcerated individuals opportunities to repair and restore the victims and the community. First, RJ can promote opportunities for change by increasing accountability and responsibility. Additionally, prison-based RJ gives the offender a better chance of reintegration once they leave the prison. Moreover, there will be a comparative analysis of different countries' prison-based RJ programs to establish best practices.

[453]Daniel W. Van Ness, Creating Restorative Systems, in Restorative Justice And The Law 209, 230 (Lode Walgrave Ed., 2002).
[454] Heino Lilles, *Circle Sentencing: Part of the Restorative Justice Continuum*, in Restorative Justice For Juveniles 161, 164 (Allison Morris & Gabrielle Maxwell Eds., 2001).

A. RJ in Sentencing

1. Restorative sentencing: sentencing circles, forum sentencing, and pre-sentence RJ

Criminal sentencing determines the legal and societal consequences of offending behavior.[455] Across different countries, sentencing typically aims to achieve four major goals: retribution, rehabilitation, deterrence, and incapacitation.[456] As more countries focus on rehabilitative outcomes, RJ offers a significant opportunity to promote social rehabilitation within the sentencing process.

RJ at sentencing has taken multiple formats in different countries, such as circle sentencing, forum sentencing, and pre-sentence RJ— all of which are implemented between the conviction and the final sentencing decision. However, all these practices involve a collaborative meeting of all stakeholders—including court officials, victims, offenders, and community representatives—to formulate a sentencing plan that meets the needs of all parties involved. Moreover, another common aspect is that as the practice happens at sentencing, the offender still has a conviction and criminal record.[457] Additionally, the principle of proportionality usually guides this process, in which the sanction cannot surpass the offense in seriousness or gravity; it must be proportional to the offense.[458] In Canada, for

[455] Van Ness & Heetderks, *supra* note 85, at 74.
[456] Doris Layton Mackenzie, *Sentencing and Corrections in the 21st Century: Setting the Stage for the Future*, NATIONAL INSTITUTE OF JUSTICE (2001), https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/1999-MacKenziePaper.pdf (last visited April 19, 2024).
[457] Chris Cunneen, Reviving Restorative Justice Traditions?, in HANDBOOK OF RESTORATIVE JUSTICE 113, 124 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).
[458] Julian V Roberts & Kent Roach, Restorative Justice in Canada: From Sentencing Circles to Sentencing Principles, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE 237, 254 (Lode Walgrave Ed., 2002); *see* also Susan Sharpe, The Idea of Reparation, in HANDBOOK OF RESTORATIVE JUSTICE 24, 34-35 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

example, conferences are ultimately guided by this principle so that the reparative agreement (sentence proposal) is neither overwhelming nor too lenient.[459]

RJ at sentencing involves stakeholders who were affected by the offense. This collaborative approach facilitates the planning of rehabilitation through reparative actions. Firstly, community representatives participate in identifying the harm done by the crime and devising appropriate responses to address the repercussions of such harm.[460] This stage reportedly results in increased offender accountability and fosters a sense of collective responsibility and solidarity.[461] Secondly, the victim's presence in the conference provides an avenue for restitution to the offender as they are given a platform to address the needs of the victim. Victims have expressed a special interest in the sentencing phase, viewing it as a crucial opportunity for justice and closure.[462] Thirdly, the offender's family and support network can also be present to inform the process. This prevents a failure associated with traditional criminal justice systems, such as the sentence being detached from the offender themselves, failing to address underlying issues, and instead applying a one-size-fits-all approach, such as incarceration.[463]

The meeting normally concludes with an agreement, usually called the sentencing or intervention plan, that is implemented by the judge and other institutional figures such as probation officers.[464] Heino Lilles states that the goal of sentencing circles is consensus. Thus, the intervention plan is the product of a focused discussion on what is needed for everyone.[465] Additionally, Lilles also states

[459] Julian V Roberts & Kent Roach, Restorative Justice in Canada: From Sentencing Circles to Sentencing Principles, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE 237, 254 (Lode Walgrave Ed., 2002).
[460] Lilles, *supra* note 87, at 163-164.
[461] Roberts & Roach, *supra* note 92, at 251.
[462] Van Ness & Heetderks, *supra* note 85, at 74.
[463] M. E. Turpel-Lafond, *Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue*, 43 CRIM. L.Q. 34, 40-44 (1999).
[464] Lilles, *supra* note 87, at 163-167.
[465] *Id.*

that all participants in the circle are aware that the offender will go back to the community. Thus, the agreement is usually focused on promoting rehabilitation.[466]

Following this agreement, community members and offender relations can help the offender behave in compliance with the reparative agreement.[467] In contrast, ordinary penal sentences, such as incarceration, place the offender in a position of isolation. Furthermore, offenders typically perceive incarceration as a punitive measure intended to express retribution for their actions. As noted by Gerry Johnstone, many offenders interpret this message as implying that enduring imprisonment for a set period absolves them of responsibility. In this context, imprisonment imposes significant suffering on offenders, as well as few expectations or demands beyond enduring the sentence itself.[468]

Alternatively, the sentencing plan places greater demands on the offender, who is then held accountable through a structured support system. This system consists of participation from figures such as relevant community members or parole officers who meet with the offender periodically to ensure adherence to the plan.[469] In some jurisdictions, a breach of the plan entails a sentencing review in court.[470]

The continuous interaction between victim, offender, and community and "shared ownership of the sentencing plan" incentivizes the offender to be committed to the agreement.[471] This is evidenced by the fact that "very few offenders who

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[466] *Id.*
[467] *Id.*
[468] Gerry Johnstone, Restorative Justice in Prisons: Methods, Approaches and Effectiveness, COUNCIL OF EUROPE, 9 (Sept. 29 2014), https://rm.coe.int/16806f9905 (last visited April 30, 2024).
[469] *Id.; See* also Meredith Rossner et al., *The Process and Dynamics of Restorative Justice: Research on Forum Sentencing*, UNIVERSITY OF WESTERN SYDNEY (2013), http://www.uws.edu.au/__data/assets/pdf_file/0004/522625/The_Process_and_Dynamics_of_Restorative_Justice_-_Research_on_Forum_Sentencing.pdf (last visited April 21, 2024).
[470]Restorative Justice and the Judiciary Information Pack, RESTORATIVE JUSTICE COUNCIL (Oct. 2015), https://restorativejustice.org.uk/sites/default/files/resources/files/Restorative%20justice%20and%20the%20judiciary%20-%20information%20pack.pdf (last visited April 21, 2024).
[471] Lilles, *supra* note 87, at 168.

participate in circle sentencing fail to complete their community disposition successfully."[472]

Benefits of RJ at sentencing include bringing together more stakeholders into a process that usually imposes " a sanction with little elaboration and rarely any reference to the community, in whose name the censure is being expressed."[473] The discussions during restorative sentencing extend beyond merely the specific offense, encompassing various aspects such as reconciliation and reparation, as well as the underlying causes of the crime and the impacts on victims, families, and community life.[474] Additionally, the inclusion of the community enriches the process by allowing for more support to the offender, thereby enhancing their reintegration later on.

Moreover, RJ at sentencing empowers the offender by offering them opportunities to actively engage in response to the offense. This involvement allows them to participate in "shaping the sentence plan, thereby taking back a measure of control over their life."[475] This active participation can be an opportunity to repair and make it right, thereby fostering personal change and desistance.[476] Additionally, the RJ practice expects the offender "to restore themselves" by addressing the personal circumstances that contributed to the offending behavior.[477] Consequently, the offender is actively participating in their own rehabilitation.

Finally, through RJ, sentencing becomes a deeply individualized process tailored to address the specific needs and circumstances of the offender with a primary focus on rehabilitation. Sentencing within an RJ paradigm requires a thorough examination of the offender's background and the factors that may have influenced their actions.[478] The discussion plays a crucial role in providing the sentencing judge, who later ratifies the sentencing plan, with a comprehensive

[472] Lilles, *supra* note 87, at 166.
[473] Roberts & Roach, *supra* note 91, at 242.
[474] Cunneen, *supra* note 90, at 124.
[475] Lilles, *supra* note 87, at 163-168.
[476] *See* discussion *supra* section V.C.
[477] Lilles, *supra* note 87, at 163-168.
[478] Turpel-Lafond, *supra* note 96, at 40-44.

understanding of the defendant's situation, including potential influences such as substance abuse, poverty, racism, family breakdown, and community dislocation.[479] By considering these unique circumstances, sentencing aims not only to hold the offender accountable but also to address the underlying issues that may have contributed to their involvement in criminal behavior. This individualized approach reflects a commitment to promoting rehabilitation and reintegration, thereby offering offenders a meaningful opportunity for personal growth and positive change within the justice system.[480]

2. Best RJ practices at sentencing

Some countries provide RJ diversion programs as sentencing following an admission of guilt or a conviction. Among others, the focus of the present discussion will be on the United Kingdom, Western Australia, Canada, and New Zealand. This discussion will allow a deeper understanding of how RJ at sentencing can enhance the social rehabilitation of offenders. These countries have integrated RJ into their sentencing procedures and share several relevant features that could potentially be adopted by other jurisdictions.

Canada employs sentencing circles, a practice that emerged in the 1990s in response to the disproportionate incarceration of Aboriginal individuals in the country and marking a shift from punitive measures to a more healing-centered approach.[481] Notably, the Canadian Supreme Court has affirmed the appropriateness of sentencing circles for Aboriginal offenders, emphasizing the need to consider the offender's circumstances to aid in desistance and development.[482]

Following an admission of guilt, offenders engage in a collaborative process involving victims, community members, judges, parole officers, and lawyers.[483]

[479] *Id.*
[480] *Id.*
[481] Lilles, *supra* note 87, at 162.
[482] Turpel-Lafond, *supra* note 96, at 37-38.
[483]Lilles, *supra* note 87, at 162-163.

Together, these stakeholders address the offense and explore its underlying causes. The reparative agreement that is created through the circle is later reviewed by a judge who might consider its recommendation to mete out the appropriate sentence.[484] Reparative agreements reached through sentencing circles not only focus on reconciliation but also directly tackle the roots of the offense, shaping tailored sentence plans that address these underlying issues.[485]

Even when sentencing circles do not occur, judges and parole officers have to take into account various background factors of (aboriginal) offenders that contributed to the crime, such as substance abuse, poverty, racism, and community breakdown.[486] This approach cannot ignore goals such as healing, restoration, and accountability.[487] Additionally, the offender will be monitored as they complete the plan and adhere to the rehabilitation plan, which includes counseling and treatment programs.[488] Thus, the Canadian example highlights the specific benefits of sentencing circles in tackling issues that can foster desistance and reduce recidivism rates.

Likewise, the UK pre-sentence program was also born out of high incarceration rates in the country.[489] The pre-sentence program is focused on empathy-building between all the stakeholders and is conditioned upon a prior admission of guilt by the offender.[490] New Zealand also uses pre-sentence hearings following a conviction or an admission of guilt.[491] Here, the court considers the possibility of an encounter between the offender and the victim so that they can

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[484] Cunneen, *supra* note 90, at 124-126.
[485] Lilles, *supra* note 87, at 162-163.
[486] Turpel-Lafond, *supra* note 96, at 40-44.
[487] *Id.*
[488] Lilles, *supra* note 87, at 166.
[489] *(UK) Restorative Justice: Time for Action*, IRISH PENAL REFORM TRUST (Sept. 8, 2011), https://www.iprt.ie/sentencing/uk-restorative-justice-time-for-action/ (last visited April 30, 2024).
[490] *Pre-sentence restorative justice (RJ)*, MINISTRY OF JUSTICE UK (May 19, 2014), https://www.gov.uk/government/publications/pre-sentence-restorative-justice (last visited April 30, 2024).
[491] *How restorative justice works*, MINISTRY OF JUSTICE NEW ZEALAND (Dec. 19, 2022), https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works/#before (last visited April 30, 2024).

deliberate with other stakeholders of the crime about the consequences the offenders should bear in response to the offense.[492] Both in the UK and New Zealand, the RJ program concludes with a report that the sentencing judge can employ to tailor the criminal sentence to both the offender's and victim's needs.[493]

A similar format is employed in Australia under the name of *forum sentencing*, which is also conducted after an admission of guilt.[494] This RJ program is concluded when all the stakeholders have drafted an appropriate and proportionate sentencing plan, called the Intervention plan.[495] This plan is later presented to the magistrate as a different sentencing plan. The magistrate has to ratify the plan before it can be implemented.[496] Most of the "items" that are outlined in the plan include voluntary community work and counseling, including mandatory substance abuse programs.[497]

Altogether, all the analyzed countries have introduced RJ out of the necessity to deal with crime in a different way. In the UK and Canada, RJ was a means for diminishing the incarceration rates. In New Zealand and Australia, RJ was a means for addressing aboriginal crimes and their root causes. Australia also uses circle sentencing to deal with high incarceration rates in the Aboriginal community; however, they created forum sentencing to expand RJ to other demographics.[498] All these RJ initiatives uphold the voluntary participation of all stakeholders and promote tailored sentencing solutions for offenders, aimed primarily at facilitating the healing process for all parties involved.

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[492] *Id.*
[493] *Id.*
[494] Meredith Rossner et al., *The Process and Dynamics of Restorative Justice: Research on Forum Sentencing*, UNIVERSITY OF WESTERN SYDNEY (2013), 8 http://www.uws.edu.au/__data/assets/pdf_file/0004/522625/The_Process_and_Dynamics_of_Restorative_Justice_-_Research_on_Forum_Sentencing.pdf (last visited April 30, 2024).
[495] *Id., at 38.*
[496] *Id., at* 45.
[497] *Id., at* 48.
[498] *Id., at* 7-8.

At the core of these processes lies the cultivation of the offender's accountability. In fact, all of these programs require that the offender plead guilty and acknowledge the wrongfulness of their actions. This initial step towards rehabilitation is pivotal, as it fosters a commitment to the plans devised during the conference or circle proceedings through in-depth discussions about the offender's responsibility by confronting the victim, who is always invited. Additionally, the offender is prompted to acknowledge the consequences of the offense and delve into the underlying causes motivating their behavior.

All the present stakeholders are involved in the drafting of the report, intervention plan, or sentencing option that is later presented to the court. Thus, everyone is engaged and has a stake in the offender's completion of the sentence through which the offender amends for their actions. The plan can include restitution, community service, apologies, and other opportunities that engage the offender in a positive and constructive way, thus opening up opportunities for personal change. Additionally, by sticking to the plan, the offender can make it right to the community, allowing them to build up their reputation and be more positively held later for reintegration. The offender's presence and contribution, in addition to their support circle, means that they will build their own rehabilitation. They are not only receivers of the aid but also the creators of their own personal change through adherence to the plan. In sum, all these jurisdictions promote the idea of reduced recidivism by allowing the offender to contribute to their own rehabilitation and repair.

B. RJ at the Post-Sentencing Stage

1. Is RJ compatible with custodial sentences?

RJ in prisons has been the highlight of discussion among some RJ scholars. Although RJ might seem incompatible with prison sentences, some scholars have been discussing the possibility of incorporating certain restorative programs within prison settings to achieve the goals set forth by RJ, such as offender rehabilitation and reintegration and victim involvement and restitution.[499]

Prisons are relevant institutions within the criminal justice systems in most countries, yet they are criminogenic in nature.[500] Van Ness specifically mentions that prison culture leads inmates to accept that they are victims of prosecutors and police, which challenges inmates' ability to engage in deep self-reflection and transformation. Moreover, Van Ness states that prison subculture is deviant in nature, making it difficult to renounce such behavior. Finally, physical violence is one of the ways that discipline is enforced; this is an obstacle to peaceful resolution among inmates and staff.[501] The supposed benefits of imprisonment for society are not proven to be concrete, and, in fact, many advocate for prison reform or even for its abolition.[502] Nevertheless, "the reality appears to be that prisons will be with us for some time."[503] Because prisons will not be dismantled and will continue to be parts of the criminal justice system in most countries, prison reform is fundamental.[504]

In this part, it shall be discussed how RJ programs in prison can help in rehabilitation by first making the prison environment more peaceful and

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[499] Daniel W. Van Ness, Prison and Restorative Justice, in HANDBOOK OF RESTORATIVE JUSTICE 312, 312-315 (Gerry Johnstone & Daniel W. Van Ness ed., 2007).
[500] Glenn D. Walters, *Are the Criminogenic Effects of Incarceration Mediated by a Change in Criminal Thinking or a Change in Perceived Certainty*, 101 THE PRISON J. 21, 34-36 (2020).
[501] Van Ness, *supra* note 132, at 319.
[502] Dot Goulding et al., *Restorative Prisons: Towards Radical Prison Reform*, 20 CURRENT ISSUES IN CRIM. JUST. 231, 231-232 (2008).
[503] Van Ness, *supra* note 132, at 321.
[504] Goulding et al., *supra* note 135, at 231-232.

constructive, second helping offenders make profound reflections that lead to change, and finally, increasing the connection between prisons and the community, which will aid in reintegration once the sentence is over. Lastly, this section will go over certain RJ programs that have been used in prisons to illustrate certain beneficial practices.

2. RJ in prison as a socially rehabilitating practice

As previously indicated, prisons are highly violent and painful experiences with little to no deterrent effect. In fact, it can promote more criminal behavior by increasing criminal thinking in incarcerated individuals.[505] The establishment of RJ programs in prison can counteract these negative effects through the creation of a humane environment. Moreover, RJ in prisons is an avenue for in-depth reflection that leads to personal change. It notably brings prisons and communities closer, which could facilitate offender reintegration at a later stage.

First, RJ in prisons can foster just and humane environments; the change in the prison can decrease violence and increase peaceful coexistence with prison staff to reduce victimization among incarcerated people.[506] Moreover, it ameliorates the way inmates resolve disputes that they have with each other. This is because RJ programs within prisons can be profoundly transformative. The process of restorative conferencing engages inmates in discussions that foster reflection and dialogues.[507] The *Mending Bridges*, a restorative justice program in New England (USA), has resulted in better self-regulation and decreased violent behavior as a consequence.[508] During this program, the inmates became more empathetic when they heard each other's stories and built relationships with each other based on mutual understanding. Consequently, the prison dynamics are affected in a positive

[505] Walters, *supra* note 133, at 34-36.
[506] Karen Ross & Denise Muro, *Possibilities of Prison-Based Restorative Justice: Transformation Beyond Recidivism*, 23 CONTEMP. JUST. REV. 291, 299-306 (2020).
[507] *Id.*
[508] *Id.*

way, as the inmates that were previously relating to one another on the basis of criminogenic connections (i.e., gangs) have better chances to establish relationships based on trust and communication.[509] Additionally, the involvement of more influential, older inmates can motivate younger inmates to start the program soon after they enter the penitentiary center. The increased participation in the RJ program incentivizes a change in the prison culture, shifting from a culture of violence and deviancy to a culture that values accountability and moral repair.[510]

Secondly, RJ in prisons is beneficial because it contributes to in-depth reflections that lead to increased responsibility and personal change. RJ programs in prisons are usually designed to push participants to introspection; offenders are taught to identify past traumas that could have led to their offending behaviors.[511] Likewise, addressing these root causes and correlating them with criminal behavior allows inmates to be vulnerable and create systems of support with each other and other stakeholders.[512] The conference leads stakeholders in the program to build empathy and understanding for one another, and this encourages the offender to take responsibility.[513]

Inmates participating in RJ programs are also involved in victim awareness courses, building upon their understanding of the impact of their crimes on victims and accepting responsibility.[514] Increased empathy towards the victim can prompt offenders to reassess their behavior and avoid harm to those they can empathize with.[515] Thus, empathy-building with the victim enhances their ability to feel genuine remorse and accountability, which changes their perception of offending and increases the chances for reparation to the victim.[516]

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[509] *Id.*
[510] *Id.*
[511] *Id.*
[512] *Id.*
[513] Goulding et al., *supra* note 135, at 238.
[514] Mandeep K. Dhami et al., *Restorative Justice in Prisons*, 12 CONTEMP. JUST. REV. 433, 438-440 (2009).
[515] Johnstone, *supra* note 101, at 12.
[516] *Id.*; Mandeep K. Dhami, *supra* note 147.

Moreover, RJ seems to positively affect behavioral and emotional regulation.[517] The connection between their social context and their offending behavior becomes a framework through which inmates can understand the roots of their actions and thus work on personal change that leads to desistance.[518] Moreover, desistance through reflection is consistent with Braithwaite's idea that offenders that are afforded the opportunity to confront their past actions within a supportive environment are less likely to reoffend.[519] Additionally, these changes are also showcased to influence offenders' behavior beyond prison walls. In an interview with inmates who participated in the *Mending Bridges* program, one offender remarked on his improved ability to emotionally regulate, particularly in interactions with his children and younger siblings. He noted that he was able to assist them in resolving conflicts without resorting to physical or verbal violence, acknowledging that his approach prior to the program would have been different.[520]

Finally, RJ programs based in prison can aid in reintegration once the sentence is over because of the involvement of the community in the restorative program. Normally, prisons are ostracized from the community in which the crime occurred, as detained people are meant to pay for their crimes through painful incarceration.[521] Notwithstanding, incarceration is not benefitting the communities that have been harmed because it often increases the risk of recidivism.[522] RJ provides opportunities for the inmates to restore the community, thereby healing offender-community relations and aiding in offender reintegration when the sentence is over.[523] Hence, the community can receive reparation from prisons and obtain reparative agreements that could conclude in symbolic restorative work such

[517] Marilyn Peterson Armour et al., *Bridges to Life: Evaluation of an In-Prison Restorative Justice Intervention*, 24 MED. & L. 831, 842-846 (2005).
[518] Ross & Muro, *supra* note 139.
[519] *Id.*
[520] *Id.*
[521] David Eagleson, *Old Keys Do Not Open New Doors: Twenty Years of Restorative Justice in Northern Ireland prisons: An Insight into Making It Happen*, 62 HOWARD J. CRIM. JUSTICE 221-222 (2023).
[522] Walters, *supra* note 133, at 23.
[523] Ross & Muro, *supra* note 139, at 300-310.

as volunteer or community service.[524] Then, the community receives symbolic reparation, which changes the community's perceptions of the offenders.[525] Hence, the incorporation of community representatives into restorative programs within prisons is apt to facilitate smoother reintegration processes. [526] Strong links with the community can be established by having relevant members visit the prison to participate in the restorative activities. Additionally, offenders can leave prison temporarily as part of the reparative agreement to comply with the symbolic reparation, such as volunteer work.[527] Hence, while punitive measures perpetuate violence and separation, RJ promotes rehabilitation and community cohesion, thereby benefiting both inmates and communities. Then strengthening community ties is crucial for the social rehabilitation of inmates, making RJ in prisons an essential tool for accomplishing this goal.

3. Best practices of RJ in prisons

This section will discuss common RJ practices in prison programs in Ireland, the UK, Belgium, and the USA (Texas). Collectively, the experiences in these countries strongly confirm the positive effects of prison-based RJ programs discussed above. In Ireland, the UK, and Belgium, the implementation of RJ programs in prisons has notably contributed to fostering a more humane community environment and improving overall conditions. For instance, in an RJ study conducted in Ireland, prison staff highlighted the positive impact of RJ programs on fostering a greater sense of community among both inmates and officers.[528] This outcome was facilitated through circle sessions, which encouraged dialogue on issues of mutual concern, thereby promoting increased openness,

[524] Dhami et al., *supra* note 147, at 435.
[525] *Id.*
[526] Johnstone, *supra* note 101, at 10.
[527] *Id.*; Dhami et al., *supra* note 147, at 435.
[528] Eagleson, *supra* note 154, at 230-233.

honesty, and respect among inmates as well as between inmates and staff members.[529]

All of the programs from the jurisdictions previously mentioned aim to build empathy in the offenders either through surrogate-victim programs, victim-offender panels, or classes in which the victim is presented in the form of videos or pictures. In Belgium, a study commented that the offenders developed an increased empathy towards crime victims as they were prompted to feel remorse for their crimes.[530] In Texas, offenders also commented on the added benefit of seeing all the sides of the crime, stating that "both sides may share and learn from each other instead of believing the bad things they hear."[531] An RJ prison-based pilot project in several European countries under EU funding, *Building Bridges*, indicated that offenders had understood the wrongness and consequences of their crimes.[532]

All the jurisdictions, particularly Ireland, employ RJ programs to enhance the community's receptivity to reintegrating offenders after their release. The effects of an apology made and restitution by the offender to the victim increase the empathy and redemption in the eyes of both the victim and the community, which facilitates the offender's reintegration after serving their sentence.[533] For instance, a restorative meeting between an Irish offender and the mother of the victim allowed for tensions in the local community to diminish through dialogue at the conference. The offender had killed the woman's daughter in a car crash, and the offender had felt remorse and expressed it to the mother; this encounter resulted in the offender being able to "go home without fear of any repercussions."[534] This outcome showcases the increased reintegration achieved through prison-based RJ programs.

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[529] *Id.*
[530] Nikolaos Stamatakis & Christophe Vandeviver, *Restorative Justice in Belgian Prisons: The Results of an Empirical Research,* 59 CRIME LAW SOC. CHANGE 79, 105-107 (2013).
[531] Armour, *supra* note 150, at 842.
[532] Esther Klaassen, *Building Bridges: Research and Implementation*, EU FORUM OF RESTORATIVE JUSTICE (2019), https://www.euforumrj.org/sites/default/files/2019-12/workshop-esther-klaassen-building-bridges.pdf (last visited April 30, 2024).
[533] Eagleson, *supra* note 154, at 230.
[534] *Id.*

Additionally, prison-based RJ has the potential to decrease recidivism in the communities where the inmates return. A study conducted in Texas analyzed the effects of an RJ program over a five-year period, focusing on recidivism rates following participants' release from prison. The study showed that participants of the program had a recidivism rate of around 12%, much lower than the state's average (31%) and exceptionally lower than the national average (67%). Thus, the study emphasized that the communities were safer because of these programs.[535]

The outcomes of the implementation of RJ in prisons in these countries show what RJ can do to improve social rehabilitation. First, RJ transforms the prison experience into a more humane one through activities that promote trust. These activities not only foster deep reflection among inmates but also encourage them to analyze their personal triggers and responses. Consequently, this reflection enhances inmates' abilities to regulate their emotions, particularly in high-stress situations.[536] Furthermore, training prison staff in the RJ process enhances its effectiveness, as their interest and involvement in RJ tend to positively influence its implementation. Additionally, such training and interest foster more amicable relationships within the prison, both among inmates and between inmates and staff.[537]

Second, RJ in prison enhances the offenders' empathy and their understanding of the consequences of their crimes. Increased empathy and understanding are often achieved through victim-offender panels. These panels can take place both outside of the prison or by bringing surrogate victims inside the prison symbolically in the form of videos. In Ireland, certain in-person panels, which were found to be highly effective for reintegration, took place with the agreement of all parties involved. Meanwhile, the use of surrogate victims and videos within the prison also helped to increase inmates' awareness of and remorse for the

[535] Armour, *supra* note 150, at 834.
[536] Ross & Muro, *supra* note 139, at 303.
[537] Eagleson, *supra* note 154, at 233.

consequences of their crimes. This finding aligns with discussions from a study on Belgian victim awareness courses.[538] Third, bringing the community and the victims closer to the prison environment can enhance social rehabilitation by improving the offenders' chances for reintegration and desistance. A study in Belgium found that offenders are highly likely to engage in reparative work, which not only aids their reintegration through earned redemption but also fosters prosocial attitudes linked to desistance.[539] Similarly, in a Texas program, interaction with community volunteers provided the offenders with the necessary support to confront the consequences of their crimes, fostering feelings of forgiveness and acceptance by individuals from the 'free world.' [540] Therefore, RJ in prisons, by improving communication between communities and prisons, effectively enhances reintegration, desistance, and, ultimately, social rehabilitation.[541]

VII. CASE STUDY: SPAIN

A. Legal Background of RJ in Spain

RJ in Spain has evolved since it was first introduced in 1992. This year, the Ley Organica 4/1992 started to incorporate penal mediation as an alternative way to end proceedings involving underage defendants.[542] The statute allowed for the suspension or delay of a conviction if the Fiscal Ministry allowed so, as long as the minor defendant complied with the restorative agreement. Furthermore, in its early stages, RJ received increased promotion in Madrid through the efforts of an organization called *Asociacion Apoyo en Madrid*. This association focused on

[538] Stamakis & Vandeviver, *supra* note 163, at 90.
[539] *Id.,* at 98.
[540] Armour, *supra* note 150, at 838.
[541] Diane Crocker, *Implementing and Evaluating Restorative Justice Projects in Prison*, 26 CRIM. JUST. POL. REV. 45, 52-57 (2015).
[542] Silvia María Rosales Pedrero, *La introducción de la justicia restaurativa en el sistema jurídico penal*, LA FUNDACIÓN INTERNACIONAL DE CIENCIAS PENALES, 8 (2017), https://ficp.es/wp-content/uploads/2017/03/Rosales-Pedrero.-Comunicación.pdf (last visited April 30, 2024).

working with young offenders who suffered from drug addiction to encourage the use of penal mediation and the restoration of victims.[543]

Later, in the year 2000, the Ley Organica 5/2000 reformed the juvenile penal system. The main objective of this law was to create a preferential mediation and conciliation process for underage offenders. This law notably promoted penal mediation when two requirements were met: that the crime committed was not serious and that the RJ process was congruent with the reeducation goals promoted by the Spanish Penal Code.[544]

Moreover, the Spanish Penal Code has undergone several reforms to incorporate RJ principles. These reforms include the suspension of sentences conditional on reparations to the victim and the performance of community service. The overarching goal of these reforms is to foster greater offender accountability, repair the harm done, and promote the principle of minimum intervention—a cornerstone of Spanish law. [545] These principles are encapsulated in Chapter III, Section 1 of the Spanish Penal Code, 'On suspension of serving of sentences of imprisonment.' [546] Article 80 of the code specifies that the applicable sentence cannot exceed two years. Judges are required to evaluate factors such as the personal circumstances of the convicted person, their criminal record, their behavior post-offense, their efforts to repair the damage caused, their family and social circumstances, and the potential effects of suspending the enforcement. These requirements are not absolute: repeat offenders may still qualify for suspension if

[543] *Taller de diálogos restaurativos: Responsabilización y reparación del daño*, GOBIERNO DE ESPAÑA MINISTERIO DEL INTERIOR 29 (2015), https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/instituciones-penitenciarias/taller_de_dialogos_restaurativos_dp-23_web_126200630.pdf (last visited April 30, 2024).
[544] Pedrero, *supra* note 175, at 8.
[545] Juan Antonio Martos Núñez, *El principio de intervención penal mínima,* GOBIERNO DE ESPAÑA BOLETÍN OFICIAL DEL ESTADO 99, 100 (1987), https://www.boe.es/biblioteca_juridica/anuarios_derecho/abrir_pdf.php?id=ANU-P-1987-10009900134 (last visited April 30, 2024).
[546] Chapter III, Section 1 (CP 1995), Art. 80 CP (ES).

the offenses are unrelated to previous ones, and those serving up to five years can qualify if their offense was driven by substance addiction.

Another Legislation (Regulation 4/2015) was passed to incorporate the Victims' Directive of the European Union.[547] This new Regulation, titled '*Estatuto de la victima del delito*,' was introduced with the aim of recognizing victims' rights during the judicial process. The regulation allowed for the interruption of the proceedings to give place to restorative practices. Given the limited familiarity with RJ practices, this regulation seeks to eliminate barriers by ensuring that victims are informed about RJ options in the prospect they wish to resolve the crime in this manner.[548]

B. Use of RJ in Spanish Prisons

The main legal norm that regulates Spanish Prisons is the Ley Organica 1/1979 of September 26th (LOPG). Article 1 of this law states that "[t]he penitentiary institutions regulated by the present Law have as their primary purpose the reeducation and social reintegration of those sentenced to penalties and punitive measures depriving them of liberty, as well as the detention and custody of detainees, prisoners, and convicts."[549] This objective is also echoed in Article 25 of the Spanish Constitution, underscoring that "punishments entailing imprisonment and security measures shall be aimed at rehabilitation and social reintegration."[550]

In penitentiary centers in Spain, RJ began in 2005 with the intention of promoting a better incarceration environment.[551] The processes were designed to equip offenders with better tools for engaging with one another and resolving conflicts constructively. The goal was to' pacify relationships' and reduce the inevitable tensions in confined environments.[552] In 2005, RJ began in one prison in

[547] *See* discussion *supra* section V.B.
[548] See *supra* note 176, at 31.
[549] Ley Orgánica 1/1979, Título Preliminar (LO 1979), Art. 1 (ES).
[550] CE, B.O.E. n. 311, 29 de diciembre de 1978 (ES).
[551] See *supra* note 176, at 32.
[552] *Id.*

Madrid, but the program's success allowed it to expand to other prisons in the country. By 2014, restorative practices to ameliorate conditions and dialogue between inmates had spread to all penitentiary centers in the country.[553]

Beyond the implementation of programs aimed at making prisons more amenable to both offenders and prison staff, RJ has also been employed as a way to repair the harm made to victims through victim-offender mediation practices.[554] Particularly, RJ programs involving the victims in prisons have been described by Cervelló Donderis as aligned with the goals of social reintegration and rehabilitation of offenders established by the LOGP. [555] In line with the above discussion, such use of RJ in prison supports these penological goals by allowing sentenced offenders to empathize with the victim's experiences and repair the damage done by crime, thereby facilitating reconciliation with society.[556]

Particularly relevant accounts from offender and victim mediations come from meetings conducted between former terrorist offenders who had denounced the terrorist group they had belonged to and reached out to victim associations in the Basque Country.[557] Throughout 2011, 13 meetings were conducted, most of which were held in person.[558] These encounters highlighted the way that restorative processes can have a rehabilitative outcome, as the meetings resulted in increased accountability and apologies made to the victims. Stakeholders reported satisfaction with the process.[559] Additionally, similar meetings were held between the offender who sold the weapons used in the 11-M terrorist attack in Madrid and one of the survivors. At the conference, the offender demonstrated remorse and

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[553] *Id.*
[554] Elena Maculan, *Encuentros Restaurativos, Petición de Perdón y Resocialización: Replanteando los Mecanismos Restaurativos con Condenados por Delitos de Terrorismo* 3, REV. DER. PENAL Y CRIMINOLOGÍA 77, 100 (2021).
[555] Vicenta Cervelló Donderis, *Elementos Restaurativos del Cumplimiento Penitenciario* 7, REV. ELECTRÓNICA DE CIENC. CRIMINOLÓGICAS, 4-5 (2022).
[556] *Id.*
[557] Maculan, *supra* note 187, at 80-82.
[558] *Id.*
[559] *Id.*

empathy towards all the victims of the attack, stating that, given the choice, he would not repeat his actions, thereby denouncing his previous criminal behavior.[560]

In Spain, the adoption of RJ has steadily increased, and this trend is expected to continue. The main programs that have been installed include: "*Construyendo Puentes*" ("Building Bridges"), which started in February 2014; the "*Proyecto Árbol Sicomoro*" (Sycamore Tree Project), with its secular version "*Justicia y Paz*" (Justice and Peace) introduced in 2017; and the "*Taller de Diálogos Restaurativos*" (Restorative Dialogue Workshop), implemented between 2017 and 2019.[561] These programs serve prisons all over the country, including those in Madrid, Sevilla, Huelva, Valencia, Algeciras, Granada, Sevilla, and Malaga.[562]

This growth is largely attributed to the overarching goal of social rehabilitation encompassed in constitutional and penitentiary laws. Recognizing its benefits for both victims and offenders, some penitentiary authorities have embraced RJ as a rehabilitation pathway in conjunction with victims' associations so that both victims and offenders can benefit from the experience.[563]

Spain has been able to implement RJ to foster social rehabilitation and reintegration within its penitentiaries. While Spanish legal frameworks and prison practices have increasingly incorporated RJ principles, demonstrating a commitment to offender responsibility and the repair of harm, RJ is not as widespread as it could be. This is partly due to insufficient dissemination of information about RJ practices and because it is not commonly used in serious cases. Despite this, the successful application of RJ in prisons in cases involving offenders of terrorist attacks underscores its potential as a tool for social

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[560] Esther Pascual Rodríguez & Julián Ríos, *Los encuentros restaurativos en delitos de terrorismo. Una posibilidad para la paz*, UNIVERSIDAD PONTIFICIA DE COMILLAS (N.D.), 2-3 https://repositorio.comillas.edu/rest/bitstreams/28453/retrieve (last visited April 30, 2024).

[561] See *supra* note 176, at 34.

[562] *Id.*

[563] *Intervención en Justicia Restaurativa: Encuentros Restaurativos Penitenciarios*, GOBIERNO DE ESPAÑA MINISTERIO DEL INTERIOR 12 (2015), https://www.interior.gob.es/opencms/pdf/archivos-y-documentacion/documentacion-y-publicaciones/publicaciones-descargables/instituciones-penitenciarias/Intervencion_en_justicia_restaurativa_DP-24_web_126200539.pdf (last visited April 30, 2024).

rehabilitation. Such examples highlight the need for broader implementation, not only in Spain but also across other European countries where social rehabilitation is a key goal of incarceration.

VIII. CONCLUSION

In European criminal justice systems, there is an ongoing, noticeable trend in prioritizing the social rehabilitation of offenders. This move underscores the potential for reforming these systems to incorporate RJ practices. RJ serves as an effective tool for social rehabilitation. These practices foster increased empathy among offenders and lead to reparation, thereby promoting prosocial behaviors and enhancing community reintegration. Collectively, these outcomes contribute to reducing recidivism. Consequently, European nations recognizing social rehabilitation as a primary objective should integrate RJ at both the sentencing and post-sentencing stages. Implementing RJ at sentencing allows for a deeper exploration of the underlying causes of criminal behavior and can help evade the criminogenic effects of incarceration by promoting alternatives such as community service and counseling. In the post-sentencing stage, RJ can also play a crucial role by facilitating programs that enhance offender empathy and emotional regulation, thus bridging the gap between prisons and community settings. As showcased in the analysis of RJ in Spain, the instances of RJ in prison have given a place for incarcerated individuals to promote their own rehabilitation through taking accountability with their victims. Hence, by enabling offenders to actively participate in RJ programs, the criminal justice system can make communities safer, provide restitution to victims, and significantly advance the social rehabilitation of crime perpetrators.

Global Threads: Unraveling the impact of Extended Producer Responsibility on the textile industry in Pakistan

Ida Nydelius

ABSTRACT

This thesis offers an in-depth evaluation of the prospective consequences of the suggested amendments to the EU's Waste Framework Directive ("WFD") and the adoption of Extended Producer Responsibility ("EPR") systems for textiles. Specifically, it examines the effects on the Pakistani textile industry, representative of third-country suppliers, with a particular focus on labor rights. As the textile industry is highly globalized and interconnected, the question arises as to how the EU's push for stringent textile legislation for a greener transition will affect non-EU suppliers. This is especially relevant for the substantial workforce of 15 million textile workers, many of whom are based in non-EU countries while subcontracted by European firms. The research thoroughly assesses the concept of EPR and two national case studies of EPR in practice, namely France and Germany. It also critically analyzes the suggested modifications of the WFD and EU's Textile Strategy from a broader perspective. After that, the research examines labor abuses in the Pakistani textile sector, including wage theft, inadequate safety measures, and modern slavery, to understand the industry's exploitative practices to better address EU policies and their impact on European business practices. Furthermore, it studies the trade relationship between the EU and Pakistan, concentrating on textile imports and exports and the possible consequences of the revised WFD for the Pakistani textile industry. The thesis concludes with policy recommendations to balance sustainable waste management with fair and safe working conditions for textile workers, highlighting the need for a just transition for the entire supply chain.

INTRODUCTION

The textile industry has been vital to the global economy for centuries. The sector employs over 300 million people across the value chain. In Pakistan, the industry makes up 45% of the country's employment.[564] In addition to causing enormous waste and pollution, the industry is also accountable for numerous labor violations, such as wage theft, modern slavery, and unfavorable working conditions.[565] The consumption of textiles in the European Union ("EU") significantly impacts third countries, particularly in Asia, where most of the production for EU markets takes place.

The EU exports a considerable amount of textile waste to these countries, much of which is purportedly for reuse. However, a significant fraction of these exports are not reusable; they contribute to environmental degradation in the receiving countries. About 1.83 million tonnes of used and waste textiles are exported annually, primarily to Asia and Africa.[566] The prevalent fast-fashion model exacerbates these issues by encouraging over-consumption and rapid disposal of textiles, which need to consider the negative environmental externalities and lead to increased waste and management challenges. This scenario underscores the need for the EU to adopt more sustainable consumption practices and regulations addressing social impacts in the global textile industry beyond the EU.

In 2023, the European Union proposed an amendment to *the Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008*

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[564] *Global Fashion Industry Statistics*, FASHIONUNITED, https://fashionunited.com/global-fashion-industry-statistics (last visited April 25, 2024).

[565] *Fashion and the circular economy* – deep dive, ELLEN MACARTHUR FOUNDATION, https://www.ellenmacarthurfoundation.org/fashion-and-the-circular-economy-deep-dive (last visited Apr. 25, 2024).

[566] Gabriela Rodriguez et al., *Circular Economy and Trade in Textile Sector in Pakistan: Challenges and Opportunities in Complying with the EU Ecodesign Proposed Regulation,* TRADELAB INTERNATIONAL ECONOMIC LAW CLINIC (Jul. 2023) https://tradelab.org/wp-content/uploads/2023/07/Group-1-Circular-Economy-and-trade-in-textiles-sector-in-Pakistan_-Final-draft.pdf.

on waste and repealing specific Directives[567] (hereafter referred to as the "Waste Framework Directive" or "WFD") that includes Extended Producer Responsibility ("EPR") systems for textiles, to address the industry's environmental and social challenges. In its final stages, the amendment is expected to be passed and enforced in 2025.[568] These amendments can potentially impact the textile industry's operations, particularly regarding its social impact on the textile industry. However, the negative consequences of the textile industry, such as labor abuses, often disproportionately affect non-EU countries, which may have few resources and regulatory frameworks to address them. These are exaggerated by the "race-to-the-bottom" and stripping basic rights for low, competitive prices. With the recent trend of increasing waste collection, the demand for cheap manual labor for sorting and recycling will increase.

Pakistan is one of the largest textile-producing countries in the world, and the industry is a significant contributor to the country's economy. But, the industry is also notorious for its labor abuses, including forced labor and poor working conditions. By examining the impact of the proposed amendment on the Pakistani textile industry, this research aims to shed light on the potential benefits and challenges of implementing EPR systems through the WFD for textiles in third countries. Thus, the research question is, *"What potential impact will the proposed amendment to the EU's Waste Framework Directive have on the Pakistani textile industry, specifically on labor rights?"*. The reason for selecting Pakistan as the focus of the study is the country's close connection to industry and intensive trade with the EU. Pakistan also proliferates as a used-clothes trader, importing large quantities of textile waste from Europe. These aspects make the country suitable for examining the potential impact of increasing textile waste collection in the EU.

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[567] European Commission, *Proposal for a Directive Of The European Parliament And Of The Council Amending Directive 2008/98/EC On Waste*, EUROPEAN COMMISSION (Jul. 5, 2023), https://environment.ec.europa.eu/publications/proposal-targeted-revision-waste-framework-directive.
[568] European Parliament, Procedure File 2023/0234 (COD) Waste Framework Directive: textiles and food waste, EUROPEAN PARLIAMENT LEGISLATIVE OBSERVATORY (Mar. 2024), https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2023/0234(COD)&l.

The thesis is divided into five chapters. Chapter One introduces the concept of EPR, its origin, and variations in national legislation - taking France's progressive implementation and Germany's adaptation of EPR in conjunction with the Due Diligence Act. Chapter Two analyses specific articles of the WFD and gives an overview of the EU's Textile Strategy to understand the EU's goals with the amendments. Chapter Three explores the labor abuses in the Pakistani textile industry, including wage theft, the use of indirect workers, poor safety and health measures, and modern slavery. This aims to highlight the realities occurring in major European retail companies' production and sourcing stages in Pakistan. Chapter Four examines Pakistani-EU trade relationships, especially textile exports and imports (including textile waste). This chapter delves into the potential impacts on the Pakistani textile industry and the core of this research: *the potential impacts of the proposed amendments of WFD on the Pakistani textile industry regarding labor rights.* The chapter explores two potential impact scenarios: whether the increased EPR requirements will encourage companies to invest in Pakistani suppliers to be compliant or move production back to European "safe suppliers". This research also asks, "How can EPR schemes be designed to encourage recycling and waste reduction while simultaneously incentivising high labor standards in the global textile industry?". Considering the increased textile waste collection due to mandatory EPR schemes in Member States imposed by the new WFD, the exports of textile waste to third countries will most likely be impacted. Therefore, this chapter will also investigate the current developments in Pakistan regarding recycling, reporting, and sustainability tracing and how the country is affected by the textile imports from the EU to provide a basis for holistic policy recommendations, including the third-country's part of the supply chain.

The final chapter presents policy recommendations based on the findings of the previous chapters. The recommendations aim to balance the need for sustainable waste management practices with ensuring fair and safe working conditions for textile workers. The chapter identifies how EPR systems can be

designed to promote sustainable and ethical practices within the textile industry, encompassing the integral role of third countries.

METHODOLOGY

This study's methodology is based on a qualitative research design that uses a gap analysis framework to assess the upcoming amendments to the WFD, which will integrate EPR systems for the textile industry. The gap analysis will comprehensively evaluate the proposed changes to the WFD and identify gaps within these changes, particularly as they relate to European companies with operational connections to Pakistani suppliers. The analysis begins by systematically collecting and reviewing the proposed changes to the WFD, focusing on integrating EPR. It will then comprehensively examine the available literature, legislative documents, expert interviews, and case studies to construct a detailed understanding of the directive's scope and intentions. Academic papers, news articles, and reports from independent NGOs will complement this.

Following the initial review, the study delves into a thematic analysis to uncover potential gaps in the directive that could impede its effectiveness or create unintended consequences, particularly in supply chain relationships. This includes scrutinizing the feasibility, scalability, and enforceability of the EPR amendments and their capacity to interface with the existing infrastructures of the Pakistani suppliers. Moreover, the research will examine the potential ripple effects of the amended directive on the intricate dynamics of the European textile companies' supply chains, such as changes in sourcing strategies or shifts in market share. In particular, it will explore how the requirement for compliance with EPR could compel European companies to reassess their relationships with Pakistani suppliers, potentially necessitating investment in compliance measures or, conversely, leading to the severance of contracts to avoid non-compliance penalties.

Recognising the limitations inherent in predicting the impact of legislative changes, the study will mitigate these by consulting diverse sources. To ensure validity, the research question will be clearly defined, and the study will use, as mentioned, data from multiple sources, including academic papers, articles, and case law, to corroborate findings. The study acknowledges potential biases due to the limited number of interviews, which will be balanced by comprehensive desk research. Furthermore, limitations such as the short time frame for the study and the reliance on secondary sources due to limited direct source accessibility are recognised. Despite these limitations, this study aims to provide valuable insights into the potential impacts of the proposed amendments to the Waste Framework Directive on the textile industry and, more specifically, on labor rights.

1. What is EPR?

1.1. History and Background

The concept was first devised by the Organisation of Economic Co-operation and Development ("OECD"), which defines EPR as "an environmental policy approach in which a producer's responsibility, physical and/or financial, for a product, is extended to the post-consumer stage of a product's life-cycle".[569] In other words, EPR is a regulatory mechanism used to finance costs associated with the environmental management of products or their packaging once they reach their end-of-life. According to the OECD, there are two critical features of an EPR policy, namely (1) the shift of responsibility away from municipalities and upstream towards the producer, especially in terms of waste management, and (2) incentivise producers to design products with the environment taken into consideration.[570] This also incentivises producers to incorporate unavoidable costs into the product's price,

[569]OECD, *Extended Producer Responsibility: A Guidance Manual for Governments,* OECD iLIBRARY (March 20 2001) PP. 11-12, https://doi.org/10.1787/9789264189867-en.
[570]*Id.*

effectively making the producer and consumer responsible for the incurred social costs of waste produced.

The EPR has the potential to change choices in the production of products, such as the selection of materials, design and treatment in the post-consumer phase. The environmental externalities from the disposal of products need to be addressed and proportionally internalized by their producers and consumers. As defined by the OECD, the 'polluter' includes the brand owner, the broader supply chain and the end consumer - which widens the definition and thus targets the wider product value chain.[571] Furthermore, the two most crucial policy design issues in terms of EPR are the balance of allocating responsibility and attributing the role of the producer throughout complex supply chains. In the context of their Guidance Manual on EPR, the OECD considered the producer, the brand owner and the importer. Nonetheless, the sharing of responsibility across the product chain plays an essential part in the overall performance of an EPR programme, and the role of retailers, distributors, consumers, municipalities, and other potential actors must be considered.

1.2. EPR in the EU

The OECD primarily inspires the concept of EPR in the EU. It posits that a producer's responsibility for a product should extend beyond its consumer use phase and into its post-consumer lifecycle. In the EU, EPR was first formulated in a Swedish Ministry of the Environment report by Thomas Lindqvist in 1990. During the same year, the German Minister of the Environment adopted a similar EPR approach in developing the Ordinance on the Avoidance of Packaging Waste (*Verpackungsverordnung*), which became effective in 1991. The Ordinance, also commonly called the "German Green Dot Scheme", was the first practical application of an EPR scheme in the EU. After that, the EU developed the concept

[571] *Id.*

and incorporated it more widely, for example, in 2000 in the End-of-Life Vehicles Directive and the Waste Framework Directive (WFD) from 2008, as well as in the amendments to the WFD in 2018.[572]

The general status of EPR has evolved significantly with the introduction of the WFD. The current proposal for amending the Directive will introduce a wider adoption of EPR systems and include the textile industry, which has traditionally been outside the scope. Moreover, the planning of national EPR systems for textiles has dramatically increased in the European Union in recent years. This trend is expected to continue, further altering the legislative landscape. The chief cause is the EU Strategy for Sustainable & Circular Textiles, published in March 2022. In accordance with this strategy, a proposal mandating the adoption of textile EPR systems in the WFD was published in July 2023. Looking ahead, all producers will be required to separately collect textiles by January 2025.[573]

Thomas Lindhqvist developed four categories of EPR. These can help understand how countries adopt EPR systems and the opportunities for different EPR approaches. The first category is "*physical responsibility"*, which implies that the procedure is held accountable for the physical end-of-life management of their products and/or through the development of technology or provision of services. An example is setting up "take-back programs". The second category is *"economic responsibility",* which refers to the producers internalizing the cost of managing their products' generated waste. This will be directly funding the collection, processing, and disposal or indirectly by paying special fees. The third category is *"Liability",* which places the damages due to the company's products being placed upon the producer. Finally, the fourth category is "*Information responsibility",* which obliges the producer to provide adequate information about the product and its

[572] Katrien Steenmans, *Extended Producer Responsibility: An Assessment of Recent Amendments to the European Union Waste Framework Directive*, 15 Law, Environment and Development Journal, (2019).

[573] Veronique Allaire, *Workshop 1: Extended Producer Responsibility (EPR) in Textiles*, YOUTUBE (Nov. 29, 2023), https://www.youtube.com/watch?v=3iEwl-jX9RA.

environmental impact throughout its lifecycle.[574] The Dutch Packaging Decision ("DPD") from 2014 illustrates how these EPR types can overlap and be selective. For example, the DPD requires *informative responsibility,* such as reporting obligations, *physical responsibility* for setting up waste collection, and *economic responsibility* regarding funding research. At the same time, *Liability* is excluded from the DPD.[575]

Moreover, EPR is in line with key European environmental law principles, such as the "Polluter-pays" principle, which provides a legal policy basis for the implementation of EPR in the context of the EU. In line with *economic responsibility*, the producer is responsible for paying for the waste management, which will have cost implications as they must finance several additional activities (for example, collection, sorting, and producing information). Some industry leaders have argued against this by stating that consumers are the real "polluters" when they dispose of the product, while producers only supply useful products. However, Katrien Steenmans, a researcher at Copenhagen University, confronts this by introducing the "Preventative Principle", which states that the producer's responsibility is "to prevent the creation of pollution or nuisance at source."[576] This highlights the producer's role in creating demand and desire for products, influencing higher consumption. Besides, producers have decision-making power over materials and quality production, contributing to textiles' durability, recyclability, and reusability. In addition to the polluter-pay principle, the preventative principle offers an additional basis for EPR systems to establish the producer's responsibility.

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[574]Thomas Lindhqvist, *Extended Producer Responsibility in Cleaner Production: Policy Principle to Promote Environmental Improvements of Product Systems,* THE INTERNATIONAL INSTITUTE FOR INDUSTRIAL ENVORONMENTAL ECONOMICS (May 5 2000), https://portal.research.lu.se/en/publications/extended-producer-responsibility-in-cleaner-production-policy-pri.

[575] Steenmans, *supra* note 9.

[576] Katrien Steenmans, *Extended Producer Responsibility: An Assessment of Recent Amendments to the European Union Waste Framework Directive*, 15 Law, Environment and Development Journal (2019).

Another recognised advantage of the EPR system is shifting economic and physical responsibilities from municipalities to producers. This encourages producers to innovate and specialize in product design for more durability and recyclability as they incorporate overall production strategies to improve waste management schemes. Under these EPR schemes, producers internalize the costs of externalities instead of placing the burden upon municipalities and later waste-receiving countries. However, this presents important considerations to policymakers, as EPR schemes will likely increase production costs, which might be detrimental to SMEs and individual producers. The French model, which is considered to be at the forefront of the implementation of the EPR scheme in the EU, shows how companies organized themselves collectively and created a joint producer responsibility organization ("PRO") that was tasked with the primary responsibility to set up and manage the waste management infrastructure on behalf of the collective.[577] In France, the collective compliance scheme, Refashion, has 95% of the market registered members, counting over 4,000.[578] The following section will explore the French model further.

1.2.1. Case Study: France - EPR System and Duty of Vigilance Law 2017

In 2008, France was the first country to adopt EPR for textiles - an essential step as France is known for its fashion and as a historically significant fashion hub. The country placed more than 3.3 billion clothes on the market in 2022 and sold nine million textile items daily during the same year. Regarding EPR, the country's collective compliance scheme, Refashion, is imposed by French law and operates its members' collection and recycling system. France also imposed an EPR fee averaging €0.01 per garment and a maximum of €0.06, with eco-modulated EPR

[577] *Id.*

[578] WRAP, *Textiles Extended Producer Responsibility Webinar*, YOUTUBE (Feb. 28, 2024) https://www.youtube.com/watch?v=lMtFxez7WS0.

fees imposed on hard-to-recycle textiles and environmentally unfriendly products. There are three levels of eco-modulation: encouraging the design of more durable and resistant products, selecting recyclable materials, and integrating recycled materials. For instance, producers integrating 15% recycled fibers from post-consumer textiles receive a 50% discount on their EPR fees. Producers must also display the Triman Logo and provide specific sorting instructions with their products to inform consumers how the textiles can be collected for recycling.[579]

The French EPR system has seen a threefold increase in consumer textiles' collection and recycling rates since 2006.[580] On the other hand, criticism and concerns have been raised about the current implementation of EPR systems in France because not all collected textiles are treated within France. The OR Foundations state in their report that out of 244,448 tonnes of textiles collected by Refashion, France's EPR responsible agency, *only 20% of the textiles were recycled.* The remaining 80% were exported, mainly to the Global South, including former European colonies with limited waste management resources.[581] While some may argue that sorting facilities, recyclers, and exporters in Europe receive inadequate funding from the EPR programme to support genuine circularity, no financial aid is provided to the countries in the Global South handling the collected clothing.[582]

In addition to their EPR system, France implemented the Duty of Vigilance Law 2017, which compels large French companies to create and publicize vigilance plans to identify and prevent violations of human rights, health and safety, and environmental norms. The legislation applies to companies with over 5,000 domestic or more than 10,000 employees globally, including subsidiaries. The

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[579] *Id.*

[580] Liz Ricketts and Branson Skinner, *Stop Waste Colonialism: Leveraging Extended Producer Responsibility to Catalyze a Justice-led Circular Textiles Economy*, THE OR FOUNDATION (Feb. 14, 2023), https://stopwastecolonialism.org/stopwastecolonialism.pdf.

[581] *Id.*

[582] Jordan Girling, *Textiles Extended Producer Responsibility (EPR): Status report summarising the proliferation of Extended Producer Responsibility (EPR) systems for the textiles waste stream*, WRAP (Jan.2024), https://asiagarmenthub.net/resources/2024/wrap-textiles-epr-status-report-january-2024-v2.pdf.

vigilance plan must include risk mapping, evaluation procedures for subsidiaries, suppliers and subcontractors, risk mitigation actions, a whistleblowing mechanism, and a monitoring system to review the plan's effectiveness and provide public reports. While the law's enforcement is primarily civil, courts can mandate compliance under the threat of a fine. Furthermore, the law establishes civil liability, allowing for damages if a company's failure to meet vigilance obligations results in preventable harm.[583] On March 23, 2022, two NGOs, in coalition with a Turkish labor union and 34 workers, initiated a lawsuit against the French cosmetic firm Yves Rocher under the French Corporate Duty of Vigilance Law. The plaintiffs allege that the company's Turkish subsidiary, Kosan Kozmetik, unjustly fired over 130 workers, mainly women, for unionizing to combat poor conditions. The claimants are seeking compensation and a court order compelling Yves Rocher to implement preventive measures to mitigate the risks to workers' fundamental rights arising from the operations of its Turkish subsidiary.[584] While the proceedings are currently pending in the pre-trial phase, this legal case will test the Duty of Vigilance Law's reach in making corporations liable for their supply chain's impact on human rights and labor standards.

1.3. EPR and Corporate Social Responsibility

Corporate Social Responsibility ("CSR") is often defined as voluntary-adopted sustainable development principles that companies implement in their strategies to encompass sustainable and social development. They are often non-binding, and penalties seem impossible. At the same time, CSR has become essential for

[583] *France's Duty of Vigilance Law*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/ (last visited May 1, 2024).

[584] *Turkey: Yves Rocher, the French cosmetics company, facing court proceedings for failure to ensure workers' rights and trade union rights,* BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (March 24, 2022), https://www.business-humanrights.org/en/latest-news/turkey-yves-rocher-the-french-cosmetics-company-facing-court-proceedings-for-failure-to-ensure-workers-rights-and-trade-union-rights/.

companies to face the increasing consumer demand for ethically produced products and an essential tool for investors to determine the company's competitiveness, brand image and social impact. While the implementation of CSR has shown positive results in brand positioning for companies, there are no mandatory enforcement or repercussions when companies fail to adhere to their code of conduct.[585] As showcased in a recent lawsuit against H&M for "greenwashing", companies that are not adequately transparent with their CSR practices can still market their products as ethically produced without facing repercussions. The H&M case was dismissed in court despite several reports suggesting labor abuses from H&M's supply chains.[586] While there were no legal consequences, failing to comply with the CSR measures will likely affect the company's relationship with investors, stakeholders, and consumers. The latter might boycott the brand and create campaigns against the company. As a result, the failure of CSR compliance can lead to significant revenue losses from sales; however, legal remedies for the victims of labor abuses are more often absent.

Transparency is the backbone of CSR, and if the company is not providing sufficient information to support its "green claims", then that should be considered Greenwashing. This is currently under revision with the Green Claim Directive (GCD) as the EU aims to introduce a legal basis to sue companies marketing themselves as CSR compliance and "ethical" when they are not. With this, the EU seeks to stop the greenwashing practices, enhance the credibility of European

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[585] Julia García Álvarez, *Corporate Human Rights Abuses committed by European Transnational Companies in Third Countries within the Textile, Oil and Defence Sector. Theory-Practice Inconsistencies in the UNGPs Implementation Process at EU level,* GLOBAL CAMPUS OF HUMAN RIGHTS UNIVERSITÉ LIBRE DE BRUXELLES (2020), https://repository.gchumanrights.org/server/api/core/bitstreams/dd42ca59-1868-465c-9ae4-7de55418466c/content.

[586] Léa Jehanno, *The place of CSR in the textile and Fast Fashion Industry* (April 2022). https://www.theseus.fi/bitstream/handle/10024/345634/Jehanno_l%C3%A9a.pdf; *USA: Class-action lawsuit filed against H&M over 'misleading' marketing of 'sustainable' clothing line,* BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (Nov. 11, 2022) https://www.business-humanrights.org/en/latest-news/usa-class-action-lawsuit-filed-against-hm-over-misleading-marketing-of-sustainable-clothing-line/.

Companies on the market, and improve consumer trust in these companies.[587] However, for CSR to be efficiently implemented, the companies must have the means and infrastructure to produce and disclose sufficient information to consumers.

The link between EPR and CSR is in their shared goal of encouraging companies to implement better practices. The EPR schemes, however, extend beyond traditional CSR by holding producers accountable for the entire lifecycle of their products. It represents a shift from voluntary measures for the brand image to mandatory requirements that producers must follow to operate in the market. Nonetheless, the EPR systems are built upon CSR and are crucial to understanding companies' current situation and sustainability practices.

1.4. EPR and Due Diligence

Due diligence is the thorough investigation process before business decisions and imposes CSR practices. At the same time, EPR is a policy approach that holds producers accountable for their products' environmental and social impact through the entire lifecycle. Nonetheless, due diligence and EPR concepts are closely interlinked through various EU regulations and directives that promote sustainable practices. In the EU, due diligence is a crucial concept in multiple rules related to corporate reasonability, environmental protection, human rights, and supply chain - for example, the proposal to the Corporate Sustainability Due Diligence Directive[588] and the EU Non-Financial Reporting Directive[589]. Moreover, companies operating in

[587] European Commission, *Environment: Green claims,* EUROPEAN COMMISSION, https://environment.ec.europa.eu/topics/circular-economy/green-claims_en (last visited April 18, 2024).

[588] The Proposal was agreed upon in March 2024; however, at the time of this paper, it has not yet been decided upon an entry-to-force date, *see* European Commission*, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.*

[589] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance.

the EU must conduct due diligence assessments to identify, prevent, and mitigate risks related to environmental impact and human rights, among other issues, which is essential for companies to comply with the regulation. Furthermore, companies subject to EPR regulations in the EU will need to integrate due diligence processes into their operations to assess and manage environmental risks associated with their products. Through due diligence, companies can ensure compliance with EPR obligations, track the environmental performance of their products, and engage in transparent reporting on sustainability metrics.[590]

In conclusion, EPR schemes are recognised by scholars to have significant limitations in establishing and tracking responsibility compared with due diligence obligations and recognise EPR's weaker nature.[591] Thus, EPR should not be adopted in a vacuum but supported with complementing due diligence directives and a robust monitoring and enforcement mechanism in cases of non-compliance.

1.4.1. Case Study: German Due Diligence Act - Opening Litigation Routes for Textile Workers

On January 1st, 2023, Germany implemented the law on Corporate Due Diligence Obligations in Supply Chains (hereafter referred to as "LkSG") to address human rights and environmental risks in global supply chains. This legislation governs the accountability of German businesses to uphold human rights in international supply chains, encompassing safeguards against child labour, ensuring fair wages, and promoting environmental conservation.[592] This obligation takes various forms - from reporting to putting in place suitable measures to protect

[590] Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability,* Journal of Human Rights 14(2), at 237-59 (Dec 20, 2015).
[591] Steenmans, *supra* note 8.
[592] Federal Ministry of Labour and Social Affairs, *Supply Chain Act,* BMAS, https://www.bmas.de/EN/Europe-and-the-World/International/Supply-Chain-Act/supply-chain-act.html (last visited April 18, 2024).

against violation of vital legal interests, such as injury to life or limb. In non-compliance, companies can face three types of fines depending on the gravity of the violation - ranging from the most severe penalties for failing to take preventative actions or establishing a complaint procedure to lesser violations, such as not preparing or late publishing of the annual due diligence report. The fines can go up to €500,000 for individuals and €5 million for companies for grave violations, and up to €100,000 (for individuals and companies) for less grave violations.[593]

Despite the LkSG's statement that it does not create civil liability, the due diligence obligations could be considered statutory duties of care within the context of torts to ensure public safety and organizational responsibilities across legal entities. This interpretation could lay the groundwork for corporate liability under § 823 of the German Civil Code. Before the LkSG, establishing corporate liability was challenging due to the absence of a clear basis for attributing misconduct at the top of the supply chain to the company. Traditionally, liability was connected to supplier misconduct without extending to the higher company, given that tort law's organizational duties applied only to the legal entity. However, in response to global human rights and environmental protection standards, the LkSG instituted statutory due diligence obligations, encouraging companies to manage their supply chains sustainably.[594] This marks a departure from previous legal stances, potentially linking these due diligence duties to tort law's safety and organizational obligations. Furthermore, the LkSG facilitates the enforcement of rights by allowing trade unions or NGOs to file actions, significantly lowering the barriers to legal redress in Germany. Despite an emphasis on administrative enforcement, the possibility remains that these due diligence obligations could indirectly create a

[593] Dr. Sonja Hoffmann & Christian M. Theissen, *The New Corporate Due Diligence Act: Potential Liability under Civil Law and Administrative Law*, WHITE & CASE LLP (July 8, 2021), https://www.whitecase.com/insight-alert/new-corporate-due-diligence-act-potential-liability-under-civil-law-and.
[594] *Id.*

safety duty, thus establishing a foundation for liability under the German Civil Code, a matter likely to require judicial determination.

Before the LkSG, there was a lawsuit against the German retailer Kik (which will be further explored in a later chapter). The lawsuit aimed to hold Kik accountable for safety lapses at a Pakistan factory after a tragic fire in 2012, arguing that the company had significant control over the factory. Despite compelling arguments on corporate accountability in global supply chains, the lawsuit was dismissed on procedural grounds, leaving questions of multinational corporations' responsibilities unresolved.[595] After the enactment of the LkSG, the National Garment Workers Federation filed a complaint in 2023 against corporations like Tom Tailor, Amazon, and IKEA, accusing them of failing to monitor safety in their Bangladeshi factories.[596] Though it is still pending, this case was enabled by the LkSG and highlights the shift towards legally mandated due diligence and proactive human rights safeguarding, representing a significant change in how legal systems can enforce multinational corporate accountability for safe working conditions.

2. The Legal Frameworks

2.1. European Legislation

2.1.1. EU Strategy for Sustainable and Circular Textiles - An Overview

"How can fast fashion go out of fashion?" That is what the EU is asking and the reason behind major legislative initiatives to support a sustainable transition of

[595] *KiK: Paying the price for clothing production in South Asia*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia/ (last visited April 18, 2024).

[596] Libby Annat, *First case filed under the German Supply Chain Due Diligence Act against Tom Tailor, Amazon, and IKEA by Bangladeshi workers*, DUE DILLIGENCE DESIGN (April 27, 2023), https://duediligence.design/first-case-filed-under-the-german-supply-chain-due-diligence-act-against-tom-tailor-amazon-and-ikea-by-bangladeshi-workers/.

the textile industry. Among these initiatives is the EU Strategy for Sustainable and Circular Fashion (hereafter "Textile Strategy"), a part of the European Green Deal. The Textile Strategy encompasses the Commission's 2023 vision for all textiles placed on the EU market to 1) be durable, repairable, and recyclable, 2) be made of recycled fibers without hazardous substances, and 3) "produced in respect of labor and social rights and the environment".[597] To achieve this, the EU targets the entire lifecycle of textiles - from sourcing to post-consumer.

In short, the existing laws in the European Union related to textiles include the EU Ecolabel Criteria for Textile Products and the EU GPP Criteria for Textiles Products and Services. These set out rules about the environmental aspects of textiles. For example, they set standards for the quality of products, and they limit the use of chemicals that could harm the environment. Building on these rules, the European Commission ("EC") is pushing for more specific rules about the design of sustainable products by replacing the Ecodesign Directive 2009/125/EC with the proposed Ecodesign for Sustainable Products Regulation ("ESPR"). With this Directive, the Textile Strategy will lay out new design requirements for textiles to make them more durable, increase their lifespan, and make them easier to repair and recycle. The ESPR will also introduce the "Digital Product Passport", requiring companies to provide information about a product's sustainability, helping consumers and businesses make informed choices.[598] However, an essential note to the increased information for consumers is that research led by Else Skjold at the Royal Danish Academy in conjunction with the Danish Government shows that consumers rank sustainability lower than other factors like fit and style when choosing garments. Therefore, the industry must ensure that garments are produced sustainably and ethically, making it easier for consumers to make sustainable choices without navigating complex labels or websites.[599]

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[597] European Commission, *supra* note 4.
[598] *Id.*
[599] EPP Group, *Podcast - EU Textile Strategy: A path to sustainability,* YOUTUBE (May 23, 2023), https://www.youtube.com/watch?v=FtOgAP9Kuf0&t=44s.

2.1.2. The Waste Framework Directive - Proposed Amendments

The first EU Waste Framework Directive ("WFD") dates back to 1975 but has been amended substantially in 1991, 2006 and 2008. On the 5th of July 2023, the Commission submitted a proposal to the Parliament and Council to amend Directive 2008/98, focusing on food and textile waste. This research will only focus on textile waste. The proposal is awaiting the first reading from the council, while the Parliament has already adopted the decision after their 1st reading under the ordinary legislative procedure.[600] The proposal's main objective is to introduce amendments to the WFD to regulate the environmental sustainability of textile (and food waste) and align the WFD further with the waste hierarchy principles of waste prevention, reuse, and recycling (see Figure 1).

Figure 1. EU's Waste Hierarchy. European Commission (2024). https://environment.ec.europa.eu/topics/waste-and-recycling/waste-framework-directive_en

[600] European Parliament, *Procedure File: 2023/0234(COD)*, LEGISLATIVE OBSERVATORY (Mar. 2024), https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2023/0234(COD)&l.

With this proposal, the Parliament proposed implementing producer responsibility schemes. Article 22a of the proposed amendment to WFD establishes EPR for household textile products, apparel, clothing accessories, and footwear. The change will make producers responsible for the items they introduce to the market within a Member State's territory. Besides that, producers would be obliged to (1) cover the costs of the collection, transportation, treatment, and recycling of used and waste textiles, (2) conduct compositional surveys of collected mixed municipal waste, (3) provide information to consumers about sustainable consumption and waste management, and (4) support research and development to improve sorting and recycling processes (Article 22, Amendment to the Directive 2008/98).[601] Moreover, the directive's application extends to corporate strategies, compelling companies to integrate eco-design principles and invest in sustainable practices. The EPR schemes, as mandated by the directive, are designed to cover the costs related to the collection, transport, and sorting of textiles, reinforcing the directive's commitment to reducing the environmental footprint of the textile sector. This shift necessitates a comprehensive approach where companies are not only responsible for the financial aspects of waste management but also for fostering a culture of sustainability and circularity within the industry.

Meanwhile, Member States would be required to clearly define the roles and responsibilities of relevant actors in the scheme's implementation, monitoring, and verification according to Article 22a. This is a crucial aspect of its success as European companies struggle to understand what is expected of them under the WFD.[602] Besides that, Article 22b stipulates the creation of a textile, textile-related, and footwear producer registered by Member States. The register tracks producers' compliance with Articles 22a and 22c(1). Producers selling textile products for the first time in the market must register in each Member State where they operate.

[601] European Commission, *supra* note 4.

[602] Interview with Alejandra González Uzcátegui (Mar. 27, 2024). Transcript available at https://otter.ai/u/t9jgyhmOk60PYhKerHGwlpPzVQ4?utm_source=copy_url, (I. Nydelius, interviewer).

Moreover, Article 22c of the WFD mandates textile and footwear producers to designate a PRO to handle their eco-design requirements and manage financial contributions based on product weight. PROs must provide extensive information to end-users about sustainable consumption, re-use, and end-of-life management of textile products.[603] Lastly, the targeted amendments to the WFD will not alter the enforcement and penalties on a legal basis stipulated under Article 36 of the Waste Directive 2008. Thus, it is still up to Member States ("MS") to prohibit the abandonment, dumping and uncontrolled management of waste and establish penalties for violations of this Directive that are effective, proportionate, and dissuasive.[604]

The proposal aims to create a unified approach to textile waste management across the European Union, focusing on standardizing collection, sorting, reuse, and recycling procedures. The first step is a separate collection of textiles, preventing contamination and preserving material quality. Following collection, sorting processes need to be standardized due to the diverse material composition of textiles.[605] For example, the France PRO only identified approximately 48% of the retail samples present in the market - which presents challenges for recycling as each material requires unique techniques to break down the different components into recyclable fibers.[606] Moreover, promoting reuse and recycling is integral to this plan, with the proposal aiming to establish common standards across the EU to maximize resource recovery and minimize environmental impact. Financial support is also essential, with EPR schemes proposed to require manufacturers to contribute to end-of-life product management costs. However, this only covers financial support to European companies and organizations. Nonetheless, this could

[603] European Commission, *supra* note 4.
[604] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on Waste and Repealing Certain Directives, 2008 O.J. (L 312) 3 (EC), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008L0098.
[605] European Commission, *supra* note 4.
[606] Veronique Allaire, *supra* note 10.

incentivise designs that are easier to reuse or recycle. This harmonization aims to eliminate inefficiencies and transition towards a circular economy.[607]

Finally, the European textile industry comprises 99% of SMEs, including 88% of all companies being microenterprises (up to 10 employees). Thus, the EU aims to support SMEs in the European textile industry and specifically tailored the proposal to minimize their financial and administrative burden.[608] Moreover, SMEs make up most of the textile market and can drive innovation as they are more adaptable than larger corporations. However, the EU has noted that SMEs may struggle with regulatory compliance due to limited resources. To address this, the EU is considering creating knowledge-sharing hubs and providing funding to support European SMEs in navigating regulations and accessing markets. In addition, the proposal excludes microenterprises from EPR obligations and stabilizes the status quo for the remaining SMEs, excluding microenterprises, by providing sufficient funding.[609]

2.1.3. The Corporate Sustainability Due Diligence Directive

The WFD aligns with the current development of the Corporate Sustainability Due Diligence Directive ("CSDDD"); therefore, this section aims to provide an overview of its potential impact on Pakistan. This directive was first proposed by the European Commission in February 2022 and is expected to be passed in the spring of 2024. The final draft was released on January 30th, 2024, and the EU member states subsequently voted in favor of a modified version on March 15, 2024. This modification removed civil liability provisions that allowed trade unions to sue non-compliant firms and significantly increased the revenue

[607] European Commission, *supra* note 4.
[608] *Id.*
[609] European Commission, *supra* note 4.

eligibility threshold.[610] The directive sets obligations for large companies to address adverse environmental and human rights impacts throughout their business chain. It includes a transition plan for climate change mitigation and rules on stringent penalties for non-compliance, including administrative fines of up to 5% of global turnover and the possibility of civil litigation in EU courts for domestic and international damages.[611] The CSDDD represents a significant shift from voluntary to mandatory due diligence practices by mandating companies to proactively identify and mitigate adverse impacts on human rights and the environment within their operations and extended supply chains.

On the other hand, critic from several member states - including Germany withdrawing their support, the abstained voting from 12 EU MS and a few MS voting against the directive, such as Sweden - have raised concerns about the directive's potential to impose undue administrative burdens on companies, particularly regarding the liability for extraterritorial impacts.[612] This resistance underscores a fundamental tension between corporate accountability and operational feasibility within the framework of the global supply chain. The forthcoming weeks will reveal the success or failure of adopting the CSDDD, its future viability, and the broader trajectory of EU corporate sustainability legislation.

In the context of Pakistan, the CSDDD impacts the country's textile sector by mandating due diligence on human rights and environmental risks for large and mid-sized companies operating in the EU. While Pakistani textile and garment companies might not be directly covered under this directive initially, the indirect implications are significant because EU companies sourcing from Pakistan are

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[610] Initially set at a net turnover of over €150 million in December, this threshold was subsequently increased to €300 million in February, then adjusted to €450 million.

[611] Nazrin Huseinzade, *Corporate Sustainability Due Diligence Directive*, KPMG (Mar. 8, 2024), https://kpmg.com/se/sv/home/nyheter-rapporter/2024/03/se-news-corporate-sustainability-due-diligence-directive.html; *The EU Corporate Sustainability Due Diligence Directive (CS3D) - Timeline, Overview & What You Need to Know*, BRIGHTEST (Mar. 15, 2024), https://www.brightest.io/eu-csddd-sustainability-due-diligence-directive.

[612] Nazrin Huseinzade, *supra* note 47.

targeted.[613] This necessitates Pakistani companies to adopt comprehensive due diligence policies that cover the entire value chain, conduct risk assessments, develop preventative action plans for complex risks, and ensure strong stakeholder engagement. According to APTMA's latest report, critical strategic considerations for Pakistani companies to prepare for CSDDD compliance include improving traceability upstream, focusing on sectoral solutions with worker backing, engaging with independent intergovernmental bodies such as ILO and UN, setting grievance mechanisms for workers at the sectoral level, and focusing on critical labor and environmental risks. Recycling hub development and collaboration with an EU Helpdesk planned to be established in Pakistan are crucial steps towards fully integrating this directive into the supply chain.[614] CSDDD presents both a challenge and an opportunity for Pakistan's textile sector to enhance its sustainability practices, improve compliance with international environmental regulations, and maintain a competitive edge in the global market by aligning with EU standards.

2.2. International Frameworks

The following section will explore the UN Guiding Principles, the Universal Declaration of Human Rights and the European Convention on Human Rights to highlight the shortcomings of these international legal frameworks in protecting textile workers.

2.2.1. The UN Guiding Principles

From 2005-2011, Dr. John Ruggie served as the UN Secretary-General's Special Representative for Business and Human Rights. During this time, he developed the "Protect, Respect, and Remedy" Framework, which evolved into the

[613] Noreen Akhtar, *European Union Green Deal | Implications For Pakistan's Textile Sector*. ALL PAKISTAN TEXTILE MILLS ASSOCIATION (Nov. 2023) https://aptma.org.pk/wp-content/uploads/2023/11/EU-GREEN-DEAL-IMPLICATIONS-FOR-PAKISTANI-TEXTILE-EXPORTERS.pdf.
[614] *Id.*

UN Guiding Principles ("UNGPs") in 2011. The UNGPs consist of three pillars: (1) the state's duty to protect against human rights abuses by third parties, (2) corporate social responsibility to respect human rights, and (3) access to remedies for victims. Rather than isolating corporate responsibilities, Ruggie's comprehensive framework emphasizes these elements' interconnectedness in preventive and remedial measures. The EU has adopted several strategies and policies to implement the UNGPs. However, discrepancies exist in their application across member states, as reflected in varied National Action Plans.[615] While the EU has made strides in enhancing workplace human rights protection, issues persist, notably in sectors such as the textile industry. The lack of preventive measures and legal accountability contribute to this, as does the voluntary nature of CSR and non-binding codes of conduct.

Critics express concern over the UNGPs' effectiveness, primarily due to their non-binding nature. This voluntary status does not guarantee all corporations or states' universal observance of high human rights standards. The UNGPs do not establish legal liability for non-compliance, leading to inconsistent enforcement across jurisdictions.[616] Although the UNGPs provide a framework for understanding and addressing business-related human rights issues, the absence of enforceable obligations means compliance heavily relies on individual states' and businesses' commitment to human rights norms. Without robust regulatory oversight or clear accountability mechanisms, the overall impact of the UNGPs in preventing human rights abuses by businesses worldwide could be limited.

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[615] *Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework*, OECD (Jun. 16, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf; Anita Ramasastry, *supra* note 27.

[616] *Id.*

2.2.2. The Universal Declaration of Human Rights & The European Convention on Human Rights

To begin, the Universal Declaration of Human Rights ("UDHR"), adopted by the United Nations General Assembly in 1948, lays down the rights and freedoms of all human beings.[617] The European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") was heavily influenced in its drafting by the UDHR, and the Declaration also guides many EU legislation, external policies, and bilateral agreements. According to the EU, its commitment to the UDHR's vision of universal rights manifests in its efforts to promote human rights universality through its external policies and funding instruments.[618]

However, it's essential to note that while the UDHR is not legally binding, its principles have been incorporated into many national constitutions and domestic legal frameworks. On the notion of labor rights in the textile industry, articles Article 23(2) and Article 25 of the UDHR stipulate the "right to just and favorable remuneration" that ensures "an existence worthy of human dignity" and the "right to a standard of living adequate for the health and well-being of his and his family" respectively (United Nations, 1948).[619] The failure to pay wages, putting workers and their families on the verge of survival, can thus potentially be seen as a direct infringement of human rights. Moreover, reports of growing landfills in Asia are another example of how the global north is arguably shipping away their waste and problems to the global south, which jeopardizes the local's rights to, for example, a "Standard of Living Adequate for Health and Well-being".[620] With the industry pushing for higher consumption, the likelihood of more garments ending up in

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[617] *Universal Declaration of Human Rights*, UNITED NATIONS (Dec. 10, 1948), https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[618] Rosamund Shreeves, *The Universal Declaration of Human Rights and the European Union*, EUROPEAN PARLIAMENT (Dec. 10, 2023) https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/757559/EPRS_ATA(2023)757559_EN.pdf.

[619] United Nations, *supra* note 54.

[620] Article 25 of the UN Declaration of Human Rights, *see* United Nations, *supra* note 54.

landfills is also increasing. Essentially, the question remains what role the EU will take on to ensure that the EU's consumption and improving waste collection align with the principles the EU has pledged their commitment - especially regarding the negative impact this has on third world countries.

3. An Overview of Labour Abuses in the Textile Sector

Labour abuses in the textile industry rarely attribute liability to the major retail companies. Instead, these corporate abuses are seen as incidental effects of business operations. Numerous instances of European transnational corporations violating human rights overseas have been discovered in recent years. The Rana Plaza collapse is a well-known example of serious human rights breaches by European multinational corporations, which resulted in the deaths of 1134 textile workers in 2013[621] and for which justice is still pending - with numerous cases filed against the owners of Sohel Rana factory and five other factory owners for their alleged negligence and violation of safety regulations.[622] This example also highlights how European retail corporations escaped liability for the lack of safety measures.

The following section aims to provide an overview of how global retail companies abuse human labor, focusing on Pakistan. This analysis will focus on the use of indirect workers, wage theft, and poor safety and health standards in textile factories. It is important to note that this is not an exhaustive list of violations and that the industry, unfortunately, hosts a variety of more abuses and violations, such as the use of child labour and exposure to harmful substances. After reviewing

[621] *Money Heist: COVID-19 Wage Theft in Global Garment Supply Chains – Asia Floor Wage Alliance*, ASIA FLOOR WAGE ALLIANCE (Jan. 6, 2022), https://asia.floorwage.org/covid/money-heist-covid-19-wage-theft-in-global-garment-supply-chains/.
[622] *Justice still outstanding: an update of legal cases related to Rana Plaza eight years on,* CLEAN CLOTHES CAMPAIGN (Apr. 28, 2021), https://cleanclothes.org/news/2021/justice-still-outstanding-an-update-of-legal-cases-related-to-rana-plaza-eight-years-on.

breaches of human rights practices, the case of *KiK, Rina and Ali Enterprise vs Jabir and others* will be examined to highlight the judicial hindrances for Pakistani workers in accessing justice and the lack of human rights protection from the EU.

3.1. Wage Theft & Use of Indirect Workers

The global apparel supply chain is characterized by a concentration of power among a few transnational corporations that exert control over numerous suppliers in developing countries, particularly in Asia. These brands dictate production terms and pricing models, leading to the exploitation of workers through practices like wage theft, which is further enabled by indirect workers - also referred to as "casual workers" - in global supply chains. Wage theft refers to workers not being paid legally or contractually promised wages. This can include non-payment or underpayment of wages, unpaid overtime, withholding final paychecks, illegal deductions, forced work off the clock, and more. Wage theft is a significant issue that particularly affects low-wage and vulnerable workers.[623]

The current global supply chain system allows fashion companies to exploit a hidden workforce of indirect workers. These workers do not enjoy the same rights and benefits as direct employees; instead, they are often subject to various forms of exploitation due to informal work arrangements. To demonstrate, H&M disclosed in its 2021 report that it has 3,878 manufacturing and processing factories globally as partners and suppliers.[624] This shows that brands' supply chains are extensive, necessitated by the high demand and fast production.

The basis for wage theft in the garment industry is rooted in asymmetrical power relations among global apparel brands, suppliers, and workers. Brands often pressure suppliers to reduce production costs, leading suppliers to pass these reductions on to workers through wage theft. This power imbalance enables brands

[623] Asia Floor Wage Alliance, *supra* note 58.
[624] *Transparency - Supply chain*, H&M GROUP (Dec. 2023), https://hmgroup.com/sustainability/leading-the-change/transparency/supply-chain/.

to distance themselves from accountability for labor rights violations by shifting responsibility to supplier factories despite their significant influence over workers' wages and employment conditions. A recent report by the Asia Floor Wage Alliance[625] ("AFWA") called "Money Heist" discusses the impact of the 2020 global recession on garment workers across Asia and highlights how brands passed on the economic burden of the recession on producers and, ultimately, workers. The report suggests that *Pakistani garment workers suffered some of the highest levels of wage theft among Asian equivalents.* Pakistani workers were also some of the worst paid in the world and faced a widespread lack of social security coverage and unionization protection.[626] The report further highlights Pakistan's textile industry's struggles with wage theft, layoffs, and terminations of contracts during and after the pandemic. Part of the reason for the crisis during this time was that many global brands canceled orders during the recession. Taking into account that approximately 8.5% of the country's GDP and 19% of its exports are attributable to the textile industry, this had a significant impact on Pakistan and the 45% of the total labor force that is employed by the sector.[627]

Moreover, the AFWA report included a survey conducted across 50 garment factories in Pakistan that revealed that many workers experienced employment shocks in layoffs (86%) or terminations (14%). The report highlighted the systematic exploitation of workers resulting from poor governance, ineffective regulations and low labor protection.[628] Strengthening labor laws, ensuring equal employment opportunities, and providing greater access to social protections can serve as pivotal steps towards mitigating the injustice faced by the workforce, particularly in times of crisis.

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[625]AFWA is an Asian labor-led global labor and social alliance operating across garment-producing countries including Pakistan, Bangladesh and India.
[626] Asia Floor Wage Alliance, *supra* note 58.
[627] Raza Ali Khan et al, *Sustainable Practices in Supply Chain: A Case Study of Yunus Textile Mills*, Journal of Social Sciences and Humanities, University of Karachi, Vol. 62 (No. 2), (Dec. 31, 2023), https://www.jsshuok.com/oj/index.php/jssh/article/view/696; Asia Floor Wage Alliance, *supra* note 58.
[628] Asia Floor Wage Alliance, *supra* note 58.

3.2. Poor Safety and Health Standards

The Pakistani garment industry is characterized by exploitative working conditions, poor safety and health protection, and labor violations.[629] Several incidents exemplify this. Most recently, a garment factory in Karachi, Pakistan, collapsed and caught fire in April 2023, resulting in dozens of injuries and the deaths of four firefighters. The incident was attributed to a lack of emergency exits and fire extinguishing equipment.[630] However, the deadliest accident happened in 2012 when the Ali Enterprise fire and collapse killed 264 garment workers (which led to the *KiK, RINA and Ali Enterprise vs Jabir and others* case, which will be examined further in a later section). As illustrated, the health and safety situation for garment workers in Pakistan is quite precarious. The Clean Clothes Campaign survey indicates that an overwhelming majority of workers—85%—lack access to proper exit stairwells in case of a fire. Moreover, about 20% of workers are not privy to fire drills and are uninformed about emergency escape routes and exits. The absence of independent factory inspections further exacerbates the risk, leaving safety equipment such as fire alarms unchecked for functionality.[631]

One international effort to tackle this lack of health and safety measurements is the Pakistan Accord on Health and Safety in the Textile and Garment Industry (hereafter referred to as the "Pakistan Accord"). The Pakistan Accord is a legally binding agreement under the broader International Accord on Health and Safety in the Textile and Garment Industry (referred to as the "International Accord") established as a response to the Rana Plaza incident 2013.

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[629] *Id.*

[630] *A decade since Rana Plaza factory safety has improved in Bangladesh but recent fire in Pakistan shows that it has not improved elsewhere,* CLEAN CLOTHES CAMPAIGN (Apr. 13, 2023), https://cleanclothes.org/news/2023/a-decade-since-rana-plaza.

[631] *A decade after deadly Ali Enterprises fire, Pakistan's garment workers report shocking lack of fire exits,* CLEAN CLOTHES CAMPAIGN (Jul. 1, 2022), https://cleanclothes.org/news/2022/report-a-decade-after-deadly-ali-enterprises-fire-pakistans-garment-workers-report-shocking-lack-of-fire-exits.

The establishment of the Pakistan Accord aims to expand the scope of the International Accord beyond Bangladesh, focusing on improving worker safety conditions in Pakistan's textile and garment industries. Some of the critical elements of the agreement include independent inspections and the remediation of safety hazards, increasing transparency, financial feasibility of remediation, safety committee training, and worker safety awareness programmes. Moreover, the agreement emphasizes the respect for freedom of association to protect worker safety, an independent complaints mechanism, and joint capacity building with the government of Pakistan.[632] Nonetheless, the applicability of the Pakistan Accord for European companies has yet to be tested in court. Despite being legally binding to signatories, including H&M, it is uncertain whether this will be sufficient to establish the company's liability and as a connecting factor between its responsibility and the harm caused to textile workers due to lacking safety standards.[633]

3.3. Modern Slavery

The issue of modern slavery is complex and diverse. It involves different forms of exploitation where an individual is forced to stay or cannot refuse due to threats, violence, coercion, deception, or abuse of power. The concept includes a "set of specific legal concepts including forced labor, debt bondage, forced marriage,

[632] *Pakistan Accord on Health and Safety in the Textile and Garment Industry - 2023_public version,* INTERNATIONAL ACCORD (Jan. 1, 2023), https://internationalaccord.org/wp-content/uploads/2023/02/Pakistan-Accord-on-Health-and-Safety-in-the-Textile-and-Garment-Industry-2023_public-version.pdf; Ezreen Benissan, *What the Pakistan Accord means for fashion's supply chain,* VOGUE BUSINESS (Jan. 5, 2023), https://www.voguebusiness.com/sustainability/what-the-pakistan-accord-means-for-fashions-supply-chain.

[633] Rachel Deeley, *Major Brands Sign Pakistan Accord for Garment Worker Safety, THE BUSINESS OF FASHION* (Jan. 24, 2023), https://www.businessoffashion.com/news/sustainability/major-brands-sign-pakistan-accord-for-garment-worker-safety/.

slavery and slavery-like practices, and human trafficking".[634] This definition offered by the international human rights organization "Walk Free" emphasizes the involuntary nature of such cases, differentiating modern slavery from other work or labor conditions where consent is freely given. The connection between modern slavery and the textile industry is the most notable. Modern slavery is often associated with practices of the textile industry, whose supply chains are complicated and sometimes even obscure. This link is not fortuitous but results from the worldwide need for inexpensive clothing, forcing manufacturers to cut costs. This demand encourages the abuse of poor workers by means of practices that amount to slavery in the modern world. However, the textile industry's dependence on such practices is evidence of the necessity to ensure comprehensive approaches, which will deal not only with the symptoms but also with systemic problems that enable modern slavery. The report by the Walk Free Foundation published in 2023 raises Pakistan's high vulnerability to modern slavery while condemning the government for its inadequate response towards the national problem. According to this report, roughly 2,349,000 Pakistanis are currently in forced labor or forced marriage, making Pakistan the 18th country in the world when it comes to the prevalence of modern slavery.[635] In addition, several recent events have exacerbated the problems and weaknesses of Pakistani workers, such as catastrophic floods, soaring energy costs and unstable political arena.[636]

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[634] Walk Free, *Global Slavery Index 2023*, MINDEROO FOUNDATION, https://cdn.walkfree.org/content/uploads/2023/09/27164917/GSI-Snapshot-Pakistan.pdf (last visited Apr. 15, 2024).

[635] *Id.*

[636] Noah Berman, *What's at Stake in Pakistan's Power Crisis*, COUNCIL ON FOREIGN RELATIONS (Feb. 6, 2023), https://www.cfr.org/in-brief/whats-stake-pakistans-power-crisis; Center for Preventive Action, *Instability in Pakistan*, COUNCIL ON FOREIGN RELATIONS (Feb. 9, 2024) https://www.cfr.org/global-conflict-tracker/conflict/islamist-militancy-pakistan.

3.4. Case Study: KiK, Rina and Ali Enterprise vs Jabir and others

This section will analyze judicial barriers for Pakistani textile workers under the current legal frameworks by examining how an EU company - KiK Textilien und Non-Food GmbH ("KiK") - could escape liability for the harm caused to Pakistani textile workers. The case is about the September 11th, 2012, tragedy that claimed 258 lives and left 32 injured. This catalyzed a compensation claim against KiK, the factory's principal client. A federal investigation showed that the fire started on a wooden mezzanine, which quickly ignited, blocking the stairway and allowing the fire to spread to the second floor.[637] The same report identified the building's absence of fire alarms and emergency exits. This occurred despite the retailer hiring RINA, an Italian audit company, two weeks before the incident to ensure the supplier's compliance with the retailer's code of conduct. The audit company outsourced the audit to a Pakistani company and issued a certification confirming that the supplier met the health and safety requirements despite never visiting the factory.[638]

The case has commenced three separate, parallel proceedings in front of German (against the retailer, KiK), Pakistani (against the factory, Ali Enterprises) and Italian (against the audit company, RINA) courts. The lawsuit in Germany in March 2015 was predicated on the notion that transnational corporations should bear responsibility for the labor conditions at their suppliers and subsidiaries overseas.[639] The plaintiffs' arguments challenged the status quo wherein corporations could profit from exploitative labor practices without bearing the consequences of inadequate safety measures. It was contended that KiK had a duty

[637] Julia García Álvarez, *Corporate human rights abuses committed by European transnational companies in Third Countries within the textile, oil and defence sector. Theory-practice inconsistencies in the UNGPs implementation process at EU level*, Global Campus Europe (2020), http://dx.doi.org/10.25330/680.
[638] *Id.*
[639] European Center for Constitutional and Human Rights, *supra* note 32.

of care that extended to the workers in Pakistan due to its significant influence over the factory operations, evidenced by imposing a code of conduct, regular inspections, and the fact that the factory produced almost exclusively for KiK (given that KiK purchased about 75% of the factory's annual production). This relationship, they argued, should render KiK liable for the safety lapses that led to the tragedy.[640] As a response, KiK defended itself by stating that its code was not legally binding or based on enforceable principles but on voluntary measures. Besides that, KiK claimed that Ali Enterprises was an independent entity, arguing that the relationship was not close enough to establish a duty of care.[641]

In the end, the case was dismissed on technicalities as it was determined that the statute of limitations barred the claim. Such dismissal on grounds of technicalities instead of merits had left questions on corporate liability in global supply chains unresolved. Not only did the decision halt a need for immediate justice from the affected people, but it also left a void in legal precedent concerning the accountability of multinational corporations for their overseas operations. As such, the Ali Enterprises case is proof of the inherent ability and, at the same time, the powerlessness of legal systems when they encounter the challenges of globalization. It highlights the pressing need for legal systems to make transnational corporations responsible for ensuring safe working conditions through their supply chains and allowing victims to seek remedies.[642]

[640] Julia García Álvarez, *supra* note 74.
[641] *Id.*
[642] European Center for Constitutional and Human Rights, *supra* note 32.

4. The Economic Relationship between Europe and Pakistan

The following sections will provide an overview of the Pakistani textile industry and the current economic situation. They will then follow a deeper analysis of the relationship between Pakistan and Europe regarding textile trade. Finally, the last section will examine the potential impact of the textile directive on the Pakistani textile industry.

4.1. The Pakistani Textile Industry

The textile industry in Pakistan holds a significant place in the country's economic structure. It is one of the largest manufacturing industries, contributing about 19% to the nation's exports and approximately 8.5% to the Gross Domestic Product. Furthermore, the textile sector is a substantial employment provider, absorbing around 45% of the total labor force.[643] Pakistan ranks eighth in Asia for textile manufacturing and is the third-largest cotton consumer globally. The textile industry exports a range of raw materials, including cotton, yarn, fabric, synthetic fabric, dyes, and chemicals. Finished goods such as bags, sheets, towels, blankets, draperies, and woven and knitted clothes are exported mainly to Europe, the USA, and Saudi Arabia. The country is home to roughly 500 textile industries, with the majority (70%) in Punjab, followed by 25% in Sindh.[644]

The Pakistani textile industry faces numerous challenges regarding labor rights abuses and transitioning to sustainable and ethical practices. The current political, social, and economic hurdles further impede progress, and the industry faces challenges such as energy supply, old machinery, limited resources, and political instability.[645] A pressing example is the rising electricity costs that have led

[643] Khan et al., *supra* note 64.
[644] Pakistan Textile Council, *Pakistan's Textile Export*s, PAKISTAN TEXTILE COUNCIL (Jun. 2, 2023), https://ptc.org.pk/pakistans-textile-exports/.
[645] *Id.*

to widespread closures of mills and a decrease in export production throughout 2023. Additionally, regulatory measures aimed at stabilizing the currency have unintentionally discouraged overseas Pakistanis from using official remittance channels, affecting the overall finances of the industry. These internal economic difficulties have hindered efforts to boost exports and investments in 2024. These economic challenges are partly due to another hurdle: political instability. This has, in turn, contributed to short-term and inconsistent policy-making and a reliance on foreign loans.[646] The country's political instability creates a high-risk, low-investment environment and hinders economic and social progress.

4.2. The Pakistan-EU Trade Relationship

The EU has long been one of Pakistan's top export destinations. Specifically, the EU was Pakistan's second most important trading partner in 2020, accounting for 14.3% of Pakistan's total trade and absorbing 28% of Pakistan's total exports. Among that, textiles and clothing dominate Pakistani exports to the EU, accounting for 75.2% of total exports to the EU in 2020. In 2022, Pakistan's total exports to the EU accounted for $9.3 billion, where the most exported products were first "Men's and boys' ensembles of cotton"[647] and second, bed linen of cotton.[648]

In the early 2000s, Pakistan benefited from preferential trade arrangements through the European Union's Generalised System of Preferences (GSP) as the two parties agreed on the Cooperation Agreement. In a significant advancement in 2014, Pakistan achieved the Generalised Scheme of Preferences Plus (GSP+) status, significantly improving trade prospects for Pakistani exporters. In short, the GSP+

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[646] Shahid Sattar and Amna Urooj, *Sustainable Business Practices in Textile Sector of Pakistan,* ALL PAKISTAN MILLS ASSOCIATION (Oct. 28, 2022), https://aptma.org.pk/sustainable-business-practices-in-textile-sector-of-pakistan/.

[647] *"Men's and boys' ensembles of cotton"* in textile trade refers to coordinated sets of cotton clothing intended for male wearers.

[648] *Pakistan's Trade with the EU & its Member States*, THE PAKISTAN BUSINESS COUNCIL (Oct. 2023), https://www.pbc.org.pk/research/pakistans-trade-with-the-eu-and-its-member-states-october-2023/.

is a component of the EU's GSP that provides special incentives for sustainable development and good governance by requiring Pakistan to implement 27 core international human rights, labor rights, environmental protection, and good governance conventions to maintain the GSP+ status. In return, it reduces tariffs to 0% for vulnerable, lower-middle-income countries like Pakistan. This arrangement aids Pakistan in its trade with the EU by making its exports more competitive. Notably, imports from Pakistan almost doubled from €3,072 to €5,537 million between 2010 and 2020, a significant growth due to the award of GSP+ in 2014.[649]

A recent trend in textile trade between the two countries is the significant increase in used textiles. Firstly, the EU's exports of used textiles have tripled in the last two decades, going from slightly over 550,000 tonnes in 2000 to almost 1.7 million tonnes in 2019. Among these, 41% of the exports of used textiles in 2019 were sent to Asia. Above that, *Pakistan has been the largest recipient of EU-used textiles since 2010 and still held that position in 2019.*[650] In 2021, Pakistan received used clothing worth $46 million from the EU. On the other hand, Pakistan exported $267M worth of used clothes in 2022 - making it the sixth-largest exporter of used clothing globally. The primary destinations for these textiles were Mozambique ($36.2M), Tanzania ($35.3M), Thailand ($29M), Kenya ($19.1M), and Zambia ($15.8M). The country has seen a significant increase in its share of imported and exported textiles, indicating a growing role in the global used textile trade.[651]

[649] European Commission, *EU trade relations with Pakistan*, EUROPEAN COMMISSION, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/pakistan_en (last visited Apr. 20, 2024).
[650] *EU exports of used textiles in Europe's circular economy,* EUROPEAN ENVIRONMENT AGENCY (Feb. 27, 2023), https://www.eea.europa.eu/publications/eu-exports-of-used-textiles.
[651] OEC, *Used Clothing in Pakistan | The Observatory of Economic Complexity,* OEC WORLD, https://oec.world/en/profile/bilateral-product/used-clothing/reporter/pak (last visited May 2, 2024).

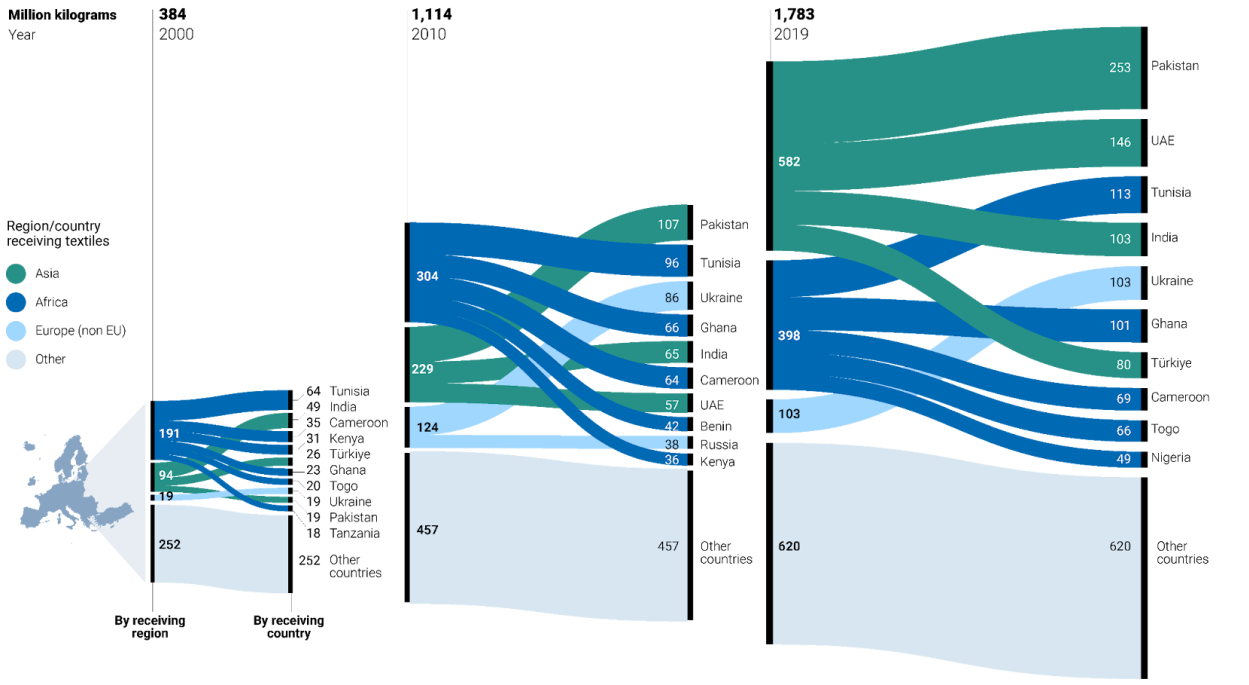

Figure 2. Textile waste Streams from the EU to receiving countries. The classification of countries into groups is derived from the United Nations Statistical Office, as per the information provided by the UN Statistics Division in 2022. Mortensen, L. (2023). https://www.eea.europa.eu/publications/eu-exports-of-used-textiles

While some textile mills recycle these textiles, a significant portion ends up in resale markets, exported or at dumping sites.[652] By channeling industries into the recycled fashion market, Pakistan could greatly benefit from recycling, redesigning, and repurposing textile waste. In other words, the EU's Strategy for Sustainable and Circular Textiles could significantly transform textile production in Pakistan by increasing the demand for recycled textiles and textile waste collection. The demand for recycled textiles will entail a shift from sourcing new material to recycled material, which requires implementing new technology and know-how of recycling methods for the wide variety of textiles.

According to APTMA, the Pakistani textile industry is showing signs of adoption of Sustainable Business practices, such as Net Zero Pakistani - a national partnership aimed at achieving net zero carbon by 2050 - and active participation in international conventions to improve their sustainability practices.[653] Moreover, to transform the landscape of textile-to-textile ("T2T") recycling in Pakistan, a joint

[652] European Environment Agency, *supra* note 87.
[653] Sattar & Urooj, *supra* note 83.

initiative has been launched by Reverse Resources - a specialist in textile waste management - and the National Textile University in Pakistan. The initiative primarily targets the country's underperforming waste-handling sector, intending to enhance the quality and commercial viability of T2T recycled products and to increase transparency and traceability within the recycling process. Pakistan's textile industry has grown and is progressively adopting sustainable business practices. These practices incorporate profit-making, societal impact, and environmental considerations, including energy sustainability, waste management, ethical sourcing, and sustainability reporting. Regulatory pressures, international conventions, and competitive pressures have positively influenced these practices.[654] Nevertheless, the country is still facing momentous challenges and hurdles to transform the textile industry and adoption of such practices is often hindered by managerial, technological, and economic barriers.

4.3. The Potential Impact of the Waste Framework Directive on the Pakistani Textile Industry

The regulatory landscape is shifting from voluntary measures for a good business brand to mandatory compliance regarding transparency, sustainability practices and social responsibility. Implementing EPR schemes in the amended WFD, along with stricter due diligence and reporting requirements, is rapidly changing the circumstances for European corporations. The question remains whether the fundamental human rights principles enshrined in the European Convention on Human Rights and the EU's commitment to a circular and sustainable economy go beyond the European borders. In other words, how will the WFD impact third countries, such as Pakistan, when textiles' collection, recycling

[654] Haydn Davis, *Reverse Resources targets Pakistan recycling sector*, ECOTEXTILE NEWS (Mar. 6, 2024), https://www.ecotextile.com/2024030631782/materials-production-news/reverse-resources-targets-pakistan-recycling-sector.html.

and reusing targets will increase in the European textile markets? As seen in the example of the implementation of EPR in France, the country's effort and imposing EPR obligations through French law have significantly improved textile waste infrastructure and increased textile waste collection. The country is seen as an example for other EU MS to follow, as the WFD will require them to put up similar infrastructure for PRO to meet the demands of textile waste collection, sorting and recycling. At the same time, Refashion - the French producer responsibility organization - reports that 80% of all the French textiles collected are exported to countries outside of the EU.[655] This indicates that the European sorting, recycling, and second-hand market cannot handle the current amounts. The fact that 41% of the exports of used textiles were sent to Asia, with Pakistan being the prominent importer, raises the question: What potential effect will the increased collection of textiles due to the WFD entail for Pakistan? Not only is Pakistan a significant importer of textile waste, but it is also dependent on the EU as an importer of textile products.

4.3.1. Two Potential Scenarios

The WFD will impose reporting obligations on producers, including registering products and collecting data about the product's social and environmental impact. This poses a significant challenge for European companies. Collecting data about products often entails requesting this data from suppliers—considering the textile industry's complex, global supply chains—who are not always willing or have the resources to provide the necessary information. Due to this, Alejandra González Uzcátegui - a Sustainability and Corporate Responsibility Expert at Business Sweden - predicts two potential scenarios:

[655] WRAP, *supra* note 15.

companies could either choose safer suppliers in a controlled environment or invest in new technologies to trace value chains more efficiently.[656]

The first scenario is that companies will choose “safe suppliers", including European suppliers who will already be under the WFD, among other EU requirements like the CSDDD. There is already investment in reporting schemes and compliance with EU laws. As companies will be compelled to produce data and information about their products - the ability and traceability of products will be essential for companies’ compliance. If companies cannot meet these requirements, they will face heavy fines. Moreover, collecting data will increase financial costs for companies. Data collection from third-country suppliers is predicted to be higher as it requires more investments, further incentivising moving production to the EU, where companies can leverage more control over suppliers, ensuring adherence to sustainability standards.[657] However, the potential drawback of this scenario is that EU producers will drop suppliers in third countries, which would lead to an initial reduction in jobs and economic activity. The trading void left by EU companies that, in this scenario, left Pakistan will most likely be filled by other non-EU partners, such as Chinese companies. Without the incentives to meet EU standards, Pakistani suppliers could face worse conditions as they would have less motivation to adhere to rigorous labor and environmental standards and lower requirements from these new non-EU partners.[658]

In the second scenario, European companies invest in third-country suppliers to support their transition to compliance under the WFD. This entails company investment in new technologies to make tracing the value chain more efficient and possible - allowing European companies to keep their supply chains in producing countries with cheaper labor. Above that, investing in such technologies and

[656] Alejandra González Uzcátegui, *supra* note 39.
[657] Steenmans, *supra* note 9.
[658] Interview with Alejandra González Uzcátegui (Mar. 27, 2024). Transcript available at https://otter.ai/u/t9jgyhmOk60PYhKerHGwlpPzVQ4?utm_source=copy_url, (I. Nydelius, interviewer).

infrastructure could have multiple benefits. Firstly, it could result in lower production costs - this is because moving production back to Europe would be significant, considering the need for infrastructure development and the complexities of setting up new supply chains. In contrast, investing in technology to enhance traceability and efficiency in existing supply chains could be more cost-effective. Secondly, it could provide much-needed transparency and accountability in the supply chain.[659] For the Pakistani textile industry, this could mean continued partnerships with EU companies and maintaining jobs and income. Moreover, adopting new technologies could improve local industry practices, enhancing sustainability and labor conditions. However, the success of this approach would depend on whether the technology is accessible and affordable for Pakistani suppliers and the decision of EU companies to invest and support this transition.

4.3.2. What will the role of European companies be?

European companies will likely become pioneers in integrating sustainable practices throughout their supply chains. They may play a dual role: first, as enforcers of the aforementioned new standards, pushing for greater transparency and ethical practices, and second as innovators who adopt and invest in technologies like AI for more sustainable operations. These roles could lead to a transformation within the industry, setting new benchmarks for global sustainability practices. Other companies must adopt similar practices to remain competitive and meet consumer demand for sustainable and ethically made products. This could lead to a global transformation of the textile industry, where sustainability and respect for labor rights become the new norm.

Furthermore, businesses have considerable influence that can be leveraged to uphold labor rights, especially in contexts where state mechanisms fail. They can

[659] *Id.*

ensure suppliers' compliance with labor standards, conduct regular audits to verify compliance and apply pressure in circumstances of non-compliance. Such measures can address regulatory gaps and fortify labor rights within supply chains. Additionally, businesses can initiate capacity-building for their suppliers in third countries, encompassing workforce training programmes, which can empower the workforce and ameliorate labor conditions, and re-training to address the need for sustainable transition in manufacturing and sourcing practices. By embodying best practices in labor rights within their operations, businesses can set industry benchmarks, enhancing labor rights while transforming the industry towards a transparent and ethical sector.

5. Policy Recommendations

The apparel supply chain is highly globalized and interconnected. All parts of the textile supply chain must be considered to address environmental and social challenges in the textile industry. This thesis has explored the potential impacts of WFD on production countries, specifically Pakistan, which are often overlooked when developing EU policies. As illustrated in the previous chapter, the EU is Pakistan's second most important export destination. Thus, new EU regulations on EPR and textile waste management requirements imposed on European companies will indirectly impact the Pakistani textile industry. The subsequent section will present policy recommendations for the EU that address these identified challenges and potential impacts on the textile industry, particularly considering the role of third countries. These recommendations aim to ensure that the proposed amendments to the WFD lead to a more sustainable and ethical global textile industry. Specifically, the recommendations will propose policies to enhance compliance flexibility for Pakistani suppliers, improve labor standards and promote more sustainable practices. Finally, this chapter will present suggestions for future research.

5.1. Assessing the Impact of the European Textile Directive on Producer Countries to align with European Principles

The first policy recommendation is to regularly assess the impact of the WFD on not only European companies but also on producing countries to ensure that the EU's commitment to human and labor rights is globally upheld. This recommendation stems from the EU's core principles, as highlighted in the ECHR, the UN Human Rights Convention's ratification and Ruggie Principles. The EU's regulations, notably the WFD, significantly influence businesses operating in third-country supplier countries beyond the EU's jurisdiction due to the textile industry's complex and global supply chain. As this thesis underscores, the EU's commitment to human rights extends beyond its geographical boundaries. Given European businesses' global reach in the textile industry, the EPR should encompass operations in third countries. This includes providing appropriate redress channels for non-EU victims and shielding them from unintended economic instability or worsening labor conditions due to WFD compliance. Major European brands outsource most of their production to third countries, such as Pakistan, Bangladesh, and India. By continuously assessing its regulations' global impact, the EU can maintain its commitment to human and labor rights worldwide. This policy recommendation is essential for a more ethical global textile industry that impacts millions of lives.

5.2. Preventing Production Shift to EU's 'Safe Suppliers' and Neglecting Producer Countries

This research has identified a significant risk for non-EU-producing countries in implementing the EU's amended WFD. Namely, this directive could motivate European companies to shift their production to 'safe suppliers' within the EU, potentially leading to job losses and decreased economic activity in third-country supplier countries. This could mean a worse situation for the 15 million textile workers worldwide subcontracted by European brands through national suppliers.[660] To prevent this, the recommendation outlines the importance of the EU's role in ensuring that the companies that source processes from third countries must first support and invest - through knowledge or monetary support - instead of sidestepping them. This investment could enhance the efficiency and traceability of existing supply chains, making them more sustainable. This approach could also provide transparency and accountability in the supply chain, crucial for promoting fair labor rights. If the company's support does not produce compliant results from suppliers, only then can the company decide to move to an alternative supplier. The EU is responsible for its member states and companies operating within the EU to ensure that new regulations do not inadvertently lead to economic instability or worsen labor conditions in these countries.

Moreover, by actively supporting third-country suppliers' compliance, the EU can indirectly influence these countries' promotion and adherence to not only labor rights but also provide liberation for workers treated as slaves, further empowering workers in developing nations. Through thoughtful policy implementation and dedicated support to third-country suppliers, the EU can contribute significantly to the sustainability of the global textile industry, promoting economic stability and just labor rights in producer countries.

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[660] *Pakistan*. ASIA GARMENT HUB, https://asiagarmenthub.net/agh-countries/pakistan (last visited May 1, 2024).

5.3. Establishing Clear Compliance Requirements for European Businesses and Global Third-Party Suppliers

A critical policy recommendation is establishing clear compliance requirements for European businesses and global third-party suppliers. The existing regulatory landscape, punctuated by the European Union's changing regulations, exerts mounting pressure on the textile industry in countries like Pakistan to adopt more sustainable practices. However, the complexities inherent in global supply chains and the substantial compliance and reporting costs can disproportionately disadvantage smaller suppliers, particularly those in developing countries. In this context, the importance of clear, standardized compliance requirements cannot be overstated. Alejandra González Uzcátegui, a Sustainability and Corporate Responsibility Expert at Business Sweden, points out the ambiguity many companies face regarding their role and how to achieve compliance. Clear compliance requirements can dispel this uncertainty, allowing both European companies and third-country suppliers to better grasp what is expected of them and how to meet these expectations.

Moreover, these recommendations underscore the imperative for greater transparency in the supply chain. By mandating that businesses disclose information about their suppliers and their adherence to sustainability standards, European businesses can be held accountable for their supplier choices. This could act as a catalyst, motivating them to collaborate with suppliers committed to sustainable and fair labor practices. The EU can create or enforce a mandate requiring companies to establish a program identifying non-compliant suppliers. This program would allow workers from suppliers in third-countries to report any breaches of regulatory practices. After a certain number of reports, the EU can either blacklist or impose sanctions on that supplier, with the stipulation that the

EU company will move their business to the competitor rather than exiting the country. The incentive for workers stems from the regulations protecting them and their interests.

5.4. Bridging the Technology Gap

Technology is crucial for complying with the emerging EU requirements, such as the amended WFD, CSDDD and ESPR. The 2004 Cooperation Agreement recognised the importance of technology transfer for developing a competitive economic environment in Pakistan, particularly in the textile and apparel industry. Technology has become even more critical with the introduction of the Digital Product Passport in the EU's Environmental and Social Policy and Risk Procedure ("ESPR"). However, due to high investment requirements, technology upgrades are a significant challenge for Pakistan, especially for smaller players. To facilitate technology transfer, Pakistan could include specific provisions for this industry in cooperation agreements. Also, the EU could provide funds specifically for technology upgrades and market access for Pakistani SMEs. A cooperation or technology transfer center similar to the EU's Centre on Technology Transfer could be established, offering policy-related expertise and services and making technology transfer faster and more effective.

The DeveloPPP initiative created by the German Federal Ministry for Economic Cooperation and Development (BMZ) works to promote sector engagement. Through this, they offer technical support to companies looking to invest or are already active in developing countries. As an example of their impact, the BMZ helped connect Ukrainian suppliers with German brands that helped to stabilize the supply chain and contribute to Ukraine's reestablishment.[661] This approach could benefit SMEs in Pakistan by supporting the restructuring of the

[661] German Federal Ministry for Economic Cooperation and Development, *Textiles*, LEVRIST.DE, https://www.leverist.de/en/app/industries/textile-industry (last visited May 1, 2024).

textile industry, which suffered a decline post-COVID due to surging energy costs and political instability.

5.5. Establishing Financial Support Channels

Financial assistance is crucial for Pakistan's sustainable transition. It is impossible to bridge the gap in Pakistan's textile industry in isolation - it must go hand-in-hand with access to finance and technology transfer. These measures are interrelated, as companies need financial resources and the right skills to adopt sustainable practices. The Pakistani industry is currently grappling with a shortage of skilled labor and outdated technology, which indicates significant hurdles in the transition to sustainability practices and sustainability reporting. Creating these channels could involve setting up dedicated funds, grants, low-interest loan schemes or collaborations with the National Bank of Pakistan to support the industry's transition. These financial mechanisms could also support skills development initiatives, addressing the industry's current shortage of skilled labor.

Moreover, European companies should be encouraged, or even required, to create support structures for their Pakistani suppliers. This could involve setting aside a budget specifically to aid the transition of their suppliers to comply with new EU regulations. This budget could provide technical assistance, fund technology upgrades, or support skills development initiatives. Additionally, the EU could set aside a budget or establish a fund to assist Pakistani suppliers in their transition. This financial support could significantly aid Pakistani textile companies in adhering to the new EU regulations and enhancing their competitiveness on the global stage. The potential impact of these channels would be multi-faceted, contributing to the economic stability of the industry, improving Pakistan's compliance with international sustainability standards, and the lives of thousands of textile workers.

5.6. Recommendations for Future Research

Finally, this research has room for improvement and extension to cover more economies and countries, providing a broader perspective on the impact of the amended directive. Post-implementation studies could also be beneficial in continuing the assessment of the WFD in and beyond the EU. Additionally, the research could be expanded to focus on other regulations, such as further assessing the impact of eco-design regulations and the Sustainability Due Diligence Directive. Comparing and contrasting these with the amended directive could provide a more comprehensive understanding of the regulatory landscape. Lastly, a critical area of study is ensuring a just transition and limiting the adverse effects of the EU's green transition on producing countries. This would involve investigating strategies and policies that balance environmental goals with fair trade practices in complex textile economies.

Pandemic, War and Half-Truths: Can The European Union's Digital Services Act Tackle Disinformation on Social Media?

Marie-Therese Burkard

ABSTRACT

With the rise of social media platforms and the resulting decentralization of media channels, accessing accurate and well-researched news has become more challenging. The media world today requires that we criticize and evaluate each piece of news that we consume in passing on digital platforms to prevent ourselves from being misled by half-truths or outright incorrect statements. Aiming to protect consumer rights online, the European Union's newly implemented Digital Services Act has the potential to counteract such disinformation on social media platforms by setting out an expansive list of obligations. With COVID-19 vaccine hesitancy and Russian propaganda regarding its war with Ukraine, disinformation is flooding social media platforms. As such, especially the last two years have shown the inherent need to prevent the spread of disinformation in the face of a crisis. As such, the following paper will analyze the DSA's effectiveness in tackling disinformation to prevent further political and social polarization and protect our democracies.

INTRODUCTION

Since its launch in November 2022, ChatGPT, a text-based dialogue AI tool, has taken the world by storm, constituting the fastest growing digital service in history.[662] Whilst these so-called "real-time chatbots"[663] can be used for research, reasoning, or even light-hearted interactions, it has sparked growing concerns regarding future job opportunities, academics and even the development of disinformation in online spaces. This is because their ability to produce elaborate, nuanced, and emotive texts from a simple input can allow these tools to produce disinformation. Even Sam Altman, CEO of OpenAI, the company behind ChatGPT, expressed his concerns in an exclusive interview with ABC News' Rebecca Jarvis: "One thing I'm particularly worried about is that these models could be used for large-scale disinformation."[664] As such, the virality of ChatGPT is one recent example that highlights the danger of disinformation itself.[665]

It is drastically clear that the dissemination of false information is not a problem that is limited to the US, nor one that solely involves the accidental spread of misleading information. Within the European Union (EU), disinformation, misleading information that is created and disseminated with malicious intent,[666] has been repeatedly named as a threat to political stability, society, and democracy overall. With the emergence of social media, a digital environment exists that is

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[662] Krystal Hu, *ChatGPT set record for fastest ´-growing user base - analyst note,* REUTERS (February 2, 2023), https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/.

[663] Tiffany Hsu and Stuart A. Thompson, *Disinformation Researchers Raise Alarms About A.I. Chatbots,* N.Y. TIMES (February 8, 2023), https://www.nytimes.com/2023/02/08/technology/ai-chatbots-disinformation.html.

[664] ABC News, *Open AI CEO, CTO on risks and how AI will reshape society,* YOUTUBE (March 18, 2023), 1:46-1:52, https://www.youtube.com/watch?v=540vzMlf-54.

[665] For more examples on how ChatGPT can produce disinformation: Tiffany Hsu and Stuart A. Thompson, *Disinformation Researchers Raise Alarms About A.I. Chatbots,* N.Y. TIMES (February 8, 2023), https://www.nytimes.com/2023/02/08/technology/ai-chatbots-disinformation.html.

[666] Don Fallis, *What is disinformation?,* 63(3) LIBRARY TRENDS, 401, 413 (2015).

increasingly exploited for large-scale disinformation campaigns.[667] The COVID-19 pandemic[668] and the ongoing Russo-Ukrainian war[669] has drastically brought the danger of disinformation campaigns conducted by China and Russia to the EU's attention.

Having entered into force in 2022, the Digital Services Act (DSA), regulating providers of digital intermediary services including social media platforms, imposes an extensive set of obligations with the aim to foster "a safe, predictable and trusted online environment".[670] Although the DSA does not solely focus on disinformation, it can potentially have significant implications on the behavior of social media platforms and the dissemination of disinformation. Given its revolutionary nature and its recent entry into force, it is of interest to evaluate the relationship between the DSA, disinformation, and social media platforms, posing the question: Can the EU's DSA tackle disinformation on social media?

To evaluate this question, normative analysis of academic research and positive law, that being the DSA, will be conducted. As such, the question will be answered at the hands of three chapters. The first one on the danger of disinformation defines the term "disinformation", explaining how the Digital Revolution has facilitated its dissemination and how this poses a threat to democracy. The second chapter entails a descriptive and analytical section on the DSA, focusing on those sections which are relevant to social media platforms and

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[667] *EEAS Special Report Update: Short Assessment of Narratives and Disinformation Around The COVID-19 Pandemic*, EUVSDISINFO (2020), https://euvsdisinfo.eu/uploads/2020/05/EEAS-Special-Report-May-1.pdf.

[668] *EEAS Special Report Update: Short Assessment of Narratives and Disinformation Around The COVID-19 Pandemic*, EUVSDISINFO (2020), https://euvsdisinfo.eu/uploads/2020/05/EEAS-Special-Report-May-1.pdf.

[669] *Disinformation about Russia's invasion of Ukraine - Debkunking Seven Myths spread by Russia,* EEAS (March 18, 2022), https://www.eeas.europa.eu/delegations/china/disinformation-about-russias-invasion-ukraine-debunking-seven-myths-spread-russia_en?s=166.

[670] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 1.

the combat of disinformation. Lastly, the third chapter will analyze the effectiveness of the DSA in reducing online disinformation, elaborating on general limitations of the DSA and the overarching difficulty in combating such a complex enemy as disinformation.

The limitation of this analysis resides in the nature of disinformation itself. It is a highly intricate phenomenon with numerous facets to disinformation, which cannot be summarized solely in one chapter. Nonetheless, the first chapter acts as a base for the understanding of the danger of disinformation and how it can be affected by the DSA.

The following argues that the DSA undoubtedly imposes a set of drastically needed duties for providers of online platforms, acting as legal and financial encouragement for social media platforms to monitor and moderate content, as well as coordinate with the EU's authorities. However, given the complex, ever-changing and highly adaptable nature of disinformation, the DSA may only have a limited effectiveness in tackling disinformation.

CHAPTER 1: The Danger of Disinformation

Defining disinformation

Since 2016 the term "fake news" has gained traction in news, politics and social media and has thus become ingrained in our day-to-day vocabulary. Academics specialized in journalism and media, such as Bennett and Livingston, however, explain that fake news cannot solely be considered as "isolated incidents of falsehood and confusion",[671] because it is more than just inaccurate information. This signals that behind the term "fake news" is not an issue solely concentrated in the realm of US politics, but a wider phenomenon: the circulation of misinformation and disinformation online.

Depending on the example in question, "fake news" can be misinformative or consist of disinformation.[672] As cited by Fallis, Floridi explains that misinformation is "well-formed and meaningful data (i.e. semantic content) that is false".[673] This often occurs during breaking news, for example, when people spread rumors to provide updates; their objective is not to circulate false information, instead they believe that this information is true.[674] Although misinformation does have negative effects on the consumption of media and influences people's outlooks,[675] disinformation could be considered as more dangerous. This is because "the activity of disinformation" can be defined as "creating and distributing intentionally

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[671] W. Lance Bennett and Steven Livington, *The disinformation order: Disruptive communication and the decline of democratic institutions,* 33(2) EUROPEAN JOURNAL OF COMMUNICATION, 122, 124 (2018).
[672] David M. J. Lazer, Matthew Baum, Yochai Benkler et al., *The science of fake news,* 359(6380) SCIENCE, 1094, 1094 (2018).
[673] Don Fallis, *What is disinformation?,* 63(3) LIBRARY TRENDS, 401, 409 (2015).
[674] Claire Wardle and Houssein Derakshan, *Journalism, "Fake News & Disinformation: Handbook for Journalism Education and Training,* UNESCO (2018), 7, 47, https://unesdoc.unesco.org/ark:/48223/pf0000265552.
[675] Alice Marwick and Rebecca Lewis, *Media Manipulation and Disinformation Online,* DATA & SOCIETY RESEARCH INSTITUTE (2017), 44, https://www.posiel.com/wp-content/uploads/2016/08/Media-Manipulation-and-Disinformation-Online-1.pdf.

deceptive content,"[676] as is shown by large-scale disinformation campaigns, for example. According to Fallis, disinformation has three distinct qualities: it is a type of information, which is likely to create false beliefs, and has the intention of evoking exactly these false beliefs.[677] Therefore, the defining difference between misinformation and disinformation is the question of malicious intent. Given its stark impact on democratic systems, disinformation will be at the heart of this analysis.

Disinformation as a threat to democracy

Although the 2016 presidential election brought viral attention to disinformation, it is by no means the first or the last time that disinformation has seriously threatened access to reliable information, trust in media and the stability of democracies. Disinformation can be traced back to the Romans,[678] however its circulation initially soared with the invention of the printing press in 1436, allowing the efficient reproduction of printed information.[679] Similarly, the increase in the spread and significance of disinformation in recent years can be attributed to the development of the internet. The emergence of the internet and social media not only enables information to reach millions through a digital click, but also gives users access to platforms where they can publish any information, such as on Twitter, Facebook, or other online forums.[680] Any user can post anonymously or behind fake usernames and repost or share arbitrarily, decreasing the ability to

[676] Peaks M. Krafft and Joan Donovan, *Disinformation by Design: The Use of Evidence Collages and Platform Filtering in a Media Manipulation Campaign,* 37(2) POLITICAL COMMUNICATION, 194, 195 (2020).
[677] Don Fallis, *What is disinformation?,* 63(3) LIBRARY TRENDS, 401, 404-407 (2015).
[678] Julie Posetti and Alice Matthews, *A short guide to the history of "fake news" and disinformation,* INTERNATIONAL CENTER FOR JOURNALISTS (July, 2018), 1, https://milunesco.unaoc.org/mil-resources/a-short-guide-to-the-history-of-fake-news-and-disinformation/.
[679] Ibid.
[680] Edson C. Tandoc, Zheng Wei Lim and Richard Link, *Defining "Fake News": A typology of scholarly definitions,* 6(3) DIGITAL JOURNALISM, 3 (2017).

maintain individual accountability for the creation or distribution of information. As such, the provision of information is no longer limited to journalists that are constrained to duties of honesty, transparency, and reliability. Instead, journalists as "gatekeepers" of information have been exchanged with intermediaries, such as social media platforms.[681]

Furthermore, disinformation campaigns exploit the system of the internet by using bots to disseminate false information on a mass scale.[682] They mimic human behavior by "[posting] content, [interacting] with each other, as well as real people, and … [targeting] people that are more likely to believe disinformation."[683] Similarly to how the identity of many users is unknown or non-existent, algorithms construct users' feeds using personal data without the user knowing how these recommendations are given. This allows for the targeting of specific user groups which are considered vulnerable to being interested in or believing the presented disinformation.[684] The result is "source blindness", a phenomenon described by Pearson as a situation "whereby individuals fail to consider source information when processing news content."[685] This creates a digital environment that is prone to exploitation by malicious actors. Therefore, Freelon and Wells argue that disinformation is "*the* defining political communication topic of our time."[686] The intricate and complex tactics used by actors of disinformation have the power to

[681] Lucas Graves and C.W. Anderson, *Discipline and promote: Building infrastructure and managing algorithms in a "structured journalism" project by professional fact-checking groups,* 22(2) NEW MEDIA & SOCIETY, 342, 344-345 (2020).
[682] Samantha Bradshaw and Philip N. Howard, *Troops, Trolls and Troublemakers: A Global Inventory of Organized Social Media Manipulation*, UNIVERSITY OF OXFORD (2017), 11, https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2017/07/Troops-Trolls-and-Troublemakers.pdf.
[683] Kai Shu, Amrita Bhattacharjee, Faisal Alatawi et al., *Combating disinformation in a social media age,* 10(165) WILEY INTERDISCIPLINARY REVIEWS, 1, 8 (2020).
[684] Samantha Bradshaw and Philip N. Howard, *Troops, Trolls and Troublemakers: A Global Inventory of Organized Social Media Manipulation*, UNIVERSITY OF OXFORD (2017), 10, https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2017/07/Troops-Trolls-and-Troublemakers.pdf.
[685] George Pearson, *Sources on social media: Information context collapse and volume of content as predictors of source blindness,* 23(5) NEW MEDIA & SOCIETY, 1181, 1183 (2021).
[686] Dean Freelon and Chris Wells, *Disinformation as a Political Communication,* 37(2) POLITICAL COMMUNICATION, 145, 145 (2020).

influence election outcomes, create social and political instability and amplify polarizations amongst a population.

Moreover, disinformation threatens democracy by undermining society's right to free and reliable information. Before the Digital Revolution, such was guaranteed by reading a newspaper or watching the news on television, even if different media outlets are also biased politically. However, today's digital world blurs our knowledge of where accurate information is found and who publishes it. A process of fact-checking and questioning content is an important part of consuming news on social media to ensure the information is truthful.

Due to the difficulty in detecting disinformation, anyone can fall into its trap; as the common saying goes, *the best lies contain a bit of the truth*. As digital tools and systems now exist that enable the fast dissemination of such lies or half-truths, democracy has found a new enemy in disinformation. Simply said, democracy is based on the foundations of freedom, equality, and representation of the population in government. However, the ability of a population to have an individual, independent, and informed voice is severely undermined by the oblivious confrontation with manipulative information. Due to the effectiveness of algorithms, disinformation is recommended to targeted groups, cementing belief in political extremism, anti-government sentiment, and hence aggravating polarization. It is unavoidable that a society has divisions, but disinformation further cements and increases these divisions.

The relationship between news, social media, and disinformation

In order to analyze the increasing threat that disinformation poses, the relationship between news and social media, and its implications, need to be analyzed. It will be illustrated how the structure of social media has challenged the position of journalists and enabled foreign powers to infiltrate media, fostering an environment for disinformation to grow.

Firstly, the emergence of social media uprooted traditional means of accessing news, resulting in a change of news distribution.[687] Before the Digital Revolution, news sources were characterized by a certain degree of centralization; information was accessed via public or private newspapers, television, or radio stations. Today, an additional layer of the digital world exists, where these traditional media outlets additionally produce digital content whether this is for their own specific application or for social media. According to the EU's annual Media and News Survey of 2022, 45% of respondents across all age groups stated that they used social media for information purposes, i.e., to follow the news and stay up-to-date with current affairs.[688] It is therefore clear that social media acts as a facilitator for information, or disinformation, distribution by "[blurring] the conception of information source".[689] The development of news from a system of centralization to one of fragmentation is only amplified by social media's characteristically low barriers to entry: anyone can make an account from anywhere in the world and can connect and reach anyone. Due to social media now being a hub of anonymity, it is more difficult to control the accuracy of published information, trace its origins and assign responsibility. This new system of fragmentation and anonymity can therefore easily be exploited by agents willing to create and distribute disinformation.

Secondly, due to the development away from traditional, centralized news sources, how we consume news and value it has changed. Apart from news now also being consumed through social media, what information we are recommended has been altered by algorithms of social media platforms. Posts that have a higher number of likes, comments, or shares (e.g., reTweets) are more likely to be viewed

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[687] Edson C. Tandoc, Zheng Wei Lim and Richard Link, *Defining "Fake News": A typology of scholarly definitions,* 6(3) DIGITAL JOURNALISM, 3 (2017).

[688] *Media & News Report 2022,* EUROPEAN PARLIAMENT (2022), 29, https://europa.eu/eurobarometer/surveys/detail/2832.

[689] Edson C. Tandoc, Zheng Wei Lim and Richard Link, *Defining "Fake News": A typology of scholarly definitions,* 6(3) DIGITAL JOURNALISM, 3 (2017).

by even more people.[690] Such algorithmic amplification therefore results in more attention being generated for posts that people interact with more, which may lead to internet virality. A 2018 study by the Massachusetts Institute of Technology on news stories on Twitter, found that false news often spreads more extensively than true ones, which may be linked to the bigger emotional reaction to such false stories.[691] This illustrates how rapidly disinformation can spread online. Furthermore, social media algorithms create echo chambers, those being virtual "environments in which the opinion, political leaning, or belief of users about a topic gets reinforced due to repeated interactions with peers or sources having similar tendencies and attitudes."[692] In short, this means that online we see what we want to see. Due to echo chambers further activating our confirmation bias,[693] disinformation that a user is confronted with which fits into their political, ideological, or moral beliefs, is more likely to be considered as true. Our news consumption has therefore changed in platform and is subject to algorithms, which can allow disinformation to flourish.

Thirdly, the emergence of social media has changed the journalistic profession, triggering the so-called third wave of journalism.[694] Whilst many positive results have also emerged due to this development, social media has posed significant challenges. Journalists have come under pressure to compete for attention, views, virality and hence advertising revenues with social media.[695] Due to such an attention economy, "low-quality but high-performing posts over

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[690] Ibid.
[691] Soroush Vosoughi, Deb Roy and Sinan Aral, *The spread of true and false news online,* 359(6380) SCIENCE, 1146, 1146 (2018).
[692] Matteo Cinelli, Gianmarco De Francisci Morales, Alessandro Galeazzi et al, *The echo chamber effect on social media*, 118(9) PROCEEDINGS OF THE NATIONAL ACADEMY FOR SCIENCE, 1, 1 (2021).
[693] *Confirmation Bias*, THE DECISION LAB, https://thedecisionlab.com/biases/confirmation-bias.
[694] Emily Bell and Taylor Owenthe, Peter Brown et al., The Platform Press: How Silicon Valley reengineered journalism, COLUMBIA UNIVERSITY (2017), 16.
[695] Alice Marwick and Rebecca Lewis, *Media Manipulation and Disinformation Online,* DATA & SOCIETY RESEARCH INSTITUTE (2017), 42, https://www.posiel.com/wp-content/uploads/2016/08/Media-Manipulation-and-Disinformation-Online-1.pdf.

high-quality journalism" are being incentivized.[696] Moreover, where it was solely journalists' role to provide reliable news, social media has now blurred the responsibility for news production and distribution. In turn, this is making the process of fact-checking and verification of information more difficult. Whilst social media has not changed the fundamental nature of journalism,[697] it has undermined journalism's ability to fulfill its core journalistic aims, including executing its role as the "watchdog" or "fourth power" and ensuring the population is accurately informed and fostering healthy democratic debate.

To summarize, the relationship between news, social media and disinformation is double-pronged. On one hand, social media acts as an amplifier for disinformation:[698] it has increased the possibility of disinformation to be viewed, disseminated and most importantly to be believed as the truth. On the other hand, journalism as a profession has undergone changes, reducing its control of the information that is broadcast to the public and adding additional pressures of competition on social media. These two inputs create an environment where disinformation can flourish.

Disinformation campaigns in practice

Social media has placed journalism in "a system built for scale, speed and revenue,"[699] a system that does not reward true news and accurate reporting but sensationalism and anonymity. This has been exploited by various actors in the past, and will continue to be exploited in the future, to execute disinformation campaigns.

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[696] Ibid.
[697] Emily Bell and Taylor Owenthe, Peter Brown et al., The Platform Press: How Silicon Valley reengineered journalism, COLUMBIA UNIVERSITY (2017), 15.
[698] W. Lance Bennett and Steven Livington, *The disinformation order: Disruptive communication and the decline of democratic institutions,* 33(2) EUROPEAN JOURNAL OF COMMUNICATION, 122, 124 (2018).
[699] Emily Bell and Taylor Owenthe, Peter Brown et al., The Platform Press: How Silicon Valley reengineered journalism, COLUMBIA UNIVERSITY (2017), 15.

In the 2020 Global Inventory of Organized Social Media Manipulation of the University of Oxford, evidence was found which illustrated that 81 countries use social media to spread disinformation and hence shape public opinion, representing an increase of 11 countries from the previous year's report.[700] Strategies for disinformation campaigns include the use of so-called cyber troops, "government, military or political party teams … to [manipulate] public opinion over social media".[701] Apart from actual people being behind the screen, countries also employ bots, accounts that are coded to interact with and imitate human users, which further virtually bombard social media with disinformation.[702] By posting automatic messages or posting keywords to trigger algorithmic amplification and control what content is trending[703] such bots support the dissemination of disinformation.[704] Given that journalists now also use social media in their look out for report-worthy news, such disinformation campaigns can also indirectly manipulate the news agenda.[705]

One of the most recent disinformation campaigns in the EU and the USA conducted by the Russian and Chinese governments occurred during the beginning of the COVID-19 pandemic.[706] In 2020, Guy Berger, Director for Policies and

[700] Samantha Bradshaw, Hannah Bailey and Philip N. Howard, *Industrialized Disinformation: 2020 Global Inventory of Organized Social Media Manipulation,* UNIVERSITY OF OXFORD (2021), 1, https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2021/01/CyberTroop-Report-2020-v.2.pdf.

[701] Samantha Bradshaw and Philip N. Howard, *Troops, Trolls and Troublemakers: A Global Inventory of Organized Social Media Manipulation*, UNIVERSITY OF OXFORD (2017), 4, https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2017/07/Troops-Trolls-and-Troublemakers.pdf.

[702] *Id*, 11.

[703] Samantha Bradshaw and Philip N. Howard, *Challenging Truth and Trust: A Global Inventory of Organized Social Media Manipulation,* UNIVERSITY OF OXFORD (2018), 6, https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2018/07/ct2018.pdf.

[704] It is important to note here that the emergence of chatbots, such as ChatGPT, have posed another strategy for disinformation campaigns. For further information: Tiffany Hsu and Stuart A. Thompson, *Disinformation Researchers Raise Alarms About A.I. Chatbots,* N.Y. TIMES (February 8, 2023), https://www.nytimes.com/2023/02/08/technology/ai-chatbots-disinformation.html.

[705] Franziska Keller, David Schoch, Sebastian Stier and JungHwan Yang, *Political Astroturfing on Twitter: How to Coordinate a Disinformation Campaign,* 37(2) POLITICAL COMMUNICATION, 256, 258 (2023).

[706] *EEAS Special Report Update: Short Assessment of Narratives and Disinformation Around The COVID-19 Pandemic*, EUVSDISINFO (2020), https://euvsdisinfo.eu/uploads/2020/05/EEAS-Special-Report-May-1.pdf.

Strategies regarding Communication and Information at UNESCO stated that "there seems to be barely an area left untouched by disinformation in relation to the COVID-19 crisis."[707] Nine key recurring topics at the heart of disinformation campaigns were identified, including origins of the coronavirus, medical science and the discrediting of journalists,[708] some of which were produced and disseminated by Russian state media and pro-Kremlin outlets, and further spread through social media.[709] Some stories of Russian disinformation campaigns that supported conspiracy theories, for example, illustrated a link between COVID-19 and 5G networks or COVID-19 has an origin in biological warfare, as well as denounced the effectiveness of vaccines, especially those produced in the West.[710] The aim was to increase the disruption and confusion caused by the public health crisis and undermine European powers.[711] One recurring story that was disseminated by Russia and China regarded alleged biological labs where the USA produced the coronavirus.[712] It is clear that in the midst of a public health crisis, a time of worry and loss, such false stories add to the overarching level of confusion within a population and pose a significant danger in that they may prevent citizens from taking action to ensure their health.

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[707] UN News, *During this coronavirus pandemic, "fake news" is putting lives at risk,* UNITED NATIONS (April 13, 2020), https://news.un.org/en/story/2020/04/1061592.

[708] Julie Posetti and Kalina Bontcheva, *Disinfodemic: Deciphering COVID-19 disinformation,* UNESCO (2020), 6, https://unesdoc.unesco.org/ark:/48223/pf0000374416.

[709] Robin Emmott, *Russia deploying coronavirus disinformation to sow panic in West, EU document says,* REUTERS (March 18, 2020), https://www.reuters.com/article/us-health-coronavirus-disinformation/russia-deploying-coronavirus-disinformation-to-sow-panic-in-west-eu-document-says-idUSKBN21518F.

[710] *EEAS Special Report Update: Short Assessment of Narratives and Disinformation Around The COVID-19 Pandemic*, EUVSDISINFO (2020), https://euvsdisinfo.eu/uploads/2020/05/EEAS-Special-Report-May-1.pdf.

[711] Robin Emmott, *Russia deploying coronavirus disinformation to sow panic in West, EU document says,* REUTERS (March 18, 2020), https://www.reuters.com/article/us-health-coronavirus-disinformation/russia-deploying-coronavirus-disinformation-to-sow-panic-in-west-eu-document-says-idUSKBN21518F.

[712] *EEAS Special Report Update: Short Assessment of Narratives and Disinformation Around The COVID-19 Pandemic*, EUVSDISINFO (2020), https://euvsdisinfo.eu/uploads/2020/05/EEAS-Special-Report-May-1.pdf.

To illustrate how disinformation campaigns are used for political gains, the Russian disinformation campaign in Russia must also be mentioned. Given Russian political interests in Ukraine as a former Soviet country and border state, Russian disinformation campaigns have been prevalent in Ukraine, especially regarding the Russian illegal annexation of Crimea in 2014 and the current ongoing war between the two nations.[713] As tracked and recorded by the EEAS, pro-Kremlin media outlets have claimed that Ukraine has committed genocides towards the Russian-speaking populations in the East for example.[714] This has since been proven as untrue in reports by the Council of Europe and the OSCE.[715] Apart from the disinformation spread by state supported news within Russia, disinformation campaigns have reached social media and across Europe.[716] Deep fake videos of Ukrainian President Zelensky, for example, were spread across social media, alleging that he had fled the country and encouraged his army to surrender.[717] Similarly, videos that impersonated those of traditional media outlets, such as the BBC and Al Jazeera, were created and disseminated to illustrate reliability and undermine popular trust in traditional media.[718] This illustrates how Russia is using disinformation to erode foreign and domestic support for Ukraine and its leadership. Therefore, Russian disinformation campaigns are exploiting the already existing horror and confusion of war to further promulgate their political goals.

[713] *Disinformation about Russia's invasion of Ukraine - Debkunking Seven Myths spread by Russia,* EEAS (March 18, 2022), https://www.eeas.europa.eu/delegations/china/disinformation-about-russias-invasion-ukraine-debunking-seven-myths-spread-russia_en?s=166.
[714] Ibid.
[715] Ibid.
[716] Roman Osadchuck et al., *Undermining Ukraine: How the Kremlin Employs Information Operations to Erode Global Confidence in Ukraine,* ATLANTIC COUNCIL (2023), 1, https://www.atlanticcouncil.org/wp-content/uploads/2023/02/Undermining-Ukraine-Final.pdf.
[717] Id., 12.
[718] Id., 1.

It is therefore clear that this new form of warfare, i.e., information warfare, poses a decisive threat to democracy.[719] Amongst many others, the distinguishing factors between democracies and authoritarian regimes are based on the involvement in free and fair elections, as well as the ability to independently produce and access reliable information that is not censored by the government. Apart from undermining a population's ability to be well informed, disinformation increases political polarization, lowers trust in traditional media outlets and subverts the honesty and accuracy of electoral processes, all of which contradict core democratic principles.[720] It is therefore of increasing importance that disinformation is tackled to maintain political stability, unity, and a healthy societal environment. The DSA has been named as one of such measures that may be able to reduce disinformation and hence ensure the maintenance of a stable and strong democratic system. How this may exactly be possible will be outlined in the following chapter.

CHAPTER 2: Defining The Digital Services Act

As outlined in the previous chapter, disinformation is a grave threat to democracy, one that is amplified through the mechanisms of social media and exploited by foreign powers. In February of this year, the EEAS published its first report on Foreign Information Manipulation and Interference Threats, analyzing disinformation campaigns and establishing a common framework for policy choices.[721] In the report, Josep Borrel, High Representative of the Union for Foreign

[719] Samantha Bradshaw, Hannah Bailey and Philip N. Howard, *Industrialized Disinformation: 2020 Global Inventory of Organized Social Media Manipulation,* UNIVERSITY OF OXFORD (2021), 21, https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2021/01/CyberTroop-Report-2020-v.2.pdf.
[720] Sophie L. Vériter, Coreneliu Bjola and Joachim A. Koops, *Tackling COVID-19 Disinformation: Internal and External Challenges for the European Union,* 15(4) THE HAGUE JOURNAL OF DIPLOMACY, 569, 572 (2020).

[721] *First EEAS Report on Foreign Information Manipulation and Interference Threats*, EEAS (2023), 7,
https://euneighbourseast.eu/news/publications/first-eeas-report-on-foreign-information-manipulation-and-interference-threats/.

Affairs and Security Policy and Vice President of the European Commission, wrote: "We need to work with democratic partners around the world to fight information manipulation by authoritarian regimes more actively. It is time to roll up our sleeves and defend democracy, both at home and around the world."[722] The EU is therefore clearly aware of the grave threat of disinformation.

The EU's fight against disinformation

Even before the COVID-19 pandemic and the Russian invasion of Ukraine, the EU has put significant efforts into establishing a framework that can prevent disinformation from thriving. These significant steps will be briefly outlined to illustrate the context in which the DSA was introduced. In 2015, the EU launched EEAS East StratCom Task Force, which focuses specifically on analyzing and monitoring disinformation in Eastern Europe,[723] by for example publishing and correcting disinformation on the EUvsDisinfo website.[724] Here, it is also important to mention the 2019 EU Action Plan Against Disinformation, which aims to "to build up capabilities and strengthen cooperation between Member States and EU institutions to proactively address disinformation."[725] This plan outlines how the EU aims to further reduce disinformation through four pillars: improving detection and monitoring of disinformation, improving coordinated responses, encouraging the private sector to fight disinformation, and raising awareness within society.[726]

Especially important for the mobilization of the private sector is the 2022 Strengthened Code of Practice on Disinformation, which sets out regulatory standards for combatting disinformation, including the transparency of political

[722] *Id*, 6.
[723] *Questions and Answers about the East Stratcom Task Force*, EEAS, https://www.eeas.europa.eu/eeas/questions-and-answers-about-east-stratcom-task-force_en#11234.
[724] *About,* EUVSDISINFO, https://euvsdisinfo.eu/about/.
[725] *Action Plan Against Disinformation,* EEAS (2019), https://www.eeas.europa.eu/sites/default/files/disinformation_factsheet_march_2019_0.pdf.
[726] *Audit Preview: EU Action Plan Against Disinformation,* EUROPEAN COURT OF AUDITORS (2020), 8, https://www.eca.europa.eu/lists/ecadocuments/ap20_04/ap_disinformation_en.pdf.

advertising and the amplification of awareness through content flagging and moderation.[727] Signatories include a wide range of private sector companies, including Google, Meta, TikTok and Twitter.[728]

What is the DSA?

Whilst the EU's Action Plan Against Disinformation has included measures of absolute importance, the efforts may be limited. The 2022 Strengthened Code of Practice on Disinformation, for example, relies on a self-regulatory approach[729] and as such may not provide the necessary encouragement to adhere to the measures.

Considered a landmark piece of legislation, the introduction of the DSA may therefore be able to fill this gap by imposing stronger and consistent legal obligations for online platforms.[730] The European Commission describes it as "a first-of-a-kind regulatory toolbox globally", which "sets an international benchmark for a regulatory approach to online intermediaries."[731] This chapter will outline exactly this new benchmark, i.e. the new obligations for social media platforms due to the implementation of the DSA, and will make first remarks regarding its implications for the spread of disinformation.

The DSA constitutes one half of the EU's Digital Services Package,[732] the other one being the Digital Market Act (DMA), which focuses on the economic

[727] *2022 Strengthened Code of Practice on Disinformation,* EUROPEAN COMMISSION (June 16, 2022), https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation.
[728] *Signatories of the 2022 Strengthened Code of Practice on Disinformation,* EUROPEAN COMMISSION (June 16, 2022), https://digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation.
[729] Ibid.
[730] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.
[731] *Digital Services Act: EU's landmark rules for online platforms enter into force,* EUROPEAN COMMISSION (November 16, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6906.
[732] *The Digital Services Act Package,* EUROPEAN COMMISSION, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

positions of digital platform companies and competitiveness within the digital services market.[733] Based on the e-Commerce Directive (ECD), which was a long-standing pillar for the regulation of digital services,[734] the main aim of the DSA however is to protect consumers of digital platforms and to ensure that their fundamental rights are upheld by regulating intermediary services.[735] Although the DSA aims to fill the gaps of the ECD and hence does not solely address disinformation, this landmark regulation for online platforms could nonetheless have significant implications for the EU's fight against harming information.[736]

To ensure that the legal approach of the DSA is understandable, its categorization of different services must first be outlined. The DSA lays out four categories of service providers varying in their size and impact on the digital ecosystem, which are targeted by the Regulation, those being: intermediary services, hosting services, online platforms and very large online search engines (VLOSEs)[737] and very large online platforms (VLOPs).[738] This does not mean that these are completely separated entities, but rather that they are interlinked: a hosting service is a subcategory of an intermediary service, an online platform a

[733] *The Digital Markets Act: ensuring fair and open digital markets,* EUROPEAN COMMISSION (October 12, 2022), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

[734] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1.

[735] *The Digital Markets Act: ensuring fair and open digital markets,* EUROPEAN COMMISSION (October 12, 2022), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

[736] *Digital Services Act: EU's landmark rules for online platforms enter into force,* EUROPEAN COMMISSION (November 16, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6906.

[737] The obligations outlined under Chapter III Section 4 of the DSA apply to VLOPs and VLOSEs equally. However, given the nature of the discussion on disinformation and social media platforms, only "VLOPs" or "social media platforms" will be mentioned. Nonetheless, the same obligations apply to those online platforms that will be designated as VLOSEs.

[738] *The Digital Services Act: Ensuring a safe and accountable online environment,* EUROPEAN COMMISSION (October 27, 2022), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.

subcategory of a hosting service, and a VLOP a subcategory of an online platform.[739] As such, more rules and obligations apply to VLOPs than a simple intermediary service. This categorization is of significance, as they result in large social media platforms, such as TikTok, Facebook, Instagram and Twitter, being categorized as a VLOP and hence held to the highest standard of due diligence under the DSA.[740] As it is estimated that these VLOPs reach more than 10% of the EU population,[741] it is understandable that the DSA introduced such an extensive list of obligations for social media platforms, facing them with an increased level of scrutiny.

With the rules of the DSA only having entered into force on the 16th of November 2022 and only fully applying from the 17th of February 2024,[742] the DSA's effectiveness is not yet known. Nonetheless, given the lack of obligations for digital platforms in relation to their content prior to the DSA, the analysis of the DSA is necessary to understand the future of disinformation in Europe.

The objectives, definitions, and structure of the DSA

In order to outline how and to what extent the DSA may be able to reduce the threat of disinformation, its aim, scope and application must be further portrayed. Article 1(1) of the DSA stipulates that the subject matter of the regulation is "to contribute to the proper functioning of the internal market for intermediary services by setting out harmonized rules for a safe, predictable and trusted online

[739] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, recital 41.
[740] Clothilde Goujard, *TikTok, Twitter, Facebook set to face EU crackdown on toxic content,* POLITICO (February 17, 2023), https://www.politico.eu/article/tiktok-confirms-it-faces-highest-content-moderation-obligations-under-eu-law/.
[741] *Digital Services Act: EU's landmark rules for online platforms enter into force,* EUROPEAN COMMISSION (November 16, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6906.
[742] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 93.

environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected."[743] Specifically, the DSA also intends to "[address] the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate."[744]

In order to achieve these objectives, the DSA imposes new obligations on providers of digital services which should harmonize the laws of the Member States, foster increased transparency and responsibility of platforms and reduce confrontation with illegal content, including disinformation.[745] As stipulated by Article 2 of the DSA, these obligations apply to all intermediary services that provide such services within the Union.[746] Therefore, the DSA is not only a milestone for the legal regulation of digital services within the EU but creates this "international benchmark"[747] for ensuring protection online, which is likely to affect regulation outside of the EU as well.

To fully understand the aim of the DSA, and let alone its application, certain definitions need to be clarified, which are laid out in Article 3 of the Regulation. A "hosting service" is the type of intermediary service that is significant in the analysis of social media platforms and disinformation, as these "[consist] of the storage of information provided by, and at the request of, a recipient of the

[743] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 1.
[744] Id., recital 9.
[745] *The Digital Services Act: Ensuring a safe and accountable online environment,* EUROPEAN COMMISSION (October 27, 2022), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.
[746] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 2.
[747] *Digital Services Act: EU's landmark rules for online platforms enter into force,* EUROPEAN COMMISSION (November 16, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6906.

service".[748] Hence, services which allow the sharing of information and content online fall under this category,[749] which is the purpose of social media platforms. Whilst the DSA does not explicitly define social media platforms, it does provide a description of an "online platform", explaining it as "a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service …".[750] As the storing and dissemination of information to the public is not an ancillary feature to social media platforms, as indicated by recital 13 of the DSA,[751] social media platforms are considered as those of a hosting service and, more specifically, an online platform in the context of the DSA.

Furthermore, the biggest social media platforms would be considered as VLOPs. Article 33(1) of the DSA stipulates that to be designated as a VLOP, an online platform must have 45 million average monthly users or higher within the EU. Until the 17th of February 2023, online platforms had to publish their number of average monthly users,[752] which confirmed that TikTok, Facebook, Instagram and Twitter would be considered VLOPs.[753] To ensure transparency and legal clarity, the Commission has published its first list of platforms that have been designated as

[748] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 3(g)(iii).
[749] Id., recital 29.
[750] Id., art 3(i).
[751] Id., recital 13.
[752] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 24(2).
[753] Clothilde Goujard, *TikTok, Twitter, Facebook set to face EU crackdown on toxic content,* POLITICO (February 17, 2023), https://www.politico.eu/article/tiktok-confirms-it-faces-highest-content-moderation-obligations-under-eu-law/.

VLOPs, including those mentioned above.[754] Therefore, these large social media platforms will be subject to the additional obligations imposed on VLOPs.

Apart from showing under which category social media platforms fall, the DSA places the concept of disinformation under the term of "illegal content." Under Article 3(h) DSA, this is defined as "any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law…". This definition alone seems to refer solely to stark examples such as images that show child sexual abuse or content that promotes the sale of illicit goods. However, recital 12 of the DSA clarifies that the phrase should be considered as an umbrella term, including "information relating to illegal content, products, services and activities."[755] Although disinformation is not generally illegal within the EU,[756] disinformation campaigns can be considered as an illegal activity due to the disruptive nature of disinformation in terms of democracy, freedom of speech, public policy, and public health.

Enforcement mechanisms

Regulations imposing new obligations can only be as effective as their enforcement mechanisms. Therefore, before analyzing any new obligations that came to fruition through the DSA, it is important to understand the general structure and methods of monitoring and enforcing the commitment to this Regulation, where specific focus needs to be given to its two key players: the Digital Service Coordinators (DSCs) and the Commission.

[754] *Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines,* EUROPEAN COMMISSION (April 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413.
[755] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, recital 12.
[756] Meyers, Z. (2022, April 21). *Will the Digital Services Act save Europe from disinformation?* Centre for European Reform. Retrieved April 15, 2023, from https://www.cer.eu/insights/will-digital-services-act-save-europe-disinformation.

Apart from imploring each Member State to "designate one or more competent authorities to be responsible for the supervision of providers of intermediary services and the enforcement of this Regulation",[757] the DSA's created the new supervisory position of the DSCs, which will consist of one of the competent authorities.[758] As such, each Member State will have a DSC that will be responsible for establishing nation-wide coordination of the matters of the DSA and coordinating with the DSC of the other Member States,[759] whilst maintaining full independence from external influences.[760]

In order for the DSCs to achieve their objective of monitoring and ensuring compliance with the responsibilities of the Regulation, they will be appointed certain powers. These include the power to demand information from providers of services, to perform themselves or seek a judicial authority of a Member State to inspect a possible infringement of the Regulation.[761] Furthermore, the DSCs may take actions to stop an infringement of the DSA. The supervisory body can adhere to this responsibility by "[requiring] the management body of those providers … to examine the situation, adopt and submit an action plan setting out the necessary measures to terminate the infringement", ensuring that the action plan is realized and reporting on it.[762] If this is not sufficient, the DSC may also "request that the competent judicial authority of its Member State order the temporary restriction of access of recipients to the service concerned by the infringement."[763] Therefore, it is clear that the DSCs are given significant powers that aid the supervision of compliance with the Regulation.

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[757] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 49(1).
[758] Id., art 49(2).
[759] Ibid.
[760] Id, art 50(2).
[761] Ibid.
[762] Id, art 51(3)(a).
[763] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 51(3)(b).

The other key player in the regulation of VLOPs is the Commission. Whilst the DSC is responsible for all intermediary services, it is the Commission that has "exclusive powers to supervise and enforce Section 5 of Chapter III", that which is solely applicable to VLOPs.[764] As such, the Commission may initiate proceedings against VLOPs,[765] request information,[766] take interviews and statements,[767] and even conduct inspections,[768] representing the new supervisory powers also gained by the Commission.[769]

The national DSCs and Commission will be supervised, advised and supported by the creation of another supervisory body: the European Board for Digital Services ("the Board").[770] It shall be tasked with aiding the coordination of investigations, supporting the analysis of reports and audits of VLOPs, as well as providing advice and opinions on matters of the DSA.[771] As such, the Board will be the player that overarchingly ensures that the DSA is efficiently applied and that the relevant parties fulfill its responsibilities under it.

Furthermore, it is the threat of a significant penalty that will play a role in encouraging compliance with the DSA. Under Article 52 of the Regulation, providers of services may be fined up to 6% of their annual worldwide turnover in the preceding financial year if they fail to fulfill an obligation.[772]

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[764] *Id*, art 56(3).
[765] *Id*, art 66(1).
[766] *Id*, art 67(1).
[767] *Id*, art 68(1).
[768] *Id*, art 69(1).
[769] *Digital Services Act: EU's landmark rules for online platforms enter into force,* EUROPEAN COMMISSION (November 16, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6906.
[770] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 61(1).
[771] *Id*, art 63(1).
[772] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 52(3).

How can the new obligations for social media platforms reduce disinformation?

General obligations

Before discussing obligations that are solely specific to VLOPs, some general requirements for all intermediary service providers that are relevant to reducing disinformation within the EU must be outlined.

Firstly, it is important to note that as is the case under the ECD,[773] social media platforms, as a hosting service, are not liable for the content on their platforms if the providers do not have "actual knowledge of illegal activity or illegal content".[774] This means that social media platforms need to remove content once they are aware of its illegality, however that no general obligation for proactive monitoring and possible removal exists.

All hosting services, including VLOPs, need to provide notice and action mechanisms to "to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content."[775] Such notices must contain various requirements, including the reasons why the individual believes the content to be illegal, as well as where this information can be found online, for example by providing a URL.[776] This shall allow for the efficient submission of notices and hence facilitate a quick response by providers where needed. When reacting to such a submission of notice, the provider of the online platform can remove the content in question, as well as suspend or

[773] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1, art 15.
[774] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 6.
[775] *Id*, art 16.
[776] *Id*, art 16(2).

terminate the provision of services to the recipient who published the content.[777] If such is the case, the service provider must provide a statement of reasons to the affected user, establishing what decision has been taken and reasons for this decision.[778] Furthermore, the provider of the service must inform the law enforcement or judicial authorities of the Member State if this process makes the provider aware of criminal offenses, which involve "a threat to the life or safety of a person or persons."[779] Therefore, when a user becomes confronted with information they consider to be dangerous, such as disinformation, it is easier for the user to bring it to the attention of the platform and for the provider of the platform to know where to react. The intention is that the reaction speed of social media platforms towards removing or reducing access to content that contains disinformation, for example, can be increased, as the users themselves direct the platforms to where the threat is.

Risk management and crisis response for VLOPs

Apart from the provisions applicable to intermediary services, hosting services and online platforms, Section 5 of Chapter III of the DSA provides additional obligations for providers of VLOPs and VLOSEs to manage systemic risks. As such, Section 5 lays out specific responsibilities that pertain to social media platforms as VLOPs, the most important of which will be discussed in the following.

Firstly, in regard to risk assessments, VLOPs are obliged to "diligently identify, analyze and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic

[777] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art17(1).
[778] *Id*, art17(2).
[779] *Id*, art18(1).

systems."[780] Such risk assessments should be conducted at least once a year.[781] The DSA then identifies four categories of systemic risks that should be taken into account in the annual report: (a) the dissemination of illegal content; (b) negative impacts on the exercise of fundamental rights, explicitly mentioning the freedom of expression and information, and freedom and pluralism of the media as guaranteed by Article 11 of the Charter; (c) negative impacts on civic discourse, electoral processes and public security; and (d) negative impacts to the protection of public health, and person's physical and mental wellbeing amongst others.[782] As disinformation campaigns interfere with access to reliable information, free and fair elections, public security and public health, it is clear that disinformation counts as a systemic risk that needs to be fought by social media platforms.

Following the assessment of systemic risks, VLOPs are tasked to implement "reasonable, proportionate and effective mitigation measures"[783] that tackle those risks. The DSA provides a non-exhaustive list of measures, however, those applicable to weakening the threat of disinformation include adapting content moderation processes and algorithmic systems, or taking measures to raise awareness.[784] In collaboration between the Board and the Commission, comprehensive reports shall be published once a year which illustrate recurrent systemic risks and the best practices to mitigate them.[785] Therefore, through the duty to perform regular risk assessments, social media platforms are obliged to stay alert to the threat of disinformation, providing proper identification of the content of disinformation, data on its spread and its results. As this formal research and recording illustrates the issues that need to be faced, it may allow social media

[780] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 34(1).
[781] Ibid.
[782] *Id*, art 34(2).
[783] *Id*, art 35(1).
[784] Ibid.
[785] *Id*, art 35(2).

platforms to respond in a way that is more fine tuned to the risk and hence more efficient at reducing disinformation.

Furthermore, the DSA establishes a crisis response mechanism under Article 36, which gives the VLOPs guidance in situations that require acute risk identification and mitigation. Given a "crisis" is defined as a situation where "extraordinary circumstances lead to a serious threat to public security or public health in the Union",[786] the provision incorporates the threat of disinformation campaigns that occurred during the COVID-19 pandemic and are still occurring during the ongoing Russo-Ukrainian war. Firstly, following a decision of the Commission on the recommendation of the Board, VLOPs may be asked one or more of the following: to assess "whether, and if so to what extent and how, the functioning and the use of their services significantly contribute to a serious threat", to determine and apply mitigation measures of such risk, and to report to the Commission on the taken steps and their impact.[787] As such, the Commission will become an active participant in the crisis response by discussing the measures' effectiveness and proportionality with the provider,[788] and by monitoring the application of the measures.[789] Furthermore, if the Commission deems it necessary, it may initiate a decision obligating the provider to review the identified measures and/or their application.[790] These decisions will be taken with and reported to the Board,[791] allowing the Board to retain oversight of the developments.

Apart from the responsibility of crisis management being transferred to the VLOPs themselves, the Board may also recommend the Commission to develop voluntary crisis protocols to mitigate crisis situations.[792] These protocols shall

[786] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 36(2).
[787] *Id*, art 36(1).
[788] *Id*, art 36(6).
[789] *Id*, art 36(7).
[790] Ibid.
[791] *Id*, art 36.
[792] *Id*, art 48(1).

include the role of each participant, the measures that shall be implemented and used to safeguard fundamental rights guaranteed by the Charter, and a process allowing for the regular reporting of the measures and their effects.[793] Crisis management and responses are therefore conceived by the social media platforms, where disinformation is found, and the Commission, the supervisory figure. It is hoped that through the adoption of such measures the spread of disinformation campaigns in situations of crisis can be effectively hindered by the collaboration between social media platforms, the Commission, and the Board.

Recommender system, transparency, and compliance requirements for VLOPs

Although the DSA already sets out obligations regarding the recommender system, transparency and compliance for all intermediary services, Section 5 includes additional responsibilities that solely apply to VLOPs.

As established in the previous chapter, the algorithms of social media platforms act as amplifiers of disinformation, adding to the targeting of disinformation campaigns and its spread. Therefore, it is necessary to discuss new regulations for the recommender systems of social media platforms and how they may combat this problem. In their terms and conditions, all online platforms that use recommender systems should describe the "main parameters used in their recommender system" and the options provided to the users "to modify or influence those parameters".[794] These parameters should explain the factors that determine which information is presented to them[795] and shall be explained "in plan and intelligible language"[796] to foster understanding among the recipients of such services. Following the obligations set out all online platforms, further

[793] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 48(4).
[794] *Id*, art 27(1).
[795] *Id*, art 17(2).
[796] *Id*, art 27(1).

requirements for the recommender systems of VLOPs are imposed under Article 38. It demands that if a VLOP uses a recommender system, it "shall provide at least one option for each of their recommender systems which is not based on "profiling".[797] The EU's General Data Protection Regulation (GDPR) defines the term "profiling" as "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person,"[798] including location or movements, personal preferences or the health or economic situation of an individual user. As such, it obliges VLOPs to provide at least one option where recommendations are given without the need of automatically processing personal data, allowing for transparency and control of user's data.

Lastly, all providers of intermediary services must publish regular reports to ensure transparency in reporting to the DSC of their Member State and to the Commission. Given their status as VLOPs, social media platforms need to provide such a report every six months[799] instead of at least once a year, as is foreseen for other providers of intermediary services,[800] and must include a wider set of information that encompasses requirements of Article 15 (for providers of intermediary services), Article 24 (for providers of online platforms) and Article 42 (specifically for VLOPs and VLOSEs). Firstly, all providers of intermediary services shall include specific information regarding content moderation in their annual reports, including what orders for content moderation were received by Member State authorities pursuant to Article 9 and Article 10, what notices were submitted

[797] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 38.
[798] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art 4(4).
[799] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 42(1).
[800] *Id*, art 15(1).

pursuant to Article 16, what content moderation was actually undertaken, as well as the median time required for such response.[801] Furthermore, upon request online platforms must communicate to the DSC and the Commission the average monthly active recipients of their services within the EU.[802] Solely applicable to VLOPs, social media platforms must also illustrate the human resources used in content moderation and compliance with other previously mentioned obligations.[803] Here, Article 42 DSA also reiterates the transparency reporting duties found in its requirements for an independent audit, and risk mitigation efforts.[804] Therefore, it is clear that the EU legislators are strongly ensuring that information on actions undertaken by social media platforms, for example, flow freely and consistently between the providers, the DSCs and the Commission. This will allow the supervisory figures to maintain oversight about the content that is spread throughout the social media platforms, as well as the actions they are taking to limit its negative impacts.

In order to ensure that the VLOPs adhere to these new obligations set out, Section 5 of the DSA includes provisions that direct VLOPs themselves to ensure compliance with the act. Firstly, VLOPs are instructed to conduct an independent audit at least once a year at their own expenses.[805] This independent entity shall assess whether the VLOP complies with the provisions of Chapter III of the DSA, as well as the codes of conduct established in Article 45, 46 and 48,[806] and make "operational recommendations" where compliance is lacking.[807] To illustrate that these recommendations are taken seriously, the VLOP shall adopt an "audit

[801] *Id*, art 24(3).
[802] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 15.
[803] *Id*, art 42(4).
[804] *Id*, art 42(2).
[805] *Id*, art 37(1).
[806] Ibid.
[807] *Id*, art 37(6).

implementation report" that either shows that they have implemented the recommendations or gives reasons as to why this has not been done.[808]

Furthermore, the VLOPs must "establish a compliance function, which is independent from their operational functions and composed of one or more compliance officers" in order to monitor compliance with the Regulation.[809] The head of such a compliance function must cooperate with the DSC and the Commission, ensuring, amongst others, that risk reporting and mitigation, as well as independent audits are conducted appropriately.[810]

Apart from implementing methods to ensure and monitor compliance with the Regulation internally, VLOPs must also secure the ability of the DSC and the Commission to monitor conformity. Under Article 40 DSA, VLOPs must provide the DSC or the Commission access to data that is necessary in monitoring the fulfillment of the obligations when required by these supervisory bodies.[811]

Lastly, given that the DSA establishes new tasks for Commission in terms of monitoring, assessing, and proposing recommendations in the field of activities on and of online platforms,[812] VLOPs are instructed to pay a yearly supervisory fee.[813] This is also intended to cover the costs for the hiring of almost 200 new staff members that the Commission expects to hire to enforce the Regulation.[814]

To summarize, it is visible that VLOPs, and hence social media platforms, are subject to a larger number of new duties than other providers of intermediary services in order to ensure that the online environment is a safe and fair place for users. It imposes responsibilities of transparency reporting, identifying, monitoring, and reacting to possible risks on social media platforms, and ensures their

[808] Ibid.
[809] *Id*, art 41(1).
[810] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 41(3).
[811] *Id*, art 40(1).
[812] *Id*, art 43(2).
[813] *Id*, art 43(1).
[814] The Associated Press, *EU law targets Big Tech over hate speech, disinformation,* NPR (April 23, 2022), https://www.npr.org/2022/04/23/1094485542/eu-law-big-tech-hate-speech-disinformation.

compliance and cooperation with the DSC and the Commission. As such, a framework is established that allows the institutions of the European Union to maintain an overview of risks and issues of the online sphere. Whilst disinformation may not be the primary subject matter of the DSA, the imposed obligations may nonetheless significantly support the EU's fight against disinformation and hence reduce this threat against democracy.

CHAPTER 3: Can The Digital Services Act Overcome The Threat of Disinformation?

From the previous chapter, there is no doubt that the DSA has set out significant new obligations for providers of VLOPs, including social media platforms, aiming to improve consumer protection and ensure the moderation of illegal content online, such as disinformation. Given the introduction of this extensive legislative system, the DSA has been described as the "constitution for the internet,"[815] which has the potential to limit the stark influence of Silicon Valley in Europe. The previous chapter has demonstrated the significant demands made for the VLOPs, illustrating the advantages the DSA can produce when combatting disinformation. The strengths of the DSA are derived from two aspects: its impact on the practice of social media platforms itself, and the benefits to the DSCs and the Commission. As such, the social media platforms are obliged to take actions, such as monitoring and moderating of disinformation, and provide the supervisory bodies information on this, allowing them to remain under oversight and deepen their understanding of the issues online. The hope is that this will allow the supervisory bodies in collaboration with the social media platforms to produce successful strategies that combat systemic risks, including disinformation online.

[815] *Europe Calling "DSA Deal: A constitution for the internet!",* THE GREENS/EFA IN THE EUROPEAN PARLIAMENT (April 29, 2020), https://en.alexandrageese.eu/video/europe-calling-dsa-deal/.

However, no matter how revolutionary a legislative piece may be, limitations will undoubtedly exist to its effectiveness. This may also be the case for the DSA, which does face significant criticisms regarding its interference with other rights, liability, and enforcement mechanisms amongst other factors. Furthermore, whilst the DSA provides a legal framework for content moderation, its effectiveness in reducing disinformation may remain limited. Therefore, the following will analyze the DSA's practical effectiveness, focusing on the possible limitations to the DSA's ability in reducing disinformation and its threat to democracy.

Limitations to the DSA's enforcement mechanism

Enforcement mechanisms of a legislative act are of such significance, because "substantive rules are nothing but a "paper tiger" without effective enforcement."[816] It is therefore important to firstly note that the DSA has strengthened its enforcement mechanisms from the GDPR, having learnt from its "serious failures".[817] The DSA enjoys a more centralized enforcement scheme, providing significant powers to the newly introduced DSCs and the Commission.

However, whilst the DSCs and the Commission not only can but should monitor, investigate, and demand information of providers of social media platforms in all Member States, there exists the risk of a lack of harmonization in implementation. Whilst the DSA lays out specific requirements for processes and information that needs to be included in reports, such as those requirements of the transparency reports,[818] it may be possible that the enforcement mechanisms may be applied differently in each Member State. This is already derived from the fact that the DSA has elicited differing opinions amongst its stakeholders regarding the

[816] Joris van Hoboke, Ilaria Buri, João Pedro Quintais et al., *The DSA has been published – now the difficult bit begins,* VERFASSUNGSBLOG (October 31, 2022), https://verfassungsblog.de/dsa-published/.
[817] Ibid.
[818] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 42.

necessity and strictness.[819] It is likely that the Member States' opinions will be divided similarly. Given that Article 6 of the DSA only provides rules for when a provider of an intermediary service cannot be held liable, "when a provider can be held liable" is up to the "applicable rules of Union or national law to determine."[820] Such freedom may "limit the capacity of the DSA to create a level playing field throughout the EU."[821] This is only reinforced by DSC's omission of specific provisions on the allocation of resourcing for each DSC, which may create "uneven enforcement" across the EU.[822] Therefore, the DSA's enforcement mechanisms may result in a lack of harmonization, which may especially pose an issue in the topic of disinformation, a phenomenon which aims to disseminate as fast and as far as possible. Due to the nature of disinformation, it is important that Member States apply similarly harsh enforcement mechanisms in order to actively and efficiently combat disinformation.

Furthermore, concerns regarding the rule of law have been raised with the responsibilities of the Commission under the DSA. As "guardian of the Treaties", the Commission is the head of the executive branch of the EU. However, the DSA "effectively assigns an implementation role to the European Commission", which may reflect a conflict of interests when the enforcer of the DSA also brings the social media platforms to court if they do not fulfill their obligations.[823] Similarly, the role distribution between the Commission, DSCs and the Board is not as clear, which may lead to overlap and conflict amongst them.[824]

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[819] Caroline Cauffmann and Catalina Goanta, *A New Order: The Digital Services Act and Consumer Protection,* 12(4) EUROPEAN JOURNAL OF RISK REGULATION, 758, 759 (2021).
[820] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, recital 17.
[821] Caroline Cauffmann and Catalina Goanta, *A New Order: The Digital Services Act and Consumer Protection,* 12(4) EUROPEAN JOURNAL OF RISK REGULATION, 758, 766 (2021).
[822] Asha Allen and Ophélie Stockhem, *A Series on the EU Digital Services Act: Ensuring Effective Enforcement,* CENTER FOR DEMOCRACY & TECHNOLOGY (August 18, 2021), https://cdt.org/insights/a-series-on-the-eu-digital-services-act-ensuring-effective-enforcement/.
[823] Ibid.
[824] Ibid.

Apart from the structural difficulties of the enforcement mechanism, it is also important to note the possible lack of effectiveness in allocating the responsibility of VLOPs, and hence disinformation, to the Commission.[825] Given the ever evolving and highly complex phenomenon of disinformation, it is possible that the Commission, not being an expert agency of the digital world, may not have the knowledge and abilities required to effectively ensure the reduction of disinformation.

Limitations to the DSA's effectiveness in combatting disinformation

Although a key element of the DSA is the monitoring, evaluation and potential removal of illegal content, the DSA does not provide a clear definition of what constitutes illegal content. This is already highlighted by the lack of certainty regarding whether the DSA targets solely illegal or also harmful content.[826] Rather it uses an umbrella term which encompasses not only hate speech and videos portraying sexual abuse, but also disinformation.[827] As different categories of illegal content are not outlined, the DSA also does not provide different obligations or recommendations depending on the illegal content found on social media platforms.[828] This uniform approach to regulating such content provides room for ineffectiveness in the application of the DSA. Simply removing a Tweet that contains hate speech and barring the user from using the platform, for example,

[825] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 56(3).
[826] Aina Turillazzi, Mariarosaria Taddeo, Luciano Floridi and Federico Casolari, *The Digital Services Act: An Analysis of Its Ethical, Legal, and Social Implications,* 15(1) LAW, INNOVATION AND TECHNOLOGY, 83, 95 (2023).
[827] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, recital 12.
[828] Joan Barata, *The Digital Services Act and its impact on the right to freedom of expression: special focus on risk mitigation obligations,* PLATAFORMA POR LA LIBERTAD DE INFORMACIÓN (2021), 17, https://libertadinformacion.cc/wp-content/uploads/2021/06/DSA-AND-ITS-IMPACT-ON-FREEDOM-OF-EXPRESSION-JOAN-BARATA-PDLI.pdf.

may be a successful content moderation act. However, doing the same for a Tweet that contains disinformation would not necessarily prevent the spread of a disinformation campaign. This difference in effectiveness is derived from the fundamental differences in the nature of types of illegal content: whilst hate speech may come from one individual, a post containing disinformation may be part of a larger campaign that is systematically organized from a governmental entity abroad. As such, the removal of a single Tweet cannot fight the dissemination of such disinformation, especially as this disinformation is spread by numerous bots and trolls. Therefore, the DSA may lack recommendations to tackle different types of illegal content, which may mean that no type of illegal content is regulated as effectively as could be possible.

Due to this lack of differentiation between illegal content, the DSA creates concerns regarding the balancing of two rights: that of consumer and user protection against freedom of expression. The latter is guaranteed by Article 10 of the European Convention on Human Rights (ECHR),[829] as well as by Article 11 of the EU Charter of Fundamental Rights.[830] Whilst both rights contain limitations, these rights can only be restricted according to principles of legality, necessity and proportionality.[831] Whilst many provisions of the DSA express that action should be taken in a "reasonable, proportionate and effective" manner, as for example stipulated in Article 35 on the mitigation of risks,[832] it is not clarified what is "illegal enough" to demand action. Although there is no longer a general liability of social media platforms for the content produced by their users,[833] the lack of specificity in

[829] Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe (1950), art 10.
[830] Charter of Fundamental Rights of the European Union [2000] OJ C364/1, art 11.
[831] Joan Barata, *The Digital Services Act and its impact on the right to freedom of expression: special focus on risk mitigation obligations,* PLATAFORMA POR LA LIBERTAD DE INFORMACIÓN (2021), 16, https://libertadinformacion.cc/wp-content/uploads/2021/06/DSA-AND-ITS-IMPACT-ON-FREEDOM-OF-EXPRESSION-JOAN-BARATA-PDLI.pdf.
[832] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 35(1).
[833] Id., art 6.

definitions and guidelines of the DSA may trigger the over-removal of content in an attempt to adhere to other obligations of the Regulation.[834] Such disproportionate infringement of users' rights as well as the disproportionate mitigation of risks,[835] is only amplified by the different interpretations of Member States in terms of what constitutes illegal expression and the lack of guidelines within the DSA.[836]

The issues of infringing on the right to freedom of expression is also present when trying to reduce disinformation. It is difficult to identify whether content qualifies as misinformation, an unintentional expression of false information, or disinformation, a purposeful and systematic dissemination of false information. Content that may just be an expression of unconventional or unaccepted views, may be flagged or removed, which could infringe on a user's right to freedom of expression and may undermine public discourse online. Whilst regulating misinformation is also important to society and democracy, the real threat is derived from actors aiming to undermine political and social stability through the intentional dissemination of false information. As such, the lack of specificity regarding types of illegal content in the DSA may not only lead to a difficulty in balancing rights but may also waste the efforts and resources of social media platforms.

Given the complex nature of disinformation due to the variety of actors and digital mechanisms involved and the speed of dissemination, social media platforms may not have the knowledge or resources available to remove disinformation from their platforms. In order to distinguish misinformation from disinformation and to follow the leads to other accounts involved in the disinformation campaign, professionals with extensive knowledge in the nature of disinformation are needed

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[834] Amélie P. Heldt, CHAPTER 4: EU DIGITAL SERVICES ACT: THE WHITE HOPE OF INTERMEDIARY REGULATION in Terry Flew and Fiona R. Martin, DIGITAL PLATFORM REGULATION: GLOBAL PERSPECTIVES ON INTERNET GOVERNANCE 79 (2022).

[835] Joan Barata, *The Digital Services Act and its impact on the right to freedom of expression: special focus on risk mitigation obligations,* PLATAFORMA POR LA LIBERTAD DE INFORMACIÓN (2021), 19, https://libertadinformacion.cc/wp-content/uploads/2021/06/DSA-AND-ITS-IMPACT-ON-FREEDOM-OF-EXPRESSION-JOAN-BARATA-PDLI.pdf.

[836] Ibid.

to investigate, monitor and deal with disinformation. Without enough resources or dedication to fighting disinformation, it easily falls under the radar of content moderators. Whilst such teams do exist, for example at Facebook, they are not a priority in the business model and their effectiveness remains questionable.[837] Given that under the DSA platforms are not ordered to take actions specifically to disinformation, no obligation to proactively investigate illegal content exists,[838] and no liability for platforms exists for content published by users,[839] the DSA also does not encourage or oblige platforms to properly tackle disinformation.

Disinformation: can legislation alone fight such a complex enemy?

Even if the DSA included obligations specific to fighting disinformation, it is unlikely that a legal framework can truly halt disinformation campaigns. This is attributable to the nature of disinformation, the speed at which it disseminates and the response of the audience.

The first barrier to the ability of legislative approaches to effectively reduce disinformation is that disinformation flexibly adapts to the restrictions put in place. Firstly, disinformation is not reliant on certain platforms to spread. If one social media platform removes certain content, the users can migrate to a different platform, which may not have tracked this disinformation campaign yet.[840] And when that social media platform removes the disinformation as well, users can even migrate to niche platforms, portals, or blogs. As such, "disinformation-related risks

[837] Steven Lee Myers and Nico Grant, *Combating Disinformation Wanes at Social Media Giants,* N.Y. TIMES (February 14, 2023), https://www.nytimes.com/2023/02/14/technology/disinformation-moderation-social-media.html.
[838] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art 6.
[839] Id., art 7.
[840] Paolo Cesarini, *Countering disinformation: Is the DSA Punching Below its Weight?,* EURACTIV (February 19, 2021), https://www.euractiv.com/section/digital/opinion/countering-disinformation-is-the-dsa-punching-below-its-weight/.

are endemic to the whole ecosystem" and not just to specific platforms.[841] Secondly, even if disinformation is tracked effectively, it can be hidden to avoid the detection of AI moderation tools.[842] Instead of using hashtags that are directly linked to the topic of disinformation, communities can use different ones to evade simple monitoring.[843] This means that AI tools used to detect disinformation must be updated regularly to adhere to the fast adaptation of dissemination. Thirdly, the use of bots in disinformation campaigns and the existence of AI which speeds up the production of disinformation means that content moderators cannot catch up to disinformation; it is simply produced, published, and disseminated too fast.

Moreover, a root cause of the success of disinformation campaigns is that it divides already existing social and political divisions and exploits a population's distrust in conventional media and the government. To put it simply, if the population were united in their opinions, and would continuously believe traditional news sources, then disinformation could not grow into a threat to democracy. However, especially since the COVID-19 pandemic, trust in the government[844]and traditional media outlets has been challenged,[845] making the population vulnerable to intentionally false information. Such individuals can effectively be targeted by disinformation campaigns.[846] These sociological factors are only amplified by the

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[841] Ibid.
[842] Iris Malone, *Will the EU's Digital Services Act Reduce Online Extremism?,* JUST SECURITY (May 16, 2022), https://www.justsecurity.org/81534/will-the-eus-digital-service-act-reduce-online-extremism/.
[843] Ibid.
[844] Cécile Jacob, Pierre Hausemer, Adam Zagoni-Bogsch, Audra Diers-Lawson, *The effect of communication and disinformation during the COVID-19 pandemic,* EUROPEAN PARLIAMENT (2023), 20, https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740063/IPOL_STU(2023)740063_EN.pdf.
[845] Alice Marwick and Rebecca Lewis, *Media Manipulation and Disinformation Online,* DATA & SOCIETY RESEARCH INSTITUTE (2017), 40, https://www.posiel.com/wp-content/uploads/2016/08/Media-Manipulation-and-Disinformation-Online-1.pdf.
[846] Samantha Bradshaw and Philip N. Howard, *Troops, Trolls and Troublemakers: A Global Inventory of Organized Social Media Manipulation*, UNIVERSITY OF OXFORD (2017), 10, https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2017/07/Troops-Trolls-and-Troublemakers.pdf.

structures of social media, as discussed in a previous chapter, and the overload of accessible and recommended information, which require constant questioning. Therefore, a legislative act may change the behavior of the intermediaries but cannot address social and political beliefs.

As such, the DSA can tackle the response of social media and hence the speed at which disinformation is disseminated. Given the wide scope of obligations imposed on platforms and the extensive regime of enforcement, it may be possible that disinformation is reduced, even if limitations exist. However, it cannot dive into the root issue of disinformation: its production and a society's willingness to believe it. As such, any attempts at reducing the impact of disinformation can only show effective results if society is united internally and can accept governmental institutions and those within them.

CONCLUSION

There is no denying that the Digital Revolution has forever changed our perceptions of and our interactions with the world around us. Whilst this has brought significant advantages, it has also created new threats, as well as amplified old ones. Such is the case with disinformation. Social media has provided a digital environment where disinformation can foster, exploiting deep-rooted fears, contradicting beliefs and political polarization, and resulting in a serious threat to democracy and its institutions.

There is no doubt that the DSA serves as a landmark Regulation to protect consumers of the digital world in a manner and to an extent that has not existed prior. However, it is likely that the DSA's effectiveness in providing protection from disinformation is only limited. There are structural criticisms that can be made of the DSA, however, its content cannot solely be criticized for this lack of impact. Disinformation is an inherently complex phenomenon whose threats cannot wholly be solved by a Regulation that does not even target it directly. To reduce the threat of disinformation, a wide range of actions need to be taken by the EU and further obligations must be imposed on social media platforms to target the dissemination of information that is threatening to democracy. As such, the DSA is a revolutionary piece of legislation that has the potential to influence legislative systems abroad, however, it may only slow down the speed of dissemination, not prevent it.

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