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OPENING REMARKS BY THE 2024-2025 MANAGING EDITORS

The 2024-2025 academic marks the fifth anniversary of the founding of the St Andrews Law Journal. This year brought an almost entirely new board to the Journal, and we have focused on attracting submissions across all areas of law, aiming for the highest quality analysis.

We are particularly grateful to be working with the Institute of Legal and Constitutional Research, which has been crucial in helping us execute our priorities for the academic year. A special thank you to the Institute's Professor Caroline Humfress and Dr Victoria Miyandazi for their invaluable guidance and support.

This is the fourth issue of the St Andrews Law Journal, and we have worked hard to maintain the high standards of past editions. Our double-blind peer review process, which ensures integrity and rigour, remains central to the Journal's work. This year, we have also introduced a review board composed of postgraduate students from the MLitt in Legal and Constitutional Studies, who are responsible for reviewing and moderating the feedback provided by the editorial board, ensuring that contributors receive constructive and high-quality feedback. We thank our editors and reviewers for their dedication and attention to detail in making this process work.

The six articles in this issue address pressing legal issues. Two articles examine international humanitarian law: one explores its role in protecting women from sexual violence in Nigeria, while another assesses the legality of US drone strikes in Pakistan. Other contributions analyse the erosion of the US Constitution's Fourth Amendment, the legality of ransom payments, and the pursuit of environmental justice through climate finance. The final article investigates how Justinian's Novel 158 reflects the relationship between imperial power, blood, and inheritance.

Most contributors are from the St Andrews community, while two are from further afield, pursuing PhDs in England and the US. This, in itself, is a testament to the Journal's growing influence and reach. We look forward to the next issue, where we will continue to build upon our current progress.

Yours faithfully,

Milo Salem — **Editor-in-Chief, 2024-25**

Freja Stamper — **Journal Manager, 2024-25**

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Evaluating the Role of International Humanitarian Law in Protecting Women and Girls from Sexual Violence in the Boko Haram Conflict in Northeast Nigeria

By Adebola Adeoti

Introduction

The Boko Haram insurgency in Northeast Nigeria has inflicted severe harm on civilians, particularly women and girls, through gender-based violence like abductions, forced marriages, and sexual enslavement. While International Humanitarian Law (IHL) and human rights frameworks aim to protect vulnerable groups during conflicts, their limitations in addressing the gendered dimensions of violence are evident in this context. Traditional legal approaches often neglect the intersectional nature of harms faced by women, reinforcing patriarchal biases.

I adopt a critical feminist methodology to examine these shortcomings, proposing a feminist approach that centers women's experiences and emphasizes localized, gender-sensitive solutions and explore Boko Haram's use of gender-based violence, critiques the effectiveness of IHL and human rights law through a feminist lens, and offers actionable recommendations based on successful strategies from other conflict zones. By integrating feminist perspectives into international law and human rights, this study seeks to advance justice for women and address gendered harms in conflict more effectively.

1.0 An Overview of the Boko Haram Insurgency and the Use of Gender-Based Violence as a Weapon of War

Since 2002, Boko Haram, an insurgent group with the literal connotation of 'Western education is sinful or prohibited,' has initiated a campaign of Islamic-based conflict within the Northeastern region against the Nigerian government.[1] Boko Haram has employed sexual violence such as rape, sexual slavery and forced marriage against women as one of its tactics in the terror campaign against the Nigerian state.[2] For the purpose of this discussion, it is essential to define sexual violence. Sexual violence was described in the Akayesu case at the International Criminal Tribunal for Rwanda as 'any act of a sexual nature committed against a person under coercive circumstances.'[3] This definition includes a wide range of behaviours, from physical penetration to comments with sexual implications and 'coercion', which provides for physical force, threats, intimidation, and

[1] Tom Batchelor, 'Rape and Sex Slavery: Life as a Girl under Boko Haram Exposed a Year on from Mass Kidnap' (London,14 April 2015) https://www.express.co.uk/news/world/570401/Boko-Haram-exposed-yearmass-kidnap , accessed 20 December 2024.
[2] Adam Nossiter, *Boko Haram Militants Raped Hundreds of Female Captives in Nigeria* (The New York Times 2014).
[3] Prosecutor v Akayesu (Judgment) ICTR-96-4-T, T Ch I (2 September 1998).

other forms of coercion.[4] This section shall discuss three major types of sexual violence used by Boko Haram to instil fear and intimidation upon women and girls in North-East Nigeria.

First, Boko haram, has engaged in the systematic use of rape as a tool of warfare. Batchelor painted a gruesome picture of a young survivor who asserted that she was raped 15 times each day while in the custody of the Boko Haram faction before her escape. [5] Another depiction was rendered of Asabe Aliyu, a young mother of four, who was saved from the Sambisa Forest. Aliyu revealed that she was raped daily by members of the Boko Haram group. Subsequently, she became pregnant and was forced into marriage with a group member.[6] During a hallowing interview by Amnesty International with young girls in the IDP camps in Northeast Nigeria, stories of rape and other sexual violence were mentioned. A 15-year-old girl who managed to escape said, 'After we were declared married, I was ordered to live in his cave, but I always managed to avoid him. He soon began to threaten me with a knife to have sex with him, and when I still refused, he brought out his gun, warning that he would kill me if I shouted. Then he began to rape me every night.[7] This narration aligns with the severe nature of rape in conflict.

Secondly, Boko Haram has embraced sexual slavery as a strategy tool of terror and intimidation[8] with tactics such as kidnapping and hostage-taking.[9] In 2014, they took 2,000 women and girls for ransom. Several mass abductions have garnered significant attention, such as the abduction of 276 school girls from Chibok in April 2014, the kidnapping of over 300 students from a primary school in Damasak in March 2015, the kidnapping of 111 girls from the Government Girls Science and Technical College in Dapchi during in 2018, and the abduction of 317 girls in Government Girls Secondary School in Jangebe in 2021.[10] Reports also emerged of women locked up in houses subjected to sexual exploitation.[11] Unfortunately, these incidents have been underreported due to the culture of silence, stigma, and shame around sexual abuse in Nigeria, especially in the conservative Northern region.[12]https://www.tandfonline.com/doi/full/10.1080/10246029.2020.1776348?scroll=top&needAccess=true&role=tab According to Bangura, the Special Representative of the Secretary-General of the United Nations on Sexual Violence in Conflict, hundreds of recently released female captives experienced sexual abuse by Boko Haram militias, and many were compelled into marriage with their captors.[13]

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[4] *Ibid.*
[5] Theresa U Akpoghome, Ufuoma V Awhefeada, 'Challenges in Prosecuting Sexual Violence in Armed Conflict under Nigerian Law' (2020) 11 Beijing Law Review 262. https://doi.org/10.4236/blr.2020.111018.
[6] Afolabi Sotunde, 'Nigerian Women Captured by Boko Haram 'Stoned, Starved by Militants' (3 May 2015) ABC News https://www.abc.net.au/news/2015-05-04/boko-haram-captives-speak-of-ordeal-for-firsttime/6441528 , accessed 23 August 2023.
[7] Amnesty International Report 'We dried our tears: Addressing The Toll on Children of Northeast Nigeria 's Conflict' (May 2020) chp4.
[8] Jacob Zenn and Elizabeth Pearson, 'Women, Gender and the Evolving Tactics of Boko Haram' (2014) Journal of Terrorism Research 48.
[9] Hilary Matfess, *Women and the War on Boko Haram: wives, weapons, witnesses*. London: (Zed Books 2017, Cambridge University Press 270).
[10] Amnesty International Report (n7).
[11] Conflict-Related Sexual Violence Report of the United Nations Secretary-General 'Condemning Use of Sexual Violence' (2023 S/2023/413) assessed 17th November 2024 tps://www.un.org/sexualviolenceinconflict/wp-content/uploads/2023/07/SG-REPORT-2023SPREAD-1.pd.
[12] Bugaje, Ogunrinde, and Faruk, 'Child Sexual Abuse in Zaria, Northwestern Nigeria (2012) Nigerian Journal of Paediatrics 23.
[13] Conflict-Related Sexual Violence Report (n12) 5.

These narratives underscore the urgency of addressing sexual violence as a weapon of war, and the pressing need to examine the adequacy of IHL in protecting women and girls in conflict zones which the next section shall do.

2.0 A Feminist Critique of International Humanitarian Law: Evaluating Its Adequacy in Protecting Women and Girls in Conflict Zones

Sexual violence in armed conflict is a pervasive problem affecting countless people, especially women and girls. Given the gravity of this issue, international humanitarian law has emerged as a pivotal instrument in addressing and mitigating the impact of sexual violence in the context of armed conflict.[14] This section shall examine the theoretical debates within feminist legal spheres regarding the adequacy of International Humanitarian Law in addressing sexual violence in conflict.

2. 1 Feminist Critique of International Humanitarian Law in Armed Conflict

The provisions of International Humanitarian Law (IHL) about women in armed conflict have sparked debates within feminist legal spheres. This discourse has highlighted two principal viewpoints concerning the adequacy of the IHL framework in addressing the specific experiences of women in conflict.[15] The first school of thought proposed by Lindsey argues that women are subjected to tragic effects of armed conflict not primarily due to shortcomings in the rules protecting them but because these rules are often not observed.[16] This view, referred to as the 'enforcement' school by Oosterveld, advocates that the main obstacle to protecting female civilians during hostilities is the lack of observance of IHL. The United Nations' work on the issue of women and conflict also reflects this view, as exemplified by Security Council resolution 1325 on women, peace and security, which calls upon all parties to armed conflict to fully respect IHL as it applies to the rights and protection of women and girls.[17] However, it does not question the suitability and adequacy of IHL in addressing women needs.[18]

The second school of thought posits that the failure to question the efficacy of International Humanitarian Law is a fallacy. While adherents of this position concur that more consistent enforcement of IHL would benefit civilian women, they contend that the absence of provisions in IHL that effectively address women's experience is the main issue rather than enforcement.[19] Consequently, a fundamental overhaul of IHL

[14]Drishti Sagar,'Sexual Violence against Women in Nigerian Armed Conflicts' (2023) 5 Indian J.L. & Legal'.
[15]Valeire Oosterveld, 'Feminist Debates on Civilian Women and International Humanitarian Law', (2009) Windsor Yearbook of Access to Justice27, 385-402.
[16]Charlotte Lindsey, 'Women and War - An Overview' (2000) 839 Int'l Rev. Red Cross 561 at 579 This is also the view of the International Committee of the Red Cross: "On the whole, public international law (in particular IHL, human rights law and refugee law) adequately addresses the needs of women in all of these situations. The challenge lies in translating the law into practice by ensuring implementation of and respect for the existing rules." International Committee of the Red Cross, "Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document" (Geneva: ICRC, 2004) at 9.
[17]Judith Gardam, 'Women and Armed Conflict: The Response of International Humanitarian Law' in Helen Durham and Tracey Gurd, eds., *Listening to the Silences: Women and War* (Netherlands: Martinus Nijhoff Publishers, 2005) at 114-116.
[18]Women and Peace and Security, UN SCOR, 4213'h Mtg., UN Doc. S/RES/1325 (2000) at para 5.
[19]Gardam (n18) 115.

is necessary to improve protection for civilian women by reconceptualisation and revision of IHL.[20] They assert that IHL's current form reflects masculine assumptions disregarding global systematic gender inequality.[21] This school of thought, referred to as the 'revision', argues that the current IHL framework fails to account for the pervasive gender inequalities that exist at a global scale, with scholars such as O'Rouke who argue that while international humanitarian law is an essential framework for addressing sexual violence in conflict, it has not given much consideration to the root cause of sexual violence such as; underlying social and economic factors in the development of legal frameworks.[22] Similarly, Gardam notes that 'IHL treaties have sometimes been criticised because they allegedly do not take 'the needs of women in armed conflicts appropriately and do not prohibit and criminalise sexual violence' sufficiently.[23]

Though O'Rouke emphasises that historical documents shaping international humanitarian law have indeed extended protection to women as victims of sexual violence, such as The Lieber Code of 1863, the Second Hague Convention of 1899, and the Fourth Hague Convention of 1907, have either explicitly or implicitly prohibited acts like the rape of women and various forms of sexual assault against them; The Fourth Geneva Convention, specifically Article 27, explicitly safeguards women from assaults on their honour, encompassing acts like rape, forced prostitution, and indecent assaults.[24] It is noteworthy, however, that Article 3 of the Convention, while prohibiting 'attacks on physical integrity and human dignity, including humiliating and degrading treatment,' does not explicitly address sexual violence.[25] O'Rouke outlines two primary criticisms. Firstly, O'Rouke highlights that these provisions seem to primarily safeguard women's honour and dignity within a patriarchal framework, potentially subordinating women to the extent that the dishonour of a woman undermines the standing of males within her family. Secondly, these measures fall short of recognising the distinctive experiences of people in armed conflict, particularly regarding sexual violence, a notable and differentiating facet of women's experiences.[26]

[20]For example, UNIFEM has called upon the United Nations Secretary-General to "appoint a panel of experts to assess the gaps in international and national laws and standards pertaining to the protection of women in conflict and post-conflict situations and women's role in peacebuilding:" Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War &Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peacebuilding* (New York: UNIFEM, 2002) at 140.
[21] Judith Gardam and Michelle. Jarvis, *Women, Armed Conflict and International Law* (Boston: Kluwer Law International, 2001) 93.
[22]Catherine O'Rourke, *Women Rights In Armed Conflict* (Cambridge University Press 2020) 200.
[23] Judith Gardam, 'Women, Human Rights and International Humanitarian Law' (1998) International Review of the Red Cross, 324, 421-432.
[24]*Lieber Code: Instructions for the Government of Armies of the United States in the Field*, General Order No. 100, 24 April 1863, Art. 44, available at: www.icrc.org/ihl/INTRO/110.
[25] Article 3, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31, 6 ILM 35 (1947).
[26]Tachou-Sipowo Alain-Guy, 'The Security Council on women in war: between peacebuilding and humanitarian protection' (2010) International Review of the Red Cross 92, 197-219.

Despite some differences between the schools of thought, 'both views express frustration at the lack of action' to alleviate 'women's violation during armed conflict and acknowledge the various' atrocities experienced 'by women during and after armed conflict'.[27] While this section provides insight into the theoretical debates within feminist legal spheres regarding the adequacy of International Humanitarian Law (IHL) provisions in the protection of women in armed conflicts generally, it is essential to note that neither of these perspectives has been applied to the analysis of sexual abuse against women and girls in the context of the Boko Haram. Therefore, this essay aims to fill this lacuna by assessing the issue.

3.0 Feminist Critique of International Humanitarian Law in Addressing Sexual Violence in the Boko Haram Armed Conflict

To evaluate the adequacy of International Humanitarian Law, it is essential to first classify the Boko Haram conflict to determine the applicable legal framework. According to Ibezim, the first difficulty the Boko Haram Insurgency presents in implementing IHL in Nigeria is its classification.[28] The primary regulations of International Humanitarian Law that govern Non-International Armed Conflicts (NIAC) are encapsulated in Common Article 3 of the Geneva Conventions of 1949 and Additional Protocol II to the Geneva Conventions.[29] These provisions establish the criteria to be satisfied to classify a conflict as a non-international armed conflict under IHL, which Boko haram conflict falls under.

First, one of the requirements is that the Armed Conflict must be between Contracting Party Armed Forces or other Organised Armed Groups; the Nigerian army is currently engaged in a battle against a dangerous armed group, which has prompted the deployment of armed forces and the establishment of Regional joint forces. It can be argued that Boko haram does qualify as an organised armed group.[30]

Secondly, there is a clear requirement that a specific threshold of intensity must be surpassed before a situation can be classified as non-international armed conflict. Protocol I mandate that its applicability depends upon a certain level of intense violence. Moreover, Article 1, Paragraph 2 of Protocol I [31]exclude situations characterised by internal disturbances, tensions, sporadic acts of violence. Boko Haram has been responsible for numerous acts of violence and terrorism, including the protracted nature of their conflict and territorial control

[27] Valerie Oosterveld, 'Gender and the Interpretation and Application of International Humanitarian Law' (2014) 46 *International Review of the Red Cross* 125.
[28] E C Ibezim, A S Amaramiro and M E Nwocha, 'Boko Haram Insurgency and Challenges to Implementation and Enforcement of International Humanitarian Law in Nigeria' (2020) 25(6) *IOSR Journal of Humanities and Social Science* 36-53, DOI: 10.9790/0837-2506043653.
[29] Geneva Conventions of 12 August 1949, *Common Article 3*, 75 UNTS 31, Additional Protocol II to the Geneva Conventions, 8 June 1977, 1125 UNTS 609.
[30] Ibezim (n 29) 16.
[31] Article 1 Paragraph 2 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).

in the northern regions; the conflict's intensity has reached the critical level required for classification as an armed conflict under international humanitarian law.[32]

Having categorised the conflict as a non-international armed conflict, it is essential to explore the key regulations governing non-international armed conflict. These regulations comprise of Common Article 3 of the 1949 Geneva Conventions[33], the 1977 Additional Protocol II and Customary International Law, for the purpose of this research, I shall examine the Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II.

First, in Common Article 3 of the GC, it is fundamental to note that Common Article 3 is seen as a 'minimum yardstick' for NIACs because of its conciseness in structure.[34] The article stipulates that:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the dispute shall be bound to apply, as a minimum, the following provisions:
>
> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness... shall in all circumstances be treated humanely, without any adverse distinction. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever concerning the above-mentioned persons:
>
> (a) Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment, and torture.
>
> (b) Taking of hostages.
>
> (c) Outrages upon personal dignity, particularly humiliating and degrading treatment...

From this definition, the Principle of Humane Treatment was drawn out; the principle governs the treatment of persons in the custody of an enemy party in IHL, whether civilians or combatants who are incapacitated.[35] Also, the revised Commentary on Common Article 3 interpret the definition of 'humane treatment' and the provisions in the (a) and (b) part.[36]

Standard Article 3 serves as a basis for addressing sexual violence in non-international armed conflict. Nevertheless, revisionist feminists have pointed out that some laws do not expressly prohibit sexual violence; this aligns with Article 3.[37] They raise significant concerns about this omission, as it only implies but does not expressly

[32] Ibezim(n29)18.
[33] *Ibid.*
[34] Article 3 of GC n (26).
[35] Marco Milanovic 'End of Application of International Humanitarian Law' (2014) International Review of the Red Cross 16, 45.
[36] ICRC, Commentary to Article 3 of 2020 to the Convention (III) relative to the Treatment of Prisoners of War of Geneva, 12 August *1949,*https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096 (accessed 23 December 2023) 2020 Commentary to GC III), para. 587.
[37] Judith Gardam and Hilary Charlesworth, 'Protection of Women in Armed Conflict' (2000) Human Rights Quarterly 22(1) 149.

mention sexual violence. [38] In their view, these laws are insufficient to address these issues.[39] Revisionist feminists further expressed apprehensions regarding the phrasing of specific provisions addressing sexual violence, particularly those about the concept of 'dignity'. Rather than acknowledging the profound physical damage inflicted upon women and girls by sexual violence, these provisions focus on dignity. Copelon posits that while the notion of dignity may encompass broader concerns, it conceals that rape fundamentally constitutes violence directed towards women. On the other hand, the feminist enforcement school argue that notwithstanding this, the notion of dignity remains an integral component of a legally binding norm that affords protection to women in civilian capacities.[40] Essentially, the current words inadequately convey the magnitude of harm experienced by victims of sexual violence in the Boko haram conflict, nor do they reflect the seriousness of sexual violence as a criminal act, and as such, these laws are inadequate.

Second, regarding Additional Protocol II, intending to complement standard Article 3, Article 4 (2) of the Additional Protocol II contains a comprehensive list of prohibited acts in its obligation of humane treatment.[41]

> Persons who do not take a direct part or have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour, convictions, and religious practices. They shall, in all circumstances, be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors. Without prejudice to the generality of the preceding, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular, murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;.....(c) taking of hostages;(d) acts of terrorism; e) outrages upon personal dignity, particularly humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault ;f) slavery and the slave trade in all their forms;...

While the provisions of Additional Protocol II do acknowledge sexual violence, such as 'outrages upon personal dignity, in particular humiliating and degrading treatment', 'rape', 'enforced prostitution, and 'indecent assault.' This acknowledgement aligns with the feminist perspective earlier discussed.[42] However, the revisionist feminist perspective expresses that this provision maintains a formal equality approach, treating all civilians equally in its prohibitions and that formal equality may not necessarily lead to substantive equality[43]; while the law prohibits these acts, it does not explicitly address the underlying systemic gender inequalities that contribute to such abuses such as in the Boko haram conflict, this omission could limit the law's effectiveness in addressing these violations. On the other hand, the feminist enforcement school have argued that the expectations of the revision school

[38] *Ibid.*
[39] *Ibid.*
[40] Lindsey n(17)40.
[41] ICRC*Commentary of 1987 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, https://hlndatabases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD0 02D6D09&action=openDocument (accessed 23 April 2024) (1987 Commentary to AP II), paras. 4517, 4530, 4539.
[42] See section 3.0.
[43] Judith G. Gardam and Michelle J. Jarvis, *Women, Armed Conflict and International Law (Boston:* Kluwer Law International, 2001) at 93 [Gardam and Jarvis, *Women].* 7 Helen Durham, Review of *Women, Armed Conflict and International.*

regarding IHL are excessively high.[44] According to this viewpoint, IHL, as a specialised legal framework, is inherently limited in its objectives, primarily aimed at ensuring the survival of as many individuals as possible in a society's direst circumstances.[45]

However, Oosterveld reiterated the argument put forth by the enforcement school, which posits that if the narrow scope of IHL cannot adequately address issues of systematic gender inequality, then it raises concerns about the potential hindrance, rather than enhancement, of the law's fundamental objective of improving the chances of survival for those impacted by armed conflicts.[46] Also, it is argued that such concerns are unwarranted, as the analytical approach advocated by the revision school resembles a more comprehensive and profound rendition of the vulnerability analysis conducted by the International Committee of the Red Cross.[47] This approach has proven valuable in identifying the specific requirements of numerous female civilians during conflict.[48] While this provision might be adequate to a certain extent in combatting sexual violence in the Boko haram conflict, However, it may not sufficiently be, it without addressing the underlying systemic gender inequality, such as the entrenched patriarchal cultural society in North-Eastern Nigeria. The next section shall discuss International Human Rights Law and Sexual Violence in Conflict.

3.1 International Human Rights Law and Sexual Violence in Conflict

According to Donnelly, International Human Rights Law are the rights held by individuals simply because they are human beings.[49] They provide frameworks for protecting the dignity of individuals, even during armed conflicts.[50] Instruments such as the Universal Declaration of Human Rights (UDHR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) emphasize the need to protect the rights of women and girls.[51] However, the application of these instruments in conflict zones such as Northeast Nigeria remains limited.

Boko Haram's use of sexual violence as a weapon of war indicates the inadequacy of existing human rights provisions in conflict situations. The sexual violence discussed in section **3.0** committed by them violate core human rights principles, including the rights to freedom, security, and dignity (UDHR, Articles 1, 3, and 5).[52] Furthermore, these actions contravene CEDAW's mandate to eradicate gender-based discrimination and violence

[44] Helen Durham, 'International Humanitarian Law and the Protection of Women' in Helen Durham and Tracey Gurd, eds., *supra* note 2 at **97** [Durham, 'Protection'.} See also International Committee of the Red Cross, *Women and War* (Geneva: ICRC, 2008) at 2: "Women benefit from the general protection afforded by IHL. Along with the rest of the protected population, they must be able to live free from intimidation and abuse." [ICRC, *Women and War*].
[45] *Ibid.*
[46] Oosterveld (n27).
[47] *Ibid.*
[48] *Ibid.*
[49] Jack Donnelly, *International Human Rights* (5th edn, Westview Press 2013).
[50] *Ibid.*
[51] UN General Assembly, *Universal Declaration of Human Rights* (adopted 10 December 1948 UNGA Res 217 A(III)), and UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
[52] Donnelly (n50).
UN General Assembly, *Universal Declaration of Human Rights* (adopted 10 December 1948 UNGA Res 217 A(III)) arts 1, 3, and 5.
UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 2.

against women (CEDAW, Article 2). Despite these provisions, the enforcement mechanisms for human rights law remain weak, particularly in regions with fragile state institutions.

A notable gap in IHRL is its insufficient attention to the intersection of gender and systemic violence. Traditional human rights frameworks often focus on state accountability while failing to address non-state actors like Boko Haram. This limitation is compounded by cultural and structural barriers that hinder the implementation of gender-sensitive protections. For instance, cultural stigmatization of survivors of sexual violence often silences women and prevents them from seeking justice or accessing support services.[53]

Feminist critiques of human rights law highlight the need for a more inclusive approach that prioritizes women's lived experiences and addresses the patriarchal biases embedded within legal systems.[54] Feminist scholars argue that existing frameworks often marginalize gendered harms, treating them as secondary to other violations[55] A feminist approach to human rights law calls for recognizing and addressing the specific vulnerabilities of women in conflict zones, advocating for survivor-centered interventions and greater accountability for non-state actors.

In the context of Northeast Nigeria, a feminist human rights framework could complement International Humanitarian Law by emphasizing localized solutions. For example, integrating community-led initiatives to support survivors to reduce stigmatization and strengthen the enforcement of women's rights.

4.0 Proposing Gender-Sensitive Solutions to Address Sexual Violence in Conflict Zones

Given the constraints of International Humanitarian Law (IHL) in addressing gender-specific harms in cultural contexts such as Northeast Nigeria, there exists an urgent necessity to implement innovative and localised approaches. This section outlines key strategies that have proved effective in similar conflict-affected regions and advocates for their adaptation to the Boko Haram conflict.

4.1 Community-Based Interventions

According to Heise, societies where women occupy relatively subordinate positions to men, the prevalence of sexual violence tends to be significantly higher. This dynamic is pronounced in conflict zones, such as Northeast Nigeria, where rigid gender roles and cultural expectations of masculinity create an environment conducive to gender-based violence.[56]Sierra Leone implemented community-based interventions following its civil war. The country's approach involved engaging traditional leaders and community groups to address stigma and provide support to survivors of gender-based violence. These efforts helped rebuild trust and facilitated the reintegration of survivors into their communities,[57] Nigeria can also adopt this method.

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[53] Amnesty International, *Our Job is to Shoot, Slaughter and Kill: Boko Haram's Reign of Terror in North-East Nigeria* (Amnesty International 2015).
[54] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000).
[55] *Ibid.*
[56] Lori L. Heise, 'Violence Against Women' 277-280.
[57] Askin, Kelly D. War Crimes Against Women: Prosecution in International War Crimes Tribunals. The Hague: Martinus Nijhoff Publishers, 1997.

4. 2 Strengthening Legal Frameworks and Enforcement Mechanisms

Though IHL provides a foundation for protecting women and girls during armed conflict, its enforcement must be strengthened through integration with domestic legal systems. This includes enacting national laws that criminalize all forms of gender-based violence, establishing specialized courts to handle cases of sexual violence in conflict zones, training law enforcement, and judiciary members on gender-sensitive practices to ensure survivor-centered legal proceedings and to monitor compliance and hold perpetrators accountable through both domestic and international tribunals.[58] With respect to Sierra Leone, the country established the Special Court for Sierra Leone included a mandate to prosecute crimes of sexual violence, setting a precedent for integrating gender-sensitive legal reforms in post-conflict settings, this can also be replicated in Nigeria.[59]

4.3 Integrating Global Constitutionalism into Gender-Sensitive Interventions

Global constitutionalism offers a valuable framework for addressing the systemic failures of IHL to adequately protect women and girls from sexual violence in conflict zones. It refers to the development of overarching legal norms and principles that govern the international community, emphasizing the protection of human rights and the rule of law across borders[60]

By adopting a global constitutionalist approach, states can create stronger legal frameworks that prioritize the lived experiences of marginalized groups, particularly women, in conflict settings. This approach aligns with feminist critiques of traditional legal frameworks, which often fail to account for gendered harms.[61] Therefore, incorporating global constitutionalism into the fight against sexual violence in conflict zones would involve strengthening international norms that explicitly address gender-based violence as a serious violation of human rights, ensuring that international legal mechanisms, such as tribunals and human rights courts, recognise and prosecute gender-specific crimes in conflict. Also, the case of Sierra Leone illustrates how global constitutionalism can be applied in practice. The establishment of the Special Court for Sierra Leone was guided by principles of international justice and human rights, demonstrating a commitment to prosecuting gender-based crimes and addressing the long-term impacts of conflict-related sexual violence.[62] Nigeria can draw on these global constitutionalist principles, the court set a precedent for future interventions that centre the experiences of survivors and promote accountability.

[58] Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *European Journal of International Law* 326.
[59] Schabas, William A. *The UN International Criminal Tribunals:* The Former Yugoslavia, Rwanda, and Sierra Leone. Cambridge: Cambridge University Press, 2006.
[60] Peters, Anne**.** 'The Merits of Global Constitutionalism' 16 Ind. J. Global Legal Stud. 397 (2009).
[61] Hilary Charlesworth and Christine Chinkin n (95).
[62] Schabas (n 60).

Conclusion

While IHL provides a framework for addressing sexual violence in the Boko Haram conflict, it falls short in tackling the underlying gender inequalities that drive such violence. Feminist critiques highlight that the current laws inadequately address the unique harms faced by women, focusing on dignity rather than the physical and psychological damage caused by sexual violence. To improve protection and accountability, gender-sensitive solutions such as community-based interventions, stronger legal frameworks, and global constitutionalism must be integrated. A more holistic approach is needed to ensure IHL evolves to effectively combat gender-based violence in conflict zones.

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A Consideration of the Legality of U.S. Targeted Killings in Pakistan Under International Human Rights Law

By Catherine Zortman

Introduction

International legal frameworks governing war were created in reaction to the most horrific acts within World War II and continued to develop as war continued to rage on in different areas of the world. It is within that legacy that all legal assessments of the Global War on Terror (WOT) operate. The WOT is riddled with legal debates that question if states themselves are "criminals".[63] The U.S. government justified its actions as legal under International Humanitarian Law (IHL). It is important to distinguish morality and effectiveness from legality. What is legal is not always the most moral or effective means of operation. By focusing on WOT operations within Pakistan, this article can engage with legal debates surrounding American action as well as drone strikes.

The United States' response to 9/11 prompted various legal scholars that both question or justify the WOT. American action within Pakistan has remained a contentious area of debate. Jonathan Masters has emerged as a proponent of American legal justification arguing that the United States can conduct operations in limited circumstances legally because the Pakistani government was not willing to deal with imminent threats. [64] On the other hand, Kenneth Roth asserts that the United States stretches the term "war" to justify overreach into alternative jurisdictions.[65] Maira Hayat's scholarship further criticizes American action through by pointing to faults within American military institutions carrying out targeted killings.[66] Additionally, Yolandi Meyer's scholarship focus on targeted killing provides a good basis to assess how lethal modern technology challenges the application of international law on powerful states.[67]l

Despite the substantial legal scholarship surrounding U.S. action within Pakistan, few scholars draw from both International Humanitarian Law (IHL) and International Human Rights Law (IHRL) in their analysis. Micheal Ramsden's "Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki" is an exception, however, he only limits the application to a single case of a targeted killing.[68] This response addresses the longstanding questions of the legality of American targeted killing in Pakistan through

[63] National Archives, "Global War on Terror," accessed December 16, 2024, https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror.
[64] Jonathan Masters, "The Target Killings Debate," *Council on Foreign Relations,* June 8, 2011, https://www.cfr.org/expert-roundup/targeted-killings-debate.
[65] Kenneth Roth, "The Law of War in the War on Terror: Washington's Abuse of 'Enemy Combatants,'" *Foreign Affairs* 83, no. 1 (2004): 2-3, https://doi.org/10.2307/20033823.
[66] Maira Hayat, "Empire's Accidents: Law, Lies, and Sovereignty in the "War on Terror" in Pakistan," *Critique of Anthropology* 40, no. 1 (2020), 54, https://journals-sagepub-com.ezproxy.st-andrews.ac.uk/doi/pdf/10.1177/0308275x19850686.
[67] Meyer, "The Legality of Targeted-Killing Operations in Pakistan," 233-235.
[68] Michael Ramsden, "Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki," *Journal of Conflict and Security Law* 16, no. 2 (2011), 385. https://doi-org.ezproxy.st-andrews.ac.uk/10.1093/jcsl/krr015.

assessing the implications of the rules and regulations of IHRL versus IHL. Through emphasizing border jurisdiction, this article illuminates the illegality of U.S. action within Pakistan. I will argue that the use of drone strikes for targeted killings in Pakistan is illegal under International Human Rights Law (IHRL) because it does not meet the necessary legal criteria. First, I will illustrate that conflict with Pakistan does not meet the criteria for International Humanitarian Law (IHL) and therefore, is governed by IHRL. Secondly, I will demonstrate that U.S. drone strikes within Pakistan were not legal under IHRL because they have become the default policy, violate *Just War* principles, and do not seek less lethal means.

1. Legal Jurisdiction of U.S. Force

While the rhetoric used by both Obama and Bush emphasized a "Global" War on Terror, legal frameworks separate on state boundaries.[69] The 2001 Authorization for Use of Military Force (AUMF), passed by Congress, authorized U.S. military operations against al-Qaeda in Afghanistan.[70] However, it has been implemented by four different Administrations for operations in 22 countries, including Pakistan, resulting in calls from Congress to end the AUMF (House Foreign Affairs Committee 2023.[71] While this is a domestic legal setting, it demonstrates the tendencies of legal frameworks to limit their laws within tangible state boundaries. International law's current mechanism considers terrorism a "criminal phenomenon" governed under domestic law, rather than under IHL.[72] This distinction is important because states can use more force under IHL than IHRL.[73]

The U.S. has sought to change this legal framework, arguing that terrorism law should account for "new" forms of terrorism.[74] The academic discourse of the "new" terrorism thesis broadly contends that modern terrorism is distinct from previous forms.[75] This "new" form of terrorism is not bound by borders or land claims, but has an international focus and reach.[76] Through the reinvention of terrorism law, the U.S. would face fewer limitations on their use of force. The International Committee of the Red Cross (ICRC), the governing body that assesses conflict jurisdiction, maintains that terrorism is not a "new" phenomenon and should be framed as an

[69] Roth, "The Law of War in the War on Terror," 2.

[70] Hayat, "Empire's Accidents," 54; "Meeks Introduces Landmark 2001 AUMF Repeal and Replace Bill." House Foreign Affairs Committee. Last modified April 7th, 2023. https://democrats-foreignaffairs.house.gov/press-releases?ID=49AE7BD4-CF43-4428-8308-BE42A316D9A6.

[71] Hayat, "Empire's Accidents," 54.

[72] "ICRC, IHL and the Challenges of Contemporary Armed Conflicts," International Committee of the Red Cross.

[73] *Ibid.*

[74] *Ibid.*

[75] Alejandra Bolanos. "YES: The 'New Terrorism or the 'Newness' of Context and Change," in *Contemporary Debates on Terrorism*, ed. by Richard Jackson and Samuel Justin Sinclair (Routledge, 2014), 57-65.; Bruce Hoffman, "Rethinking Terrorism and Counterterrorism Since 9/11," *Studies in Conflict and Terrrorism* 25, no. 5 (2002), 303, https://doi-org.ezproxy.st-andrews.ac.uk/10.1080/105761002901223.; Walter Laqueur, "Postmodern Terrorism," *Foreign Affairs* 75, no. 5 (1996), 36, https://www.jstor.org/stable/20047741.

[76] Isabelle Duyvesteyn. "How New is the New Terrorism?," *Studies in Conflict & Terrorism* 27, no. 5 (2004), 443. https://doi-org.ezproxy.st-andrews.ac.uk/10.1080/10576100490483750.

illegal domestic criminal act.[77] Therefore, the ICRC only looks within domestic bounds rather than transnational and abstract ideas.[78] Terrorism is not a justification for IHL jurisdiction, but when the conflict amounts to an "armed conflict", IHL can be applied.[79] Therefore, the jurisdiction of the conflict in Afghanistan and Pakistan must be considered separately.[80] There must be a minimum level of organization and intensity to be classified as an "armed conflict" and transition from IHRL to IHL.[81]

Organization of Actors in Pakistan

To be classified as an "armed conflict" all actors must reach a certain threshold of organization. This threshold is met within Afghanistan but falls short within Pakistan.[82] While Al-Qaeda had structures that were sophisticated and coordinated enough to orchestrate 9/11, they did not have control over the territory that the law requires to be classified as an organized actor in an "armed conflict".[83]

The September 11th attack illustrated the capabilities of Al-Qaeda in choreographing such a lethal attack. Bruce Hoffman describes Osama bin Laden's Al-Qaeda as "a large multinational corporation: defining specific goals and aims, issuing orders, and ensuring their implementation".[84] However, this structure changed in the wake of 9/11 and has evolved in reaction to the WOT counterterrorism strategies.[85] Al-Qaeda has adapted by forming smaller groups and emphasizing diffuse structures that are more difficult to detect.[86] Additionally, the U.S. strategy of decapitation, which targets heads of organizations, has eliminated many of the top officials resulting in a power vacuum.[87] U.S. strategy in Pakistan has led to a decrease in a centralized structure, prompting many to scatter across numerous countries.

According to Article 51, "armed conflict" is between at least two organized actors and to be organized, they must have effective control over the land.[88] Al-Qaeda does not have effective control over land in Pakistan.[89] Authorities in Afghanistan tolerated Al-Qaeda within its borders until the WOT which prompted the group to seek refuge in Pakistan.[90] Top officials – including Khalid Sheikh Muhammad, Ramzi Bin al Shibh, and

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[77] "ICRC, IHL and the Challenges of Contemporary Armed Conflicts," International Committee of the Red Cross.
[78] Heinze, "The Evolution of International Law in Light of the 'Global War on Terror," 1069.
[79] "ICRC, IHL and the Challenges of Contemporary Armed Conflicts," International Committee of the Red Cross.
[80] United Nations Office on Drugs and Crime, "Module 6: Military / Armed Conflict Approaches to Countering Terrorism," accessed December 16, 2024, https://www.unodc.org/e4j/en/terrorism/module-6/key-issues/categorization-of-armed-conflict.html.
[81] Roth, "The Law of War in the War on Terror," 2-3.
[82] "Module 6: Military / Armed Conflict Approaches to Countering Terrorism," United Nations Office on Drugs and Crime.
[83] Heinze, "The Evolution of International Law in Light of the 'Global War on Terror," 1069.
[84] Hoffman, "Rethinking Terrorism and Counterterrorism Since 9/11," 309.
[85] Maryam Azam, "Transnational Militant Network in Pakistan: An Analysis of Al Qaeda and Islamic State," *Pakistan Perspectives* 26, no. 1: 4 (2021), 4, https://search.ebscohost.com/login.aspx?direct=true&AuthType=shib&db=edb&AN=154748891&site=eds-live&authtype=shib&custid=s3011414.
[86] Bolanos, "YES," 32.
[87] Jenna Jordan, "Attacking the Leader, Missing the Mark: Why Terrorist Groups Survive Decapitation Strikes," *International Security* 38, no. 4 (2014): 37, https://www.jstor.org/stable/24481099.
[88] Heinze, "The Evolution of International Law in Light of the 'Global War on Terror," 1078.
[89] *Ibid*., 1079.
[90] Imdad Ullah, *Terrorism and the US Drone Attacks in Pakistan: Killing First* (Routledge, 2021), 17.

Abu Badr – who were responsible for orchestrating the 9/11 attack, were found within Pakistan's borders.[91] Despite the evidence of the Pakistani government's lack of action concerning Al-Qaeda, the government was not involved enough in Al-Qaeda operations to be legally characterized as an organized adversary to an "armed conflict".[92] Al-Qaeda is present within Pakistan, but there is no evidence that they have effective control or colluded with the Pakistan government enough to be labeled an "armed conflict".[93]

Intensity of Conflict in Pakistan

There are no quantitative standards for "intensity", however, we can look to the International Criminal Tribunal for the Former Yugoslavia for guidance.[94] "Intensity" is measured through the analysis of duration, gravity, number of troops, type of government forces, kinds of weapons, number of casualties, and extent of the damage caused by the fighting.[95] The law requires consideration of "intensity" through a culmination of different facets, but it is important to note that categorizing tragedy is problematic, and individual experiences are important to collective understanding.

Through the comparison of "intensity" in Afghanistan and Pakistan, this section will discern why the ICRC classified Afghanistan as an "armed conflict" and Pakistan as not.[96] While the U.S. had a small number of ground forces in Pakistan, it largely relied on the Pakistani Army to reinforce the Afghani border.[97] Specifically, around 9,500 troops were sent by the Pakistani army to domestic regions of Baluchistan and the Northwest Frontier Provence.[98] Comparatively, there were 19,000 American military personnel sent to Afghanistan.[99] The number of casualties or direct deaths since 2001 attempts to quantify the impact of the conflict on the populations. Between 2001 and 2011, there were 176,000 direct deaths in Afghanistan and 67,000 direct deaths in Pakistan.[100] The extent of damage can also be measured through those displaced by the conflict. In Afghanistan, 5.3 million people were displaced as opposed to 3.7 million people in Pakistan.[101] Those who are displaced have cited "air strikes, bombings, artillery fire, drone attacks, gun battles, and rape" as the reasons for their fleeing.[102] The conflict had undeniably devastating impacts on the community.

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[91] *Ibid.*, 105.

[92] *Ibid.,* 107.

[93] *Ibid.,* 105-110.

[94] "Module 6: Military / Armed Conflict Approaches to Countering Terrorism," United Nations Office on Drugs and Crime.

[95]International Committee of the Red Cross, "Internal conflicts or other situations of violence – what is the difference for victims?," last modified November 10, 2012, https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm.

[96] "Module 6: Military / Armed Conflict Approaches to Countering Terrorism," United Nations Office on Drugs and Crime.

[97] "U.S. Military Operations in the Global War on Terrorism: Afghanistan, Africa, the Philippines, and Colombia." Congressional Research Service, last modified January 20, 2006. https://crsreports.congress.gov/product/pdf/RL/RL32758/5.

[98] *Ibid.*

[99] *Ibid.*

[100] Watson Institute of International & Public Affairs, "Human Cost of Post-9/11 Wars: Direct War Deaths in Major War Zones," last modified March 2023, https://watson.brown.edu/costsofwar/figures/2021/WarDeathToll.

[101] *Ibid.*

[102] "Human Cost of Post-9/11 Wars: Direct War Deaths in Major War Zones," Watson Institute of International & Public Affairs.

Consideration of these factors led the ICRC to determine that Afghanistan is an "armed conflict" within the jurisdiction of IHL, while Pakistan falls short and within the jurisdiction of IHRL.[103]

2. Legality of Drone Strikes under IHRL

Drone strikes embody the U.S. counterterrorism approach in Pakistan with 420 drone strikes carried out between 2006-2016.[104] IHRL does not explicitly mention the use of drones, however, they do have guidelines surrounding targeted killings.

American drones used in Pakistan are highly sophisticated, they are very effective tools for hitting their targets without risking American soldiers' lives.[105] However, legality and effectiveness do not always align. Drones fall within the military model and arguably against the law enforcement model because of the lack of due process associated with the weapons. As established within the first section, U.S. action falls within IHRL jurisdiction which clashes with the American military model.

Legal Restrictions of IHRL

The key documents forming the basis of IHRL are the International Covenants on Civil and Political Rights 1966 and customary law.[106] IHRL was created to regulate law enforcement, but found itself regulating the military in the WOT.[107] Counterterrorism efforts are divided into different "models" that group together tools of statecraft.[108] The military model provides advantages in gathering and employing intelligence as well as better equipment to handle specific terrorist threats.[109] Comparatively, the law enforcement model is ideal for preventing terrorist activities with the proper investigative powers to arrest and prosecute terrorists.[110] While many of these models are blended to form diverse counterterrorism strategies, the legal field separates them and regulates state action in different ways. [111]

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[103] "Module 6: Military / Armed Conflict Approaches to Countering Terrorism," United Nations Office on Drugs and Crime.

[104] Rafat Mahmood and Michael Jetter, "Gone with the Wind: The Consequences of US Drone Strikes in Pakistan," *Economic Journal* 133, no. 650 (2023): 787, https://eds.p.ebscohost.com/eds/detail/detail?vid=0&sid=5c29ec62-4263-4080-bc77-ef5ebd38efd4%40redis&bdata=JkF1dGhUeXBlPXNoaWImc2lOZT1lZHMtbGl2ZQ%3d%3d#AN=161902303&db=buh.

[105] Casey Fitzpatrick, "Drone Strikes on Citizens: Ensuring Due Process for U.S. Citizens Suspected of Terrorism Abroad," Case Western Reserve Journal of Law 4, no. 1 (2012), 133, https://heinonline.org/HOL/P?h=hein.journals/caswestres4&i=137.

[106] International Committee of the Red Cross, "International Humanitarian Law and International Human Rights Law: Similarities and Differences," last modified January, 2003, https://www.icrc.org/en/doc/assets/files/other/ihl_and_ihrl.pdf.

[107] Meyer, "The Legality of Targeted-Killing Operations in Pakistan," 234.

[108] Michael Boyle, "The Military Approach to Counterterrorism," In *Routledge Handbook of Terrorism and Counterterrorism,* ed. by Andrew Silke (Routledge, 2020), 384.

[109] *Ibid.*

[110] *Ibid.*

[111] *Ibid.*; Meyer, "The Legality of Targeted-Killing Operations in Pakistan," 234-235.

IHRL does not protect the military counterterrorism model in the same way IHL does.[112] According to IHRL, lethal force is only permissible if the threat is imminent, "strictly necessary to save human life", and when less lethal tactics are exhausted.[113] IHRL was created with the law enforcement model in mind to allow authorities a minimum amount of force to maintain order.[114] Lethality is only permitted in very narrow circumstances and under intense scrutiny because "life cannot be considered arbitrary".[115] When lethal action is taken it must follow the *Just War* principles of necessity and proportionality.[116] Despite these regulations under IHRL, the U.S. has developed systemic practices surrounding drone strikes in Pakistan.[117] This combined with the lack of engagement with Pakistani authorities demonstrates that U.S. action with Pakistan is illegal under IHRL.

Systemic Drone Strikes

Drones have become a defining feature of U.S. counterterrorism efforts in Pakistan, especially under the Obama administration.[118] President Obama authorized 542 drone strikes, killing an estimated 3,797 people.[119] According to Gabriel Rubin, Obama replaced the Bush administration's "enhanced interrogation" in Guantanamo Bay with an increase in lethal drone strikes.[120] The tactic took a systemic form within the Obama administration, becoming a standardized counterterrorism tactic.[121]

In 2010, the "disposition matrix" was created by John Brennan, who was the Administration's counterterrorism advisor.[122] The "disposition matrix" combined various lists across American agencies to centralize intelligence on suspected terrorists.[123] The database was named the "kill list" because the names within the matrix were often the targets of drones.[124] The "kill list" centralized intelligence and created a streamlined system that provided the necessary information to target and kill on a large scale.[125] The effectiveness of these systems depends on the correct gathering of information.[126] The worry of potentially

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[112] Meyer, "The Legality of Targeted-Killing Operations in Pakistan," 234.

[113] Office of the United Nations High Commissioner for Human Rights, "Human Rights, Terrorism and Counter-terrorism," https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet32EN.pdf.; ""Q & A: US Targeted Killings and International Law." Human Rights Watch, Last modified December 19, 2011, https://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law#2.%20What%20international%20law%20is%20applicable%20to%20targeted%20killings?. Ramsden, "Targeted Killings and International Human Rights Law," 385.

[114] Meyer, "The Legality of Targeted-Killing Operations in Pakistan," 234.

[115] "Human Rights, Terrorism and Counter-terrorism," Office of the United Nations High Commissioner for Human Rights.

[116] *Ibid.*

[117] *Ibid.*

[118] Fitzpatrick, "Drone Strikes on Citizens," 117.; Gabriel Rubin, *Presidential Rhetoric on Terrorism under Bush, Obama and Trump: Inflating and Calibrating the Threat after 9/11* (Springer, 2020), 83.

[119] Rubin, *Presidential Rhetoric on Terrorism under Bush, Obama and Trump,* 97.

[120] *Ibid.,* 83.

[121] Fitzpatrick, "Drone Strikes on Citizens," 117.

[122] Jutta Weber, "Keep Adding. On Kill Lists, Drone Warfare and the Politics of Databases," *Environment and Planning D: Society and Space* 34, no. 1 (2016): 108, https://search.ebscohost.com/login.aspx?direct=true&AuthType=shib&db=edselc&AN=edselc.2-52.0-84957807462&site=eds-live&authtype=shib&custid=s3011414.

[123] Weber, "Keep Adding. On Kill Lists, Drone Warfare and the Politics of Databases," 108.

[124] *Ibid.*

[125] *Ibid.*

[126] *Ibid.*, 111.

missing terrorist threats drove data collection too broadly resulting in false positives.[127] The lack of scrutiny and mistakes of the systemic process is deadly, with false positives paying the ultimate price. The "disposition matrix" demonstrates that rather than in an exceptional case, the U.S. government has created a drone strike system that is convenient and problematic for determining targets and is against IHRL.

In 2011, a U.S. drone falsely struck a *jirga*, a meeting of tribal elders, because the intelligence mistook them for militants.[128] At least 40 people were killed because of the American military's mistake.[129] The intelligence and due diligence required under IHRL were not followed.[130] The airstrikes did not follow the principle of necessity or proportionality because they were not militants and did not provide an advantage. The families of those killed began a legal battle questioning U.S. action which ended in the Peshawar High Court.[131] The court ruled that U.S. action was against the UN Charter and the Geneva Convention.[132] This story is not an original one but highlights the result of faulty information and systemic practices that value efficiency over necessity and morality.

The Principle of Proportionality

The principle of proportionality dictates that the damage caused by force must be commensurable to the advantage sought and meet the standards under IHRL.[133] Effectiveness and legality have an important intersection under proportionality. Effectiveness in this section is the best operation to achieve the goal with the most limited amount of loss. However, the tactic of drone strikes is not very effective at achieving the overarching goal of eradicating terrorism.[134] The practice of decapitation has infiltrated the U.S. counterterrorism strategy. Decapitation strategy refers to the idea that killing the heads of a terrorist organization will "kill" the organization and therefore save future lives.[135] This practice is not very effective at eradicating terrorism, but instead provides a disadvantage.[136]

Rafat Mahmood and Michael Jetter's 2022 study connects drone strikes to the emotional impact and motivation of terrorists.[137] Their findings highlight the ineffectiveness of U.S. drone strikes between 2006 and 2016, attributing 19% of terror attacks to the emotional impact of 3,000 drone strike deaths.[138] Mahmood and

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[127] *Ibid*., 111.
[128] Hayat, "Empire's Accidents," 60.
[129] *Ibid*.
[130] *Ibid*.
[131] *Ibid*., 63.
[132] Hayat, "Empire's Accidents," 63.
[133] "Proportionality," International Committee of the Red Cross, accessed December 16, 2024, https://casebook.icrc.org/a_to_z/glossary/proportionality#:~:text=The%20principle%20of%20proportionality%20prohibits,and%20direct%20military%20advantage%20anticipated%E2%80%9D.
[134] Mahmood and Jetter, "Gone with the Wind," 787-808.
[135] Jordan, "Attacking the Leader, Missing the Mark," 37.
[136] *Ibid*., 37-39.
[137] Mahmood and Jetter, "Gone with the Wind," 787-808.
[138] *Ibid*., 788.

Jetter's scholarship demonstrates the discrepancy between the use of force and the goals of the WOT.[139] Therefore, the use of drone strikes in decapitation missions cannot be viewed as proportional because rather than eliminating threats, it significantly expands the number of threats and casualties.

Necessity and Pakistani Sovereignty

The principle of necessity states that the use of force is only acceptable if it is the last resort or necessary.[140] According to IHRL and international sovereignty law, the use of drone strikes within Pakistan should be the last option to both respect Pakistani authority and the principle of necessity.[141] Advocates of U.S. drone strikes in Pakistan argue that the Pakistani government was not sufficiently cooperative making the only plausible tactic drone strikes.[142] To fulfill its obligations under IHRL, the U.S. must draw upon the Pakistani authority's less lethal means before resorting to drone strikes. Still, the U.S. and Pakistan hold different goals and counterterrorism strategies.[143]

The U.S. approach is framed by decapitation policies, the conflict in Afghanistan, and 9/11.[144] Pakistan's strategy is shaped by geopolitics, its rivalry with India, and domestic turmoil.[145] May 2011 marked a significant development in the WOT, the U.S. conducted an operation within Pakistani territory to kill Bin Laden.[146] The lack of communication with the Pakistani authorities undermined the sovereignty of the government and the people's confidence in the government's potential to evade military operations by India.[147] Later that same year tensions between the U.S. and Pakistan became worse after a NATO airstrike killed 24 Pakistani soldiers mistakenly, leading to a halt of supplies for the U.S. in Afghanistan and a re-examination of U.S. operations by Pakistan.[148]

The misalignment of political objectives has cultivated a lack of trust, having implications on how operations are conducted and under what legal grounds.[149] While conducting drone strikes without the cooperation of the Pakistani government is effective for the U.S. government, it violates state sovereignty that applies within IHRL.[150] The law requires the U.S. to engage with Pakistani authorities because Pakistani interests are protected under sovereignty laws, and they have the resources within the Pakistani law

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[139] *Ibid*., 808.
[140] "Military Necessity," International Committee of the Red Cross, accessed December 16, 2024, https://casebook.icrc.org/a_to_z/glossary/military-necessity.
[141] *Ibid*.
[142] Christine Fair, "Pakistan in 2011: Ten Years of the "War on Terror," *Asian Survey* 52, no. 1 (2012), 100, https://www.jstor.org/stable/10.1525/as.2012.52.1.100.; Masters, "The Target Killings Debate."
[143] Fair, "Pakistan in 2011," 100.
[144] *Ibid*., 105.
[145] *Ibid*.
[146] Fair, "Pakistan in 2011," 103.
[147] *Ibid*.
[148] *Ibid*.,112.
[149] *Ibid*., 100.
[150] Meyer, "The Legality of Targeted-Killing Operations in Pakistan," 233.

enforcement model.[151] The lack of regard for IHRL led to widening divisions between the U.S. and Pakistan, further violating international law.

Additionally, Drone strikes leave no room for other measures of statecraft to take place.[152] This is demonstrated through the comparison of the SEAL team's Bin Laden operation to the drone strike of Ayman al-Zawahiri.[153] Both were high-level targets within al-Qaeda connected to 9/11, but the tactics used to kill them differed.[154] According to IHRL, all other means must be exhausted before a targeted killing operation occurs.[155] Within a SEAL team operation, there is a potential to apprehend a suspect if they surrender, but that is not an option within drone strikes.[156] Al-Zawahiri was not given the chance to surrender immediately before his targeted killing, so it is not compliant with IHRL.

3. Conclusion

The WOT rhetoric and legal arguments implemented by the American leadership sought to bridge the gaps between armed conflicts and terrorism. The current legal frameworks place counterterrorism within the law enforcement model, resisting this transition. Within the jurisdiction of IHRL, the U.S. government's drone strikes in Pakistan are illegal. The "disposition matrix" embodies the systemic processes developed to kill more effectively, and the drone strike killing the *jirga* illustrates the deadly faults of this system.[157] Increased scrutiny of actors with immense power is important to ensure that only imminent threats are being killed in compliance with IHRL. Despite rulings from domestic Peshawar courts and the ICRC, the U.S. has not been held accountable for their lack of scrutiny.[158] This is partly due to the political nature of legal questions and the U.S. rejection of the Rome Statue (International Criminal Court. *n.d.*).[159] The WOT has pushed new debates to the forefront of legal discussion, contributing to the wider understanding of both the benefits and pitfalls of international law.

[151] *Ibid.*
[152] Ramsden, "Targeted Killings and International Human Rights Law," 385.
[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*
[157] Hayat, "Empire's Accidents," 60-63.; Weber, "Keep Adding. On Kill Lists, Drone Warfare and the Politics of Databases," 108.
[158] Hayat, "Empire's Accidents," 60.
[159] International Criminal Court, "The US-ICC Relationship," accessed December 16, 2024, https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/.

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The Eroding Fourth Amendment

By Greta Shope

Introduction

"I agree that constitutional rights apply to situations that were unforeseen in 1791 or 1868— such as applying the [...] Fourth Amendment.[160]" So wrote Supreme Court Justice Brett Kavanaugh, whose method for interpreting the United States Constitution is ostensibly rooted in the document's original meaning[161]. This internal contradiction demonstrates the difficult task that contemporary judges face when assessing the historic document with modern circumstances. The Fourth Amendment of the Bill of Rights is perhaps the best example of this tension. The amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized[162].

In the intervening centuries, the Supreme Court has developed a significant body of Fourth Amendment jurisprudence, defining a 'seizure' under the amendment[163], protecting officials who perform unconstitutional searches in 'good faith[164],' and otherwise regulating the surveillance capabilities of law enforcement. These precedents have been created by conservative and liberal courts alike, using textual analysis and 'original public meaning[165],' as well as the more abstract concept of a living constitution that adapts to contemporary circumstances, to hone the Fourth Amendment's meaning. Regardless of the mode of constitutional interpretation, however, a study of Fourth Amendment case law demonstrates one clear trend: the Supreme Court fails to keep up with modern surveillance technology, creating bigger and bigger constitutional gaps as new modes of search and seizure are classified under 'no search' exceptions[166]. While this erosion of Fourth Amendment rights is not reliant on a particular mode of constitutional interpretation, it often plays out against the backdrop of 'national threats,' or periods of public fear[167]. Throughout the 20th and 21st centuries, these threats have shifted from the 'war on drugs' to the 'war on terror,' and finally to fears about domestic civil unrest. While judicial interpretation of the Constitution changes, the Court habitually bends to the political will of domestic crime-stopping and national security; both politicians and judges are keen to treat hypothetical

[160] Dobbs et. al v. Jackson Women's Health Organization et. al, 597 S. Ct. 215-423, 340 (June 24, 2022).
[161] Brett M. Kavanaugh, "Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution," *Notre Dame Law Review* 89, no. 5 (2014), 1907.
[162] U.S. Const. amend. IV.
[163] Roxanne Torres v. Janice Madrid, No. 19-292, slip op. at 10-11 (Mar. 25, 2021).
[164] United States v. Alberto Antonio Leon et. al, 104 U.S. 897 (June 5, 1984).
[165] Ute Römer-Barron and Clark D. Cunningham, "Applied Corpus Linguistics and Legal Interpretation: A Rapidly Developing Field of Interdisciplinary Scholarship," *Applied Corpus Linguistics* 4, no. 1 (2024), 1-2, https://doi.org/10.1016/j.acorp.2023.100080.
[166] Phillip Heymann, "An Essay on Domestic Surveillance," *Journal of National Security Law and Police* 8 (2016), 425.
[167] *Ibid.,* 435.

future threats as inevitable, "despite the fact that their actual appearance in the world has not occurred[168]."

This article will begin with a brief overview of the major 'schools' of constitutional interpretation available to the Supreme Court, followed by a section outlining the origins of the Fourth Amendment and the early jurisprudence that created procedural privacy. Advancing chronologically, the article will discuss the erosion of the Fourth Amendment through exceptions created for new technologies, beginning with physical technologies invented to combat the 'war of drugs,' then novel digital surveillance technology weaponized in the aftermath of the 9/11 terrorist attacks, and finally, the exponential rise in information sharing and metadata surveillance brought about in responses to fears about civil unrest. Throughout, these exceptions will be explained in reference to their legal and political arguments to demonstrate that the Supreme Court, regardless of its political ideology or preferred mode of constitutional interpretation, ultimately sacrifices Americans' Fourth Amendment rights in the name of domestic and foreign threats.

I. Schools of Constitutional Interpretation

The most formidable school of constitutional interpretation is originalism. Focused on jurisprudence that follows the intentions of the Constitution's Framers, it was conceived the oppose the liberal 'excesses' of the liberal Warren and New Deal Courts[169], both of which focused on the expansion of civil rights and participation in government[170] and tended to place emphasis on the consequences of their rulings rather than the Framers original intentions. While originalism is often linked to conservative political movements[171], analysis of the Framer's original intentions when drafting the Constitution can lead to wildly different conclusions, as most constitutional provisions are the product of fearsome debate between the Constitutions drafters[172] and have no quantitatively singular meaning[173]. Even before the 'school' of originalism sprung up in the late 20th century, many Justices interpreted the Framer's intentions and linguistic choices. In the context of the Fourth Amendment, there is no consensus on the Framer's intentions[174]; while some suggest it was written with extremely narrow tailoring to solely protect the 'persons, houses, papers, and effects' it names without room for expansion[175], others claim the amendment includes a broader right to procedural privacy outside of its mere 54 words[176].

[168] Lauren Martin and Stephanie Simon, "A Formula for Disaster: The Department of Homeland Security's Virtual Ontology," *Space and Polity* 12, no. 3 (2008), 286, https://doi.org/10.1080/13562570802515127.
[169] Ruth Marcus, "Originalism Is Bunk. Liberal Lawyers Shouldn't Fall for It," *Washington Post* (DC), December 1, 2022.
[170] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Knopf Doubleday Publishing Group, 2007), 10-11.
[171] Lee J. Strang, "Originalism and Conservatism: An American Story," *Foundational Principles* 94 (February 2024), 3.
[172] Stephen D. Solomon, "Madison-Jefferson Letters on Advisability of a Bill of Rights, 1787-1789," First Amendment Watch, New York University, last modified February 2, 2018.
[173] Erwin Chemerinsky, *Worse than Nothing: The Dangerous Fallacy of Originalism* (New Haven: Yale University Press, 2022).
[174] Erwin Chemerinsky, *We the People: a Progressive Reading of the Constitution for the Twenty-first Century* (New York: Picador, 2018), 29: "Not even Justice Scalia could find an eighteenth-century English law precedent about whether the use of cellular technology is a search within the meaning of the Fourth Amendment."
[175] Sophia Z. Lee, "The Reconciliation Roots of Fourth Amendment Privacy," *University of Chicago Law Review* 91, no. 8 (2024), 2144.
[176] United States v. Olmstead, 277 U.S. 438, 478 (June 4, 1928).

The loose interpretation of the Constitution originalists fear, generally termed 'living constitutionalism,' is also highly malleable. Living constitutionalists often debate the meaning of the Constitution's preamble, for example, or what common law rights are unalienable despite their omission from the Constitution[177]. Many judges who do not consider themselves originalists–including the Supreme Court's newest member, Ketanji Brown-Jackson– believe "it's appropriate to look at the original intent…" when interpreting the Constitution[178]. From this analysis, it becomes clear that modes of constitutional interpretation are much more fluid than their naming conventions suggest. Judges across the political spectrum use every weapon in their 'toolkit[179],' from original intent to future consequences to, as this article argues, erode the Fourth Amendment's protections.

II. Origins of the Fourth Amendment and Early Jurisprudence

The Fourth Amendment was born out of colonists' outrage over British writs of assistance, a form of general warrant used to carry out searches for contraband en masse and violate the sanctity of Americans' homes[180]. Many Constitutional Framers, including its main drafter James Madison, viewed the Bill of Rights as unnecessary[181], though states' rights activists at the Constitutional Convention were ardent about its inclusion; Virginian Patrick Henry warned that "they may, unless the General Government be restrained by a Bill of Rights […] go into your cellars and rooms, and search, ransack and measure, everything[182]…" The amendment was ratified three years later. However, the definition of searches and seizures was not discussed thoroughly during debates on the Bill of Rights, making the original intent or meaning of the Fourth Amendment 'nearly impossible' to define[183].

Less than a century later, President Lincoln systematically violated Fourth Amendment protections during the American Civil War[184], one of the earliest examples of civil liberties being suspended in the face of extraordinary circumstances[185]. Rights litigation exploded post war with jurisprudence to accompany it[186]. *Boyd v. United States,* though its definition of a search was still rooted in the trespass of tangible property, declared the Fourth Amendment "relate[s] to the personal security of the citizen," and is not implicated only after an intrusion into the home[187]. *Boyd's* reliance on both an originalist definition of a search and adapting the Fourth Amendment to modern circumstances is contradictory on its face and is only explained by the

[177] Chemerinsky, *We the People* 183.
[178] Andrews Koppelman, "Ketanji Brown Jackson's Originalism," *The Hill* (DC), April 10, 2022.
[179] Breyer, *Active Liberty*, 8.
[180] James Otis, *Collected Political Writings of James Otis*, comp. Richard Samuelson (Indianapolis, IN: Liberty Fund, 2015), 11-14.
[181] James Madison to Thomas Jefferson, October 17, 1788.
[182] Jonathan Elliot, comp., *The Debates in the Several State Conventions* (1836), 3, 301.
[183] Orin S. Kerr, "The Curious History of Fourth Amendment Searches," *The Supreme Court Review* 2012, no. 1 (2013), 71, https://doi.org/10.1086/670228.
[184] Lee, "The Reconciliation," 2169.
[185] Duncan Hunter and Malcolm N. MacDonald, "Arguments for Exception in US Security Discourse," *Discourse & Society* 28, no. 5 (2017), 496, https://doi.org/10.1177/0957926517710978.
[186] Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union Thomas McIntyre Cooley*, 5th ed. (Union, N.J: Lawbook Exchange, 1999), 299-308.
[187] Boyd v. United States, 116 U.S. (Feb. 1, 1886), 616.

pressure the Court caved to from Congress about overreaching governmental power, as well as calls from Southern Democrats to limit governmental power during Reconstruction[188].

At the turn of the 20th century, the Fourth Amendment was strengthened through the creation of the exclusionary rule[189], though the Court also created significant carveouts for warrantless searches of non-physical evidence[190] and any evidence collected under the plain view doctrine[191]. While it is far from the 'states of exception' to be discussed in later sections, it is worth noting that these cases centered around alcohol smuggling which had created significant public moral panic.

In 1967, however, the Court moved away from its property-based understanding of the Fourth Amendment in *Katz v. United States*, a decision which explicitly condemned an originalist interpretation of the Fourth Amendment and declared non-physical searches–in this case, a payphone call– as requiring warrant protection[192]. This decision revolutionized Fourth Amendment jurisprudence, removing the physical intrusion requirement outlined in Boyd and replacing it with a 'reasonable expectation of privacy' standard[193]. This standard is the basis on which many of the cases in the following sections are based, whether their reasoning is explicitly originalist or not.

III. Physical Searches and the 'War on Drugs'

Throughout the final decades of the 20th century, the Supreme Court heard more Fourth Amendment challenges than ever before, the result of which was "considerable expansion, beyond what existed prior to *Katz*, of the power of police and other authorities to conduct searches[194]." Many of these decisions are based on an originalist definition of a 'search' rooted in physical trespass, ignoring the *Katz* reasonableness test laid out decades prior. *California v. Ciraolo*, which found warrantless surveillance of an enclosed yard with an airplane to be constitutional, cited Katz but reaffirmed the importance of physical trespass as the Framers would have understood it[195]. Likewise, *United States v. Ross*, one of many cases allowing for warrantless vehicle searches, found its reasoning in early Congressional actions, applying early rules for the smuggling of bootleg alcohol to distribution of narcotics[196]. Ross explicitly disagreed with the Court's previous decisions which to protect American's procedural privacy within their vehicles, writing that "there is no evidence at all that [the Framers] intended to exclude from protection of the Clause all searches occurring outside the home[197]." Justice Marshall's dissent in *Ross,* however, condemned the majority as "far from being 'faithful to

[188] Lee, "The Reconciliation," 2139.
[189] Fremont Weeks v. United States, 232 U.S. 383 (Feb. 24, 1914).
[190] *Olmstead*, 277 U.S. 438.
[191] Hester v. United States, 265 U.S. 57 (May 5, 1924).
[192] Katz v. United States, 389 U.S. 347, 352-3 (Dec. 18, 1967).
[193] *Ibid.*, 360.
[194] Congressional Research Service, Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 117-117-12, 2d Sess. 1619-20 (June 30, 2022).
[195] State of California v. Ciraolo, 476 U.S. 207, 226. (May 19, 1986).
[196] United States v. Ross, 456 U.S. 798, 804-6 (June 1, 1982).
[197] *Ibid.*, 798.

the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history[198],'" demonstrating how the question of Fourth Amendment protections was far from settled, even within the originalist paradigm.

Many other decisions that created exceptions to the Fourth Amendment's warrant requirement, however, were rooted in *Katz's* 'reasonable expectation' standard. By 1992, the Court had used the reasonableness doctrine[199] to permit warrantless searches in schools[200], border crossings[201], and nearly all searches of a vehicle and the containers therein[202]; all these exceptions were found to be constitutional when related to drug possession and distribution. This change in Supreme Court jurisprudence, then, seems far from related to changes in the Court's preferred interpretive framework, but rather part of a larger push to increasingly criminalize drug use. These cases were decided at the same time as 'mandatory minimums' for drug crimes at state[203] and federal levels[204], as well as massive public fears about drug abuse as the nation's "number one enemy[205]".

IV. Digital Technology and the War on Terror

By the early 2000s, however, the government and the Court refocused its attention on growing fears of foreign enemies. Driven by the horrors of the 9/11 attacks, the 'war on terror' was declared by President George W. Bush with massive political and judicial support[206]. Justice Douglas had warned in his concurrence in *Katz v. United States* that the Court may eventually allow "for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels "national security" matters[207]." This statement proved prescient in the aftermath of the attack on American soil, as the massive public fear created in response allowed law enforcement to take unprecedented surveillance actions "commensurable to the threat presented[208]." The PATRIOT Act, drafted in secret and expediently passed in 2001[209], allowed for unprecedented data collection by intelligence agencies whenever "a significant purpose of the investigation is foreign intelligence[210]." This included pen register and tap and trace (PR/TT) devices which allow for searches of non-content communication information like phone numbers and call times, information

[198] *Ibid.*, 835.
[199] Congressional Research Service, "Constitution of the United States of America" 1613.
[200] State of New Jersey v. T.L.O., 469 U.S. 325 (Jan. 15, 1985).
[201] United States v. Cortez, 449 U.S. 411 (Jan. 21, 1981).
[202] State of California v. Acevedo, 500 U.S. 565 (May 30, 1991).
[203] Mason B. Williams, "How the Rockefeller Laws Hit the Streets: Drug Policing and the Politics of State Competence in New York City, 1973–1989," *Modern American History* 4, no. 1 (2021), 67, https://doi.org/10.1017/mah.2020.23.
[204] United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System, H.R. Rep. (Aug. 1991).
[205] Richard Nixon, "Remarks about an Intensified Program for Drug Abuse Prevention and Control.," speech presented in Washington D.C., American Presidency Project, University of California Santa Barbara, last modified June 17, 1971.
[206] Coalition of Information Centers, "The Global War on Terrorism: The First 100 Days," US Department of State: Archive, last modified 2002.
[207] *Katz*, 389 U.S. 347, 360.
[208] Hunter and MacDonald, "Arguments for Exception," 501.
[209] *Anti-Terrorism Investigations and the Fourth Amendment after September 11, 2001: Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 108th Cong., 1st Sess. (2003) (statement of Jerrold Nadler), 10.
[210] *Anti-Terrorism Investigations* (statement of Viet Dinh), 16.

which is not governed by the Fourth Amendment's probable cause standard and instead only requires "specific and articulable facts showing [...] reasonable grounds to believe that the contents [...] are relevant and material to an ongoing criminal investigation[211]".

Seven years later, Section 702 of the Foreign Intelligence Surveillance Act passed through Congress with bipartisan support. Section 702 "authorizes the government to target non-U.S. persons, reasonably believed to be located outside the United States, in order to collect foreign intelligence information using the compelled assistance of U.S. electronic communications service providers[212]," and compels those providers, including mobile carriers and internet service companies, to assist in compiling foreign intelligence[213]. All this information is collected without a warrant and does not have to meet the probable cause standard in found in the Fourth Amendment. While Section 702 has been reauthorized several times, including under President Biden in 2024[214], its critics have pointed out the Fourth Amendment implications: namely, that it allows for the indirect surveillance of US persons who fall under the Fourth Amendment's warrant protection.

The Privacy and Civil Liberties Oversight Board, which conducts external reviews of the government's invocation of 702, notes that "Once collected [...] U.S. person information may be queried, analyzed, disseminated in intelligence reports, retained, and used as evidence[215]." While intelligence agencies with access to Section 702 surveillance information must follow querying rules when searching for US persons' communications–also known as 'backdoor searches[216]'– The FBI and other intelligence agencies frequent violate these procedures[217]. Rather than querying US persons under 702 only when 'specific and articulable facts[218]' related to foreign intelligence are presented, the FBI often uses 702 queries as a 'first resort' to find initial evidence of a crime[219] and their querying compliance incident rate reached nearly 40%[220]. These queries implicate not only Americans' Fourth Amendment rights to be free from warrantless surveillance but also have the potential to chill their rights of association and speech protected under the First Amendment when communicating with non-US persons[221].

[211] Requirements for Government Access, 18 U.S.C. § 2703 (Jan. 23, 2000).
[212] Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, 2, September 28, 2023.
[213] Congressional Research Service, *Foreign Intelligence Surveillance Act (FISA): An Overview*, report no. IF11451, 1 April 11, 2024.
[214] Associated Press, "Biden Signs Reauthorization of Surveillance Program into Law Despite Privacy Concerns," *National Public Radio*, April 20, 2024.
[215] *Report on the Surveillance Program*, 10.
[216] *Fixing FISA: How a Law Designed to Protect Americans Has Been Weaponized Against Them: Hearings Before the House Judiciary Subcommittee on Crime and Federal Government Surveillance*, 118th Cong. 2-3 (2023).
[217] Office of the Director of National Intelligence, *Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (FISA) Joint Assessments*, 61, December 21, 2022.
[218] *Report on the Surveillance Program*, 94.
[219] *Ibid.,* 14.
[220] *Ibid.,* 142.
[221] Manu Singh Bedi, "Social Networks, Government Surveillance, and the Fourth Amendment Mosaic Theory," *Boston University Law Review* 94 (December 3, 2014), 1849-50.

The Supreme Court has avoided ruling on the constitutionality for 702 despite calls from free speech and privacy advocates to do so. In 2013, the Court ruled against petitioners in *Clapper v. Amnesty International*, declaring that "the plaintiffs–various attorneys and human rights organizations–lacked standing to challenge section 702 [...] because they could not show that future injury was "certainly impending[222]." Truthfully, the plaintiffs could not show imminent injury, partially because the FBI and other intelligence agencies do not provide figures on the number of Americans surveilled under Section 702 and claim they have no way of doing so[223]. However, discovery in *Clapper* revealed that, among other procedural abuses, the FBI had not been following regulations requiring it to notify aggrieved parties when warrantless surveillance under Section 702 was to be presented in a trial or proceeding[224], and had lied about doing so[225]. This limited the evidence available to plaintiffs in claiming injury, though the Supreme Court dismissed their concerns as being based in "no specific facts[226]." This ruling, rather than being based on any specific constitutional interpretive doctrine, was a simple balancing between the government's law enforcement abilities and its interest in civil liberties[227].

Part of the Supreme Court's reasoning in *Clapper* was that there was already a judicial check on the federal government's warrantless surveillance; the Foreign Intelligence Surveillance Courts (FISC)[228]. FISC does not approve individual acts of data collection under 702; the Attorney General and the Director of National Intelligence jointly authorize 702 surveillances of anyone 'reasonably believed' to be non-US persons outside the United States[229]. FISC need only approve agencies' targeting, minimization, and querying procedures, all of which attempt to keep U.S. persons information safe in line with the Fourth Amendment. As previously mentioned, violations of these procedures are frequent, and the FISC enforces remedies of these violations with concerning infrequency. In 2009, FISC approved the National Security Administration's regulatory procedures for 702 collections, only for the NSA to overstep its authority nearly a dozen times to collect millions of improperly collection communications[230]. Despite FISC's demands for remedy, the NSA continued to collect domestic communications without requesting a warrant. FISC judge John Bates noted that the collections "raise questions as to whether NSA's targeting and minimization procedures comport with FISA and the Fourth Amendment[231]," despite FISC having approved their procedures.

[222] Clapper et. al v. Amnesty International USA et. al, 568 U.S. 398, 399 (Feb. 26, 2013).
[223] *Report on the Surveillance Program*, 2.
[224] Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806.
[225] *Report on the Surveillance Program*, 24.
[226] Clapper, 568 U.S. 398, 412.
[227] Kerr, "The Curious," 94.
[228] Clapper, 568 U.S. 398, 410.
[229] Electronic Privacy Information Center, "Foreign Intelligence Surveillance Court (FISC)," EPIC, last modified 2024.
[230] James Risen and Eric Lichtblau, "E-Mail Surveillance Renews Concerns in Congress," *New York Times*, June 16, 2009.
[231] Foreign Intelligence Surveillance Court, *Declassified- Memorandum Opinion*, by John D. Bates, 40, October 2011.

It is difficult to assess FISC judges' methods of interpreting the Fourth Amendment, as, even when they note constitutional violations, judges rarely give advice on how to make 702 surveillances align with American's privacy protections. The FISC has proven itself to be inefficient in providing constitutional remedies for these abuses; in 2016 it said "the Court was not in a position to assess[232]" the constitutionality of the NSA's 702 procedures despite the agency reporting significant non-compliance. In 2021, FISC Judge Contreras attributed flagrant violations of the FBI's procedures to a 'lack of understanding[233]' and ordered an internal revision of the agency's procedures, which he deemed to be constitutional when followed[234]. This proved fruitless, as in 2022 Judge Contreras once again noted the FBI's 'habitual[235]' and 'pervasive[236]' violations including 278,000 non-compliant queries by FBI agents[237]. Nevertheless, he once again declared their procedures to be constitutional[238].

Near universal approval of Section 702 surveillance is not linked to any particular mode of constitutional interpretation, nor to any political party. Current FISC judges, all of whom also served as District Court judges, were nominated to their positions by Presidents Bush, Clinton, Obama, and Trump[239] and their judicial records place them throughout the political spectrum. Since its enactment, Section 702 has enjoyed bipartisan support as the 'state of emergency' caused by terrorist threats drags on, leading Professor Alex Sinha to lament that "the current political climate is even less likely to lead to significant oversight than it was in 2005 and 2006, as administrations of both parties have now formally endorsed the FAA, thereby illustrating their commitment to the NSA program[240]."

The apolitical, blanket prioritization of national security over civil liberties is eloquently illustrated by the dissolution of the US-EU Privacy Shield. In 2020, the European Court of Human Rights overturned the Privacy Shield which had previously allowed for the free flow of data across the Atlantic, condemning U.S. intelligence programs as "not limited to what is strictly necessary and […] a disproportionate interference with the rights to protection of data and privacy […] since they do not sufficiently limit the powers conferred upon US authorities[241]." Following the decision, US Senate hearings focused on the risks the national security caused by the Privacy Shield's dissolution, rather than updating American privacy protections[242]. Justice Douglas's fears in *Katz* have proven true not only for the Executive branch in response to national security threats; it now appears that legislative and judicial officials are willing to defer to intelligence officials even when surveillance is in

[232] Foreign Intelligence Surveillance Court, *Declassified: Memorandum Opinion and Order*, by Rosemary M. Collyer, 4, April 26, 2017.
[233] Rudolph Contreras, *Declassified: Order in Response to Querying Violations*, 9, September 2, 2021.
[234] *Ibid.*, 14.
[235] Rudolph Contreras, *Declassified: Memorandum Opinion and Order*, 24, April 21, 2022.
[236] *Ibid.,* 26.
[237] *Ibid.,* 31.
[238] *Ibid.,* 16.
[239] Foreign Intelligence Surveillance Court, "Current Membership - Foreign Intelligence Surveillance Court," *USCourts.gov*, last modified May 2024.
[240] G. Alex Sinha, "NSA Surveillance since 9/11 and the Human Right to Privacy," *Loyola Law Review* 59 (2013), 945.
[241] Alexander Henrik Mildebrath, "The CJEU Judgment in the Schrems II Case," news release, September 15, 2020.
[242] *The Invalidation of the EU-US Privacy Shield and the Future of Transatlantic Data Flows: Hearings Before the Committee on Commerce Science, and Transportation*, 116th Cong., 2d Sess. (2020).

violation of international treaties, or the Constitution.

V. Information Sharing and Civil Unrest

Another huge source of potential Fourth Amendment violations comes from private data brokers who amass huge profiles of individual's data and sell it on to domestic government agencies. While this data collection is carried out by private companies, intelligence agencies weaponize it as a 'mechanism of state surveillance[243].' The judiciary has been incredibly permissive of private data collection, rubber stamping collection under the 'third-party doctrine.' While early Fourth Amendment warrant exceptions were based in originalist interpretation, the third-party doctrine, which allows for warrantless government collection of data voluntarily disclosed to a non-governmental entity, is built off the 'reasonable expectation of privacy' standard outlined in *Katz*[244]. Even judicial critics of the third-party doctrine like former Supreme Court Justice Brennan use a living constitutionalist doctrine, arguing that a modern interpretation of the Constitution must consider the "accelerated [...] ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds[245]." Brennan's grievances with the third-party doctrine, now more than 40 years old, is even more relevant today. Bank statements[246] and call records[247], the information that was originally excepted from the Fourth Amendment's warrant requirement under third-party doctrine, have been replaced with technology that can create an "exhaustive chronicle of location information [...] every day, every moment" over a long period of time[248].

Brennan's concerns about the third-party doctrine were brought into the 21st century in *Carpenter v. United States*, a case in which the Court held that law enforcement could not collect cell-site location information (CSLI) without a warrant, even though the 12,898 locational data points collected by Carpenter's cell provider and turned over to law enforcement was ostensibly collected with his consent[249]. Echoing Brennan's dissent in *Miller*, the Court majority found that the data available through CSLI was far too personal to be disclosed without a warrant[250]. Unlike Brennan, however, Justice Roberts invoked the Founder's original intentions, writing in for the majority in *Carpente*r that, "We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools[251]" while also referring to *Katz's* 'reasonable expectation of privacy' standard[252]. Both originalist and living constitutionalist rhetoric were used to protect CSLI from warrantless collection; however, the high specificity of the Court's language did not significantly alter the third-party doctrine.

[243] Hunter and MacDonald, "Arguments for Exception," 508.
[244] Smith v. State of Maryland, 442 U.S. 735, 742 (June 20, 1979).
[245] United States v. Miller, 425 U.S. 435, 425-6 (Apr. 21, 1976).
[246] Miller, 425 U.S. 435.
[247] Smith, 442 U.S. 735.
[248] Congressional Research Service, *Abortion, Data Privacy, and Law Enforcement Access: A Legal Overview*, 2, July 8, 2022.
[249] Ben Vanston, "Putting Together the Pieces: The Mosaic Theory and Fourth Amendment Jurisprudence since Carpenter," *West Virginia Law Review* 124, no. 2 (2022), 669.
[250] Congressional Research Service, *Supreme Court Takes Fourth Amendment Case about Cell Phone Location Data*, 1, June 26, 2018.
[251] Carpenter v. United States, No. 16-402, slip op. at 6 (June 22, 2018).
[252] *Ibid.*, 15.

Lower courts have struggled to apply Carpenter as it did not provide an applicable standard for electronic surveillance as *Katz* did for non-physical searches[253]. The Eleventh Circuit Court declined to extend protections to emails sent through cloud services or IP addresses stored in messaging apps[254]; while the Court noted the potential for this data to reveal locational information, they held that Carpenter created a 'narrow' exception to third-party doctrine[255]. State courts have extended *Carpenter's* protections to drone photographs [256] and medical records[257] in Michigan and Ohio respectively. While the former relied upon the Framer's understanding of private spaces and cited British Common law jurisprudence dating as far back as 1765[258], the latter called for "a modern and more nuanced approach to the third-party doctrine[259]." These decisions seem contradictory as they use opposite interpretive frameworks to reach nearly identical conclusions, but a report in the Harvard Law Review suggests there may be a simple answer. Upon analyzing nearly 300 state court opinions referencing *Carpenter*, the report found that, regardless of political affiliation or preferred mode of constitutional interpretation[260], courts with popularly elected judges, including the Appeals Courts in Michigan and Ohio mentioned above, were more likely to find surveillance
required warrant protection under *Carpenter's* precedent[261].

Meanwhile, the Department of Homeland Security (DHS) has interpreted Carpenter limitedly as "only applying to location data obtained through compulsory legal process and that Carpenter does not apply to data purchased by the government[262]" and has such has not ceased buying or otherwise acquiring data from private third parties. The Domestic Security Alliance Council, for example, continues to "facilitate strong, enduring relationships among its private sector member companies [..] and with the Department of Homeland Security (DHS) [...] in addition to other federal government entities to detect, prevent, and deter criminal acts[263]." While data brokers were forced to stop selling CSLI data to law enforcement after the ruling in *Carpenter*, there are many other forms of data collection that law enforcement agencies purchase from brokers, including social media handles[264] and locational software that can track every cell phone entering a particular location[265]. Public-private contracts, as well as the 'dissolution of institutional boundaries' between agencies at the state and federal level constitute important steps in the suspension of

[253] Matthew Tokson, "The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law, 2018-2021," *Harvard Law Review* 135, no. 7 (2022), 1828.
[254] Vanston, "Putting Together," 672.
[255] United States v. Scott Joseph Trader, No. 23-13189, slip op. at 11 (11th Cir. Nov. 25, 2020).
[256] Long Lake Township v. Maxon, No. 349230, slip op. (Mar. 18, 2021).
[257] State of Ohio v. Eads (May 6, 2020).
[258] Long Lake Township, No. 349230, 4-5.
[259] Eads, No. 2805, 11.
[260] Matthew Tokson, "The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law, 2018-2021," *Harvard Law Review* 135, no. 7 (2022), 1794.
[261] *Ibid.*, 1845-6.
[262] Defense Intelligence Agency, *Unclassified: Clarification of Information Briefed during DIA's 1 December Briefing on CTD*, by William Stuart, 1, January 15, 2021.
[263] Domestic Security Alliance Council, "About DSAC," DSAC, Federal Bureau of Intelligence.
[264] Faiza Patel, Rachel Levinson-Waldman, and Harsha Panduranga, *A Course Correction for Homeland Security*, 11, April 20, 2022.
[265] Bennett Cyphers, "How the Federal Government Buys Our Cell Phone Location Data," Electronic Frontier Foundation, last modified June 13, 2022.

civil liberties, including those included in the Fourth Amendment[266]. These contracts are preemptively justified under the third-party doctrine, even though much of the information is not really 'publicly available' and is compiled by private data firms for exclusive government use[267]. In 2023, Georgetown Professor Laura Moy testified in front of the House Committee on Energy and Commerce that law enforcement used third party data brokers to "make an end run around the Fourth Amendment" and collect data that they could not otherwise obtain without a warrant, including location data for more than 250 million devices[268] which may have been obtained without robust checks for accuracy or Fourth Amendment privacy considerations[269].

This massive amount of information sharing also implicates innocent Americans' rights to speech, assembly, and political and civil association, especially as warrantless data collection often targets Americans that openly express political and social opinions. Additionally, most of this data originates from electronic communications where people are more likely to express themselves freely[270], thus implicating all Americans' "ability to choose [their] paths slowly and deliberately[271]" when records of their actions may be collected and sold to law enforcement. This collection, like much of the surveillance discussed above, is justified in the name of protecting against potential terrorism or domestic crimes[272], even when the opinions in question fall under protected First Amendment speech.

There is no better example of the dangerous potential of warrantless data collection and sharing than the national network of fusion centers, whose abuse is often closely tied to instances of legal civil protest. Fusion centers, hubs of intelligence sharing between federal and state officials and nongovernmental stakeholders erected in all 50 states[273], derive their legitimacy from the Homeland Security Act of 2002[274] as a response to the 9/11 terrorist attacks[275]. Counterterrorism is the explicit mission of fusion centers, but they have proven wholly inefficient at producing significant intelligence to prevent terrorist attacks[276], to the point where DHS officials "expressed amazement at the poor quality of reporting[277]." As such, most fusion centers focus on lesser crimes including local crime rings and crimes in schools[278]. This implicates the data of Americans in their day-to-day activities, including their involvement in social movements and civil protest.

[266] Hunter and MacDonald, "Arguments for Exception," 508.
[267] Carey Shenkman et al., *Legal Loopholes and Data for Dollars: How Law Enforcement and Intelligence Agencies Are Buying Your Data from Brokers*, 7, December 2021.
[268] *Who Is Selling Your Data: A Critical Examination of the Role of Data Brokers in the Digital Economy: Hearings Before the Subcommittee on Oversight and Investigation of the Committee on Energy and Commerce*, 118th Cong., 1st Sess. (2023).
[269] *Ibid.*, 11.
[270] John A. Bargh, Katelyn Y. A McKenna, and Grainne M. Fitzsimons, "Can You See the Real Me? Activation and Expression of the 'True Self' on the Internet," *Journal of Social Issues* 58, no. 1 (2002), 44-6, https://doi.org/10.1111/1540-4560.00247.
[271] Heymann, "An Essay," 421.
[272] Committee on the Judiciary, Financial Surveillance in the United States: How Federal Law Enforcement Commandeered Financial Institutions to Spy on Americans, H.R. Rep. (Mar. 6, 2024).
[273] Patel, Levinson-Waldman, and Panduranga, *A Course*, 5.
[274] Committee on Homeland Security and Governmental Affairs, Federal Support for and Involvement in State and Local Fusion Centers, S. Rep., 12 (Oct. 3, 2012).
[275] Department of Justice, *Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era*, 10, 2007.
[276] Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Federal Support for and Involvement in State and Local Fusion Center, H.R. Rep. No. 112, 2d Sess., 26 (Oct. 3, 2012).
[277] *Ibid.*, 32.
[278] *Ibid.*, 4.

Intelligence officials, though they claim to be bound by the First and Fourth Amendments, often surveil legal protestors under the guise of crime stopping; in reality, the only suspected crimes are graffiti or minor damage during protests[279]. A fusion center in Austin, Texas disseminated personal data including social media handles and addresses of organizers involved in 'peaceful motorcycle ride[s]' and 'music and spoken word performances' as well as Black Lives Matter protests[280], claiming that surveillance was necessary to monitor "potential use of incitement rhetoric could be used to instigate acts of violence[281]." An ongoing investigation into Oregon's fusion center alleges the center "used surveillance software to track the physical location of social media users posting the 'Black Lives Matter' hashtag[282]" even when those users were not suspects in a criminal investigation[283] and no warrant had been issued. Even when surveillance didn't reveal any illegal activity, a lack of clear data purging procedures means that information about Americans' constitutionally protected activity is often stored indefinitely[284]. Given the first federal guidance on fusion centers cites 'legal and cultural' concerns related to free speech and privacy as 'obstacles' to fusion centers' missions[285], it is unsurprising that they continue to exploit the third-party through a narrow reading of *Carpenter* and *Katz*, further eroding Fourth Amendment protections.

VI. Conclusion

The erosion of American's procedural privacy is not directly linked to originalism, nor living constitutionalism, nor any political party. Both modes of constitutional interpretation have led to carveouts in the Fourth Amendment's warrant requirement, and warrantless surveillance has only increased in the name of protecting the country against internal and foreign threats. In the face of these threats, whether they be an uptick in drug use, fears about terrorist attacks on American soil, or the potential unrest caused by civil protest, the government has argued both in the Courts and legislature that "conditions of extraordinary danger require a response that is commensurable to the threat presented[286];" these conditions often flagrantly violate the Fourth Amendment as has been demonstrated above. As technology advances, be it physical or digital surveillance technology or increasing communication channels to share surveillance data, the gap between all searches available to law enforcement constitutionally protected searches continues to widen.

[279] Patel, Levinson-Waldman, and Panduranga, *A Course*, 7.
[280] Memorandum by Austin Regional Intelligence Center, "ARIC Informational Bulletin June 2020 Week 3," June 18, 2020.
[281] *Ibid.,* 1.
[282] Farrell-Smith et. al v. Oregon Department of Justice, No. 21CV47809, *Complaint for Declaratory Judgement and Injunctive Relief* 3, (Dec. 14, 2021).
[283] Patel, Levinson-Waldman, and Panduranga, *A Course*, 2.
[284] Permanent Subcommittee on Investigations, *Federal Support for and Involvement*, 58.
[285] Department of Justice, *Fusion Center*, 9.
[286] Hunter and MacDonald, "Arguments for Exception," 501.

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"Ransom Payments, Maritime Insurance, and English Common Law: A Legal and Economic Dilemma"

By Archie Popham

Introduction

Piracy for ransom, by its very nature, involves the taking of hostages to extract a ransom payment.[287] Modern piracy has evolved into a systematic hijack-for-ransom model, where vessels and their crews are detained until payments are extracted—typically from shipowners and insurers—creating a high-stakes, economically impactful practice (Raffety, 2024).[288] This model underscores the operational sophistication of modern piracy and its reliance on the vulnerabilities of international shipping and insurance systems. The financial toll is staggering: maritime piracy and extortion cost an estimated $6–12 billion annually, with human costs peaking at 3,000–5,000 captives during the height of pirate activity around 2010.[289] Yet, the full extent of these impacts is likely underreported due to fears surrounding security breaches and potential commercial liability, as noted by Lloyd's of London, the leading maritime insurance broker.[290] These challenges illuminate the complex interplay between economic interests, legal frameworks, and security concerns, setting the stage for examining how states and the private sector navigate the perilous waters of piracy and ransom payments.

This article explores how the private sector, notably the professional services sector (insurance and legal), contends with the strict government approach to ransom payments. Limiting the scope to government policy post-2010, the article outlines how the government does little to support the shipping sector, notwithstanding the implementation of the Counter Terrorism and Security Act 2015 which, from an industry perspective, 'alienates' those involved in a ransom dispute.[291] The issue is of great importance within English law due to the presence of UK-based insurers and the industry. While piracy is a global issue, London is the epicentre of "negotiations on ransom payments… between pirates and the shipping company affected" according to Mark Dickinson; it is not necessarily decided in the "countries of origin of the hostages or the flag state of the ship".[292] This has enabled the civil courts to interpret cases in their domain, offering clarity on key stipulations friendly to the shipping industry. The article outlines two key cases, *Westminster N.V.*[293] and *Masefield* to understand how public policy was instrumental in the decision to enable ransom payments.[294] This is finally followed by a detailed examination of the industry's and its stakeholders' response to the proposed ransom ban, highlighting their strong opposition. Drawing on perspectives from London's maritime, shipping, and

[287] Sofia Galani, "The Human Rights and Maritime Law Implications of a Piracy Ransom Ban for International Shipping," *Maritime Safety and Security Law Journal,* no. 3 (June 2017), 33.
[288] Professor Matthew Raffety, "Pirates and Private Law: The Legality of Ransom Payments in the Age of Terrorism" (Essay, 2024).
[289] Jadranka Bendekovic and Dora Vuletic, "Piracy Influence on the Shipowners and Insurance Companies," *DAAAM International Scientific Book*, 2013, 711–15, https://doi.org/10.2507/daaam.scibook.2013.42.
[290] Martin Kelly, "The Lloyd's List Podcast: Where Have All the Pirates Gone?" Lloyds List Podcast, January 20, 2023, https://www.lloydslist.com/LL1143685/The-Lloyds-List-Podcast-Where-have-all-the-pirates-gone.
[291] Counter Terrorism and Security Act 2015.
[292] Nautilus: Outlawing Ransom Payment Jeopardizes Seafarers' Offshore Energy 17 December 2014.
[293] *Royal Boskalis Westminster N.V. and Others v. Mountain and Others*, [1999] QB 674.
[294] *Masefield AG v. Amlin Corporate Member Ltd*, [2011] EWCA Civ 24, [2011] 1 Lloyd's Rep. 630.

professional sectors, this section underscores the overwhelmingly negative reception to such a ban. It explores how an outright prohibition on ransom payments is argued to be both economically detrimental and physically perilous for all stakeholders involved.

The Legality of Ransom Payments: UK Jurisdiction

Piracy today is not what it once was; pirates do not usually seek to deprive shipowners of property but rather place an onus on extortion.[295] Due to this, the UK still operates within a legal and political 'grey area' concerning maritime pirate activities. Recent cases, such as Chandlers' case, highlight the political and legal difficulties. The Chandlers, left alone following the UK government's "long-standing policy against ransom payment", did "not have [the prerequisite sailing] insurance",[296] finding themselves captive for over nine months while the British Foreign Office offered little consolation bar "tea and sympathy".[297]

On return to the UK, the Chandlers presented their situation to the Parliamentary Select Committee on Piracy, arguing that they, and all others held captive for ransom felt "let down" by the government, as they offered little assistance both prior, and during the ordeal.[298] This lack of communication is a thematic example of the interplay between British home and foreign policy and the private sector concerning maritime ransom payments.

Yet, the official stance of non-intervention has been routinely broken in recent years. The Ministry of Defense reported in 2013, that over 100 illegal boardings have occurred over 5 years since 2008, with many of the vessels being recaptured under the guise of "national interest".[299] David Cameron stated in his 2013 address to the G8 that recent Royal Navy anti-piracy operations have seen the UK expand its original remit, extending to helping nations with strong relations with the UK in instances of illegal boardings and 'mayday' calls.[300] One example was the 2012 boarding of the Italian Merchant Vessel Montecristo. The vessel, boarded by Somali pirates, sent a mayday call to the US frigate, De Wert, who alerted the nearby Royal Navy's Royal Fleet Auxiliary Fort Victoria. "Equipped with a Royal Navy helicopter and Royal Marine boarding teams", the Royal Navy successfully implemented the "tough, patient and intelligent approach" in dealing with maritime piracy seeking to extort ransom.[301] This showcased the UK's tactful and non-negotiative stance towards what the G8 nations hailed as a "poisonous ideology" in 2012.[302]

[295] Raffety, "Pirates and Private Law: The Legality of Ransom Payments in the Age of Terrorism", 5.
[296] Lee-Eilertsen, "The Legality of Maritime Ransom Payment in the Light of UK and Singapore Jurisdictions" (thesis, 2015), 32.
[297] Caroline Davies, "Foreign Office Let Us down, British Kidnap Couple Tell MPs," *The Guardian,* October 24, 2013.
[298] Jessica Davis and Alex Wilner, "Paying Terrorist Ransoms: Frayed Consensus, Uneven Outcomes & Undue Harm," *International Journal: Canada's Journal of Global Policy Analysis* 77, no. 2 (June 2022), 356–67.
[299] Ministry of Defence. "Viewfinder General." *Defence Focus*, June 13, 2013, 26.
[300] Lee-Eilertsen, "The Legality of Maritime Ransom Payment in the Light of UK and Singapore Jurisdictions", 28.
[301] Ministry of Defence. "Royal Navy Helps Reduce Somali Pirate Activity." GOV.UK, February 21, 2012. https://www.gov.uk/government/news/royal-navy-helps-reduce-somali-pirate-activity.
[302] Cabinet Office. "Prime Minister's Statement on G8 Summit." GOV.UK, June 19, 2013. https://www.gov.uk/government/speeches/prime-ministers-statement-on-g8-summit.

From this, one may attest that the UK's stance on piracy and subsequent ransom payments is clear and assertive, especially based on the action taken. Yet, on closer inspection, the perspective within Westminster is much more nuanced. Payments made by private actors (ie. insurance companies, shipowners, families) are not deemed illegal, yet are not condoned. The Foreign and Commonwealth Office in 2010 stated that "although there is no UK law against third parties paying ransoms, we counsel against them doing so because we believe that making concessions only encourages future kidnaps"; a plausible rationale as to why the government does not make or facilitate substantive concessions to hostage takers".[303] Offshore Energy further reported that as of 2015, the government kept ransom payments to pirates legal, "pledging that it would not outlaw ransoms" [304] considering the stronger Counter Terrorism and Security Act 2015 (CTSA 2015) introduced.[305] Nevertheless, the CTSA 2015 has made it increasingly more problematic and convoluted for those paying the ransom to pirates.[306]

The relevant issues surrounding the CTSA 2015, and ransoms are showcased within how pirates seeking ransom payments operate, and who the actors are connected to.[307] The CTSA 2015 introduced enhanced legislation, namely a further burden onto third parties seeking to pay ransom.[308] Within the legislation, amendments were made under part 6 of the act,[309] in which the Terrorism Act 2000 (TA 2000) was amended to include "insurance payments made in response to terrorist demands".[310] Further, sections A and B make it an offence for an insurer to make a payment to pirates under the contract, or purportedly under it if "the insurer or the person authorising the payment on the insurer's behalf knows or has reasonable cause to suspect that the money or other property has been, or is to be, handed over in response to such a demand".[311] The section also develops criminal charges for a corporate entity paying a ransom where suspected terrorist activity is involved. Subsection 2 (a and b) states a "director, manager, secretary" or "any person who was purporting to act in any such capacity" is guilty of the offence and is liable to prosecution.[312] According to Lee-Eilertsen, this is cultivated by the controversial "long-time fears and discussions" on collusion between Somali pirates and terrorists in the region.[313] This therein has forced the UK's hand in enforcing piracy under the scope of counter-terror legislation, notwithstanding the pirates acting as mercenaries with no "political, religious or ideological cause" as per the TA 2000 (s 1) - only apolitical, financial gain.[314]

[303] BBC News. "UK Defends Not Paying Pirates Ransom for Kidnapped Pair." Bbc.co.uk. BBC, February 1, 2010. http://news.bbc.co.uk/1/hi/england/kent/8491301.stm.
[304] Offshore Energy. "UK Keeps Piracy Ransom Payment Legal." Offshore Energy, January 21, 2015. https://www.offshore-energy.biz/uk-keeps-piracy-ransom-payment-legal/.
[305] Counter Terrorism and Security Act 2015.
[306] *Ibid.*
[307] *Ibid.*
[308] *Ibid.*
[309] *Ibid.*, p 6.
[310] *Ibid.*, s 42(1).
[311] *Ibid.*, s 42(1a, c).
[312] *Ibid.*, s42, ss 2(a, b).
[313] Lee-Eilertsen, "The Legality of Maritime Ransom Payment in the Light of UK and Singapore Jurisdictions" (thesis, 2015), 16.
[314] Terrorism Act 2000, s 1.

Galani (2017), believes that the CTSA 2015's anti-pirate measures are counter-humanitarian, as visible by the many examples of nationals stranded by their government.[315] This has led stakeholders within the maritime industry, such as Nautilus General Secretary Mark Dickinson, to note that delaying payment or even making such payments illegal, only "jeopardise[s] the safety of seafarers held captive"; further adding that the threats of violence and death to crew are more likely now due to lack of a ransom payment (Offshore Energy, 2015).[316] Dickinson's concerns hold merit, especially in light of other states having issues dealing with both terror and piracy-related incidents. Davis and Wilner notes that Canada, in implementing a no-payment clause for both terrorists and pirates, has reported that their citizens, and "citizens of non-paying countries, are often prioritised for execution to further compel potential paying countries",[317] undoubtedly marking those with a British passport to be at risk of increased danger considering the CTSA 2015.[318]

Ultimately, a clear non-ransom policy against piracy only seeks to undermine the private sector, with seafarers bearing a substantive risk to personal safety as a result. The UK government's finding that ransom payments "may reimburse pirates linked with terrorist groups produces an environment which may facilitate the payment of terrorist ransoms".[319] Prima facie, the government's policy is valid, notwithstanding the real threat to sailors. Statistics show that a substantial amount of piracy is linked with a wide network of "organisers and financiers" who seek to use the ransom to fund and arm terrorist cells.[320] Additionally, Freeman reported as early as 2009 that "pirate gangs" off the coast of Somalia were colluding with prescribed terrorist organisations' "smuggling operations" for financial gain.[321] Thus, Galani's counter-humanitarian argument leaves a lot to consider.[322] With no international cooperation or agreement, the UK policy on non-ransom payment would leave its nationals vulnerable. States who will (or can) pay often obtain better treatment in these situations, and therefore UK nationals held in captivity will face the consequences of the CTSA 2015 and the illegality of private payment of ransom, especially in light of EU states who cede to demands.[323]

[315] Galani, "The Human Rights and Maritime Law Implications of a Piracy Ransom Ban for International Shipping", 29.
[316] Mark Dickinson, "UK Keeps Piracy Ransom Payment Legal," Offshore Energy, January 21, 2015, https://www.offshore-energy.biz/uk-keeps-piracy-ransom-payment-legal/.
[317] Jessica Davis and Alex Wilner. "Paying Terrorist Ransoms: Frayed Consensus, Uneven Outcomes & Undue Harm." *International Journal: Canada's Journal of Global Policy Analysis* 77, no. 2: 002070202211303. https://doi.org/10.1177/00207020221130308, 358.
[318] Counter Terrorism and Security Act 2015.
[319] Lee-Eilertsen, "The Legality of Maritime Ransom Payment in the Light of UK and Singapore Jurisdictions" (thesis, 2015), 17.
[320] *Ibid.*, 16.
[321] Colin Freeman. "Pirates 'Smuggling Al-Qaeda Fighters' into Somalia." The Telegraph, July 5, 2009. https://www.telegraph.co.uk/news/worldnews/piracy/5743328/Pirates-smuggling-al-Qaeda-fighters-into-Somalia.html.
[322] Galani, "The Human Rights and Maritime Law Implications of a Piracy Ransom Ban for International Shipping", 29.
[323] *Ibid.*

The Judiciary on Maritime Ransom

The courts are typically apolitical on matters of parliamentary governance, insofar as they do not seek to expand their mandate on government policy.[324] Yet, the early 2010 case law within the English courts has permitted a closer inspection of the-legality of ransom payments. Adjacent to the discussions within the political arena, simultaneous proceedings within the civil courts have determined the rationale for which ransom payments can be deemed legal within the UK. Looking at two key cases on the matter, *Westminster N.V.*[325] and *Masefield*, the courts, tackling issues on maritime insurance law, deemed it necessary that in dealing with the substantive facts, the legality of ransom payments should be discussed.[326] It will be demonstrated that both cases recognise the element of public policy as pivotal in determining the jurisprudence of the decision.

Whilst *The Longchamp* (2017) case is also significant in this context, its focus on the general average principle—a doctrine governing the equitable distribution of losses among maritime venture participants—places it outside the primary scope of this article.[327] Unlike *Westminster N.V*[328] and *Masefield*, The *Longchamp* does not engage with the overarching theme of ransom payments as a matter of public policy but rather addresses contractual and commercial considerations within the shipping industry.[329] Nevertheless, its judgment highlights the nuanced interplay between legal principles and maritime practice, a theme explored in later sections.

Westminster N.V v Trever Rex Mountain and Others

The first case discussing maritime ransoms to reach the English courts in recent history was *Royal Boskalis Westminster N.V v Trevor Rex Mountain and others* (1997) (*Westminster N.V*).[330] The case, in front of the Court of Appeal (CoA), debated the insurance considerations of a ransom payment, particularly looking into the Marine Insurance Act 1906.[331] *Westminster N.V.* confirmed that where section 78(1) of the MIA 1906 applies under a "sue and labour clause", "the assured can recover any expenses properly incurred pursuant to the clause" - in this case, ransom payment.[332]

However, principally to this discussion, the court further developed a rationale positing the acceptance of ransom payments. In doing so, Lord Justice Philips examined the compatibility of ransom payments and the public policy considerations regarding ransom, however, he "did not elaborate further on this issue".[333]

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[324] Dr Kane Arby, "Reconsideration of the Exercise of Prerogative Powers Since GCHQ: Balancing Legitimate Judicial Control Against Government Interest": Social Science Research Network (13 Jan 2024), 3.
[325] *Royal Boskalis Westminster N.V. and Others v. Mountain and Others*. [1999] QB 674.
[326] *Masefield AG v. Amlin Corporate Member Ltd*, [2011] EWCA Civ 24, [2011] 1 Lloyd's Rep. 630.
[327] *The Longchamp* [2017] UKSC 68, [2018] 1 Lloyd's Rep. 1.
[328] *Royal Boskalis Westminster N.V. and Others v. Mountain and Others*, [1999] QB 674.
[329] *Masefield AG v. Amlin Corporate Member Ltd*, [2011] EWCA Civ 24, 630.
[330] *Royal Boskalis Westminster N.V. and Others v. Mountain and Others*, [1999] QB 674.
[331] Marine Insurance Act 1906.
[332] *Royal Boskalis Westminster N.V. and Others v. Mountain and Others*, para. 6.
[333] Galani, "The Human Rights and Maritime Law Implications of a Piracy Ransom Ban for International Shipping", 30.

Masefield AG v Amlin Corporate Member Ltd

By the Court "leaving [the discussion on public policy] for further consideration" in *Westminster N.V.*, a decade later the English courts clarified what embodies public policy concerning ransom payments.[334] *Masefield AG v Amlin Corporate Member Ltd (2011) (Masefield)* concerned the seizure of a vessel by Somali pirates for ransom, leaving the crew and cargo subject to a $2 million payment for their release.[335] The claimant (Amlin Ltd) advocated that "although the payment of a ransom was not illegal, it was contrary to public policy", leaving the courts to determine the scope of public policy in light of maritime ransom payments.[336]

The court in *Masefield*, similar to *Westminster N.V.*, was primarily interested in the insurance implications of the ransom payment. Yet, intertwined within stipulations of abandonment of cargo, Justice Steele in the court of first instance inspected the insured's claim that "the court ought not to take into account the fact that the payment of a ransom would probably secure the release".[337] This was posited for two reasons - "because payment of bribes is contrary to public policy"[338] and secondly, "because the insured could not be regarded as being under any duty to pay the ransom".[339]

On the first matter, Justice Steele was "wholly unpersuaded".[340] Steele J's judgement argues that, historically, there has not been legislation rendering ransom payments illegal for centuries and thus, it was not for the courts to discuss the merits of updated legislation.[341] Steele J further notes that "the repeal of the Ransom Act 1782, in light of the Naval Prize Repeal Act 1864, only served to "outlaw the payment of a ransom in respect of British ships taken by the King's enemies or persons committing hostilities against the King's subjects", "only emphasising this fact".[342]

Regarding the second matter, Steele J reaffirms and clarifies Phillps J's judgement in *Westminster N.V.* that "it cannot be against public policy" to pay a ransom on the high seas.[343] In doing so, Steele J referred to Arnould's Law of Marine Insurance and Average (2008, 21-25), which states that "there appears to be little doubt that where a payment which is not illegal itself under any relevant law is made to secure the release of property, this

[334] *Royal Boskalis Westminster N.V. and Others v. Mountain and Others*, [1999] QB 674., para. 14.
[335] *Masefield AG v. Amlin Corporate Member Ltd*, [2011] EWCA Civ 24, 630.
[336] Phillip Roche, "Public Policy and the Payment of Ransoms - Masefield AG v Amlin Corporate Member [2011] EWCA Civ 24 | Global Law Firm | Norton Rose Fulbright." Nortonrosefulbright.com, https://www.nortonrosefulbright.com/en/knowledge/publications/8d4607b6/public-policy-and-the-payment-of-ransoms---masefield-ag-v-amlin-corporate-member-2011-ewca-civ-24#section5.
[337] Kate Lewins and Robert Merkin. "Masefield AG v Amlin Corporate Member Ltd; the Bunga Melati Dua Piracy, Ransom and Marine Insurance." *Melbourne University Law Review* 35, no. 2 (August 1, 2011), 723. https://search.informit.org/doi/abs/10.3316/informit.129563291363275.
[338] *Masefield AG v. Amlin Corporate Member Ltd*, [2011] EWCA Civ 24 630, para. 58.
[339] *Ibid.*, para. 64.
[340] *Ibid.*, para, 60.
[341] *Ibid.*
[342] *Ibid.*, para. 63.
[343] *Ibid.*, 64.

can be recovered even though the persons demanding the payment are not acting lawfully in so doing".[344] In reaffirming this point, Steele J made it clear that insurers had no legal barriers in paying out ransom sums.[345]

On a second reading in the CoA, a similar verdict was held. Leading the judgement, Rix LJ on the matter of public policy again accepted Steele J's findings, agreeing that "the payment of ransom was neither illegal nor… against public policy" and thus, dismissed the appeal.[346] Nevertheless, within the judgement, Rix LJ argued that while "pirates have been spoken of as the enemies of mankind", he argued that paragraph 598 of Kaufman v Gerson (1904)[347] (discussing the moral principality of ransom to pirates) is more relevant now than ever.[348] Rix LJ furthered his examination of the matter by looking at the "mandate and effectiveness of the EU Operation Atalanta", in particular, the payment of ransom to pirates.[349] Rix LJ refers to a statement of Mr Kopernicki, Co-Chair of the UK Shipping Defense Advisory Committee who found that making ransom illegal in the Courts would drive "the process underground", making the issue "far, far worse".[350]

There is no escaping the fact that ransom payments encourage repeat attacks.[351] Yet as stated by both Steele J and Rix LJ, it is not in the scope of the judiciary to determine the legality of ransom payment, rather such a contentious matter is for the government to discuss. *Masefield's* Judgement provided "welcome clarification on some of the legal issues raised by many", both by the judiciary and law firms on ransom payments.[352] This decision provided vital legal assurance to the maritime industry at a time when discussions surrounding policy responses to piracy—including David Cameron's 2012 proposal to outlaw ransom payments—were reaching their zenith.

An Outright Ban on Maritime Ransom Payments? – The Private Sector and Stakeholders Perspective

During the height of Somali Piracy, David Cameron sought to introduce a world-first policy making ransom payments to pirate's illegal prior to the CTSA 2015. Speaking at the London Conference on Somalia in 2012, Cameron argued that an outright ban should be implemented on ransom payments to pirates to curb the unremitting endemic piracy and ransom payments inflicted on the economy and lives of the sailors.[353] According

[344] Joseph Arnould, Robert Samuel, and C T Bailhache. *The Law of Marine Insurance and Average*. London: Stevens, 2008, 21-25.
[345] *Masefield AG v. Amlin Corporate Member Ltd*, [2011] EWCA Civ 24 630, para. 68.
[346] Kate Lewins and Robert Merkin. "Masefield AG v Amlin Corporate Member Ltd; the Bunga Melati Dua Piracy, Ransom and Marine Insurance", 725.
[347] *Kaufman v. Gerson*, [1904] 1 KB 591.
[348] *Masefield AG v. Amlin Corporate Member Ltd*, [2011] EWCA Civ 24 630, para. 67.
[349] *Ibid.*, para. 68.
[350] *Ibid.*
[351] Kate Lewins and Robert Merkin. "Masefield AG v Amlin Corporate Member Ltd; the Bunga Melati Dua Piracy, Ransom and Marine Insurance.", 727.
[352] Clyde and Co. "Shipping and Insurance Update - Piracy." Clyde and Co, March 2010. https://www.clydeco.com/clyde/media/fileslibrary/Publications/2010/Shipping%20Insurance%20update_Piracy_March2010.pdf.
[353] Foreign and Commonwealth Office. "Piracy Ransoms Task Force Publishes Recommendations." GOV.UK, December 11, 2012. https://www.gov.uk/government/news/piracy-ransoms-task-force-publishes-recommendations.

to critics, Cameron's rhetoric was entrenched in the idea that ransoms "only ensure that crime pays".[354] While this is correct, one must take this, as Freeman argues, skeptically. With the "ultimate goal [being] where pirates are no longer able to profit from ransom", Freeman argues that Cameron's "trade" is obvious; now the UK can profit from the ransoms.[355] London's dominance in maritime insurance, legal and security services is renowned globally, and a nuanced view showcases that the "UK PLC" as Freeman calls it, will prosper from the illegality.[356]

This perspective is further showcased by government publishing, which suggests that those who were non-treaty to David Cameron's Piracy Ransom Task Force largely consisted of many of the world's "great flag and ship register states… including the Marshall Islands, Hong Kong, and Singapore".[357] Alongside state objectors, private actors and industries globally disapproved of the remarks and potential illegality. The shipping and insurance industry for example in their open letter noted that a ransom ban would be catastrophic, not just fiscally, but under humanitarian and environmental grounds. This fails to acknowledge the positive financial implications that may arise.[358]

Following the Shipping Association letter in 2012, the legal market, spearheaded by Holman Fenwick Willan (HFW) remarked that "banning ransom payments to Somali pirates would outlaw the only method a shipowner has to remove his crew from harm's way and rescue his vessel and cargo".[359] HFW's report, in collaboration with Lloyds List, sharply condemned the plausibility of a ransom ban, deeming it "unconscionable … to take away a shipowner's only prospect of rescuing its personnel and assets and to prevent a potential environmental catastrophe".[360] With a ransom ban, it is "unconscionable" to expect the Government to intervene. At the height of contemporary piracy, over 30 British-flagged or insured ships were held for ransom concurrently, however, due to a lack of reporting, this figure is estimated to be much greater.[361] Neither the Royal Navy nor the established Task Force has the mandate nor the size to implement such a robust anti-piracy strategy. Even if it did, geopolitics and national military ambitions would exhaust the British Navy. During this period, the Royal Navy was under extensive pressure globally. Counterterrorism efforts in the Middle East and anti-piracy operations in South America and Southeast Asia saw the organisation stretched to its limits.

[354] Freeman, Colin. "UK: Why Cameron Will Not Stop Somali Pirates Getting Their Pieces of Eight." The Telegraph, September 6, 2012.
[355] *Ibid.*
[356] *Ibid.*
[357] Foreign and Commonwealth Office. "Piracy Ransoms Task Force Publishes Recommendations.".
[358] Galani, "The Human Rights and Maritime Law Implications of a Piracy Ransom Ban for International Shipping", 24.
[359] Holman Fenwick Willan, "Banning Ransom Payments to Somali Pirates Would Outlaw the Only Method a Shipowner Has to Remove His Crew from Harm's Way and Rescue His Vessel and Cargo." Lloyds List, January 2012. https://www.hfw.com/app/uploads/2024/02/HFW-LL-Article-Ban-Ransom-Payments-A4-4pp-February-2012.pdf, 1.
[360] *Ibid.*, 3.
[361] ICC International Maritime Bureau. "Piracy and Armed Robbery against Ships - Report for the Period 2011." Safety4Sea, January 2012. https://www.safety4sea.com/wp-content/uploads/2014/09/pdf/IMB%20REPORT%202011.pdf, 16.

HFW's open article discussing the banning of ransom payments echoed statements made around the UK legal sector.[362] The firm approved of Steele J's judgement in Maesfield, adding to his rhetoric on the legalisation of ransom payments, arguing that the judgement provided a "further peace of mind" for all relevant parties in the event of a ransom situation.[363] HFW, as "global industry specialists", has further put forward the ramifications they determine would occur facing a ransom ban, including the massive loss to cargo which, from their experience would "fall on the shipowners and possibly their insurers, and ultimately on the public".[364] Secondly, they believe a ransom ban would have a detrimental environmental impact. HFW argue that (at the time of publication) the "last very large crude carrier that was captured carried approximately two million barrels of crude oil", almost "eight times the amount lost from the Exxon Valdez" disaster in 1989 and 40% of the loss of the BP Horizon incident in 2010.[365] It therefore is implausible from HFW, an industry-leading maritime law firm, that a ban should take place either from a fiscal, humanitarian, or environmental point of view.

A further point, only alluded to by HFW and other service sector stakeholders, is the adverse impact that piracy had, and is having, on the recruitment and retention of seafarers. A 2011 Foreign Affairs Committee discussion with Nautilus International raised this point, highlighting the need for additional support from the British government on hijacking and ransoms.[366] The Maritime Exclusive, an industry news source, further argued the same. Here, they discussed the UK's potential ransom ban months before its announcement, arguing that "a one-sided view of public interest… has severely curtailed the human rights of the seafarer", leading to "a direct, negative impact on crew retention and natural replenishment of the workforce".[367] Consequently, one can argue that curtailing a ban would have only fostered more resentment in the industry, whereby common consensus at the time showed that seafarers not only felt let down by the UK government but also unsupported in the event of a ransom situation. Little to no other private industry places as much legal and psychological consequences on employees, with cases at the time suggesting a swing towards criminalisation for negligence by the crew in some instances of hijacking.[368] Therefore, solely from a workforce point of view, it was imperative again that the ban was not enacted. Not only would companies, who were already struggling lose many seafarers, but further, the economic loss "could not be understated".[369]

Finally, and as aforementioned, little evidence suggests a ban would deter pirates seeking ransom. Dutton

[362] Holman Fenwick Willan, "Banning Ransom Payments to Somali Pirates Would Outlaw the Only Method a Shipowner Has to Remove His Crew from Harm's Way and Rescue His Vessel and Cargo."
[363] *Ibid.*
[364] *Ibid.*, 2.
[365] *Ibid.*, 3.
[366] Foreign Affairs Committee. "Written Evidence Submitted by the Mancur Olson Institute for Comparative Political Economy, Lund University." Written evidence to the Foreign Affairs Committee. Session 2010-12, HC 1318. https://publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/1318we11.html.
[367] The Maritime Exclusive. "Criminalization and Piracy Are Damaging Seafarer Recruitment Warns InterManager." The Maritime Executive, January 2012. https://maritime-executive.com/article/2010-3-23-criminalization-and-piracy-are-damaging-seafarer-recruitment-warns-intermanager.
[368] *Ibid.*
[369] *Ibid.*

and Bellish noted that pirates would "simply abandon the illegal activities that have enabled them to reap huge monetary rewards".[370] This rhetoric is true, especially if it was only the UK that would have employed such a measure. While the UK government's stance on not paying ransom is backed by many in the maritime sector, the stance held by Cameron in 2012 is merely idealistic at best. Yet, the indecisiveness of government policy surrounding ransoms suggests to Galani [371] that the government was aware of the ramifications that it could have on the industry, echoing Freeman's (2012) notion of the "UK PLC" years prior.[372] Consequently, it appears that Britain's 'dilemma' regarding ransom payments, which according to the UK Foreign and Commonwealth Office "[was] by no means a veto", stems from the implications for the City of London - the maritime capital of the world.[373] With the industry in acknowledgement that ransom payments, while having evident problems, are "often the only practical way to ensure the return of a ship", such a ban would counteract the only safe and plausible way to keep the industry afloat, and as such, "a ban would severely limit its ability to operate".[374]

Conclusion

The UK's position on ransom payments, shaped by counterterrorism efforts, legal precedents, and industry realities, highlights the tension between British national security objectives and the practical needs of the maritime industry. While the CTSA 2015 reflects the UK's commitment to preventing the financing of terrorism through piracy, its strict stance on ransom payments creates significant challenges for those operating in the shipping sector.[375] Judicial decisions have clarified the legality of ransom payments. At the same time, the maritime industry remains resolute in its belief that these payments are often the only viable means of ensuring the safe return of hostages and vessels.

Moreover, Freeman's notion of "UK PLC" underscores how the broader economic interests of the UK, particularly in London's dominance in maritime insurance, legal services, and logistics, complicate the government's stance.[376] As Freeman argues, the UK stands to benefit economically from maintaining a framework where ransom payments are legally permissible, thus reinforcing the UK's position as a global leader in maritime services. This economic dimension cannot be overlooked, and the interplay with security concerns forms a complex policy landscape. Without a shift in policy that balances security concerns with the realities of maritime piracy, the UK risks undermining both its legal framework and the safety and stability of the global maritime industry.

[370] Yvonne Dutton and Jon Bellish. "Refusing to Negotiate: Analysing the Legality and Practicality of a Piracy Ransom Ban." *Cornell International Law Journal* 47 (March 7, 2014), 301.
[371] Galani, "The Human Rights and Maritime Law Implications of a Piracy Ransom Ban for International Shipping", 32.
[372] Freeman, Colin. "UK: Why Cameron Will Not Stop Somali Pirates Getting Their Pieces of Eight."
[373] Foreign and Commonwealth Office. "Piracy Ransoms Task Force Publishes Recommendations.".
[374] David Osler, "Failure to Arrest Tanker Attackers Angers Intertanko." Lloyds List, August 9, 2010. http://www.lloydslist.com/ll/sector/ship-operations/article342220.ece and Charles Marts. "Piracy Ransoms: Conflicting Perspectives." One Earth Future, August 9, 2010, 1–36.
[375] Counter Terrorism and Security Act 2015.
[376] Freeman, Colin. "UK: Why Cameron Will Not Stop Somali Pirates Getting Their Pieces of Eight."

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Achieving Environmental Justice: The Role of Climate Finance and International Cooperation between Developed and Developing Countries

By Chenghuai Xu

I. GLOBAL CLIMATE-RELATED RISKS AND ENVIRONMENTAL JUSTICE

A. Climate-Related Risks Between Developing and Developed Countries

Climate change has become one of the most urgent challenges of our time. It not only has direct physical impacts on nature but also causes damage to socio-economic life. For example, research shows that the baseline predictions for once-in-a-century extreme weather events are highest in the coastal and southern regions of the United States. With a 2°C and 4°C increase in temperature, these events could double or triple, while over 37% of major farmland will face years of drought risk.[377] Climate change can also affect financial stability through an increase in physical risk in the form of weather and climate severity and long-term impacts and a disorderly transition to a net zero economy.[378] According to the Intergovernmental Panel on Climate Change(IPCC), if global warming exceeds 1.5°C before stabilizing at 1.5°C by 2100, some impacts may be long-lasting or irreversible, such as the loss of some ecosystems.[379] Indeed, the economic consequences of climate change will be at least as bad as the 2008-9 financial crisis.[380] As global temperatures rise and extreme weather events become more frequent, developing countries, particularly Small Island Developing States (SIDS), have long been recognized as some of the most vulnerable regions to climate change. These areas face significantly greater climate threats compared to developed nations, especially in terms of rising sea levels and coastal extremes.[381] With such huge potential losses and impacts, the international community has become increasingly aware of climate-related risks.

However, developing and developed countries have differing approaches to addressing climate-related risks. Developed nations have accumulated over 150 years of wealth through the use of fossil fuels and advanced technologies, while developing countries are still struggling to overcome poverty and combat diseases as they work to grow their economies. This disparity may ultimately deprive future generations of equal access to Earth's resources.[382] Developed countries bear a long-standing historical responsibility for the carbon

377 Saiful Haque Rahat et al., "Bracing for Impact: How Shifting Precipitation Extremes May Influence Physical Climate Risks in an Uncertain Future," *Scientific Reports* 14, no. 1 (July 29, 2024), 17398, https://doi.org/10.1038/s41598-024-65618-9.
378 Seraina Grünewald, "Climate-Related Risks: Is the Macroprudential Framework Fit for Purpose?," *Journal of International Banking & Financial Law* 36, no. 11 (December 2021), 743.
379 Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.), "Summary for Policymakers — Global Warming of 1.5 ºC" (Cambridge University Press: Intergovernmental Panel on Climate Change (IPCC), 2018), https://www.ipcc.ch/sr15/chapter/spm/.
380 Barnali Choudhury, "Climate Change as Systemic Risk," *Berkeley Business Law Journal* 18, no. 2 (2021), 52–93.
381 Michalis I. Vousdoukas et al., "Small Island Developing States under Threat by Rising Seas Even in a 1.5 °C Warming World," *Nature Sustainability* 6, no. 12 (December 2023), 1552–64, https://doi.org/10.1038/s41893-023-01230-5.
382 Jennifer Huang, "Climate Justice: Climate Justice and the Paris Agreement," *Journal of Animal & Environmental Law* 9, no. 1 (2018 2017), 23–59.

accumulation in the atmosphere, which is largely the result of their heavy reliance on industrialization to achieve economic growth and prosperity.[383] However, developing countries recognize that industrialization is also necessary for their growth, which inevitably leads to greenhouse gas emissions. Therefore, they advocate for a fair distribution of responsibilities for emissions reduction, while developed countries push for an equal distribution of these obligations.[384] The challenge of achieving a balance between economic development and adapting to and mitigating climate change risks has raised issues of environmental justice between developed and developing countries.

B. Environmental Justice Between Developed and Developing Countries

Before delving deeper into the environmental justice issues between developing and developed countries, it is essential to understand the concept of environmental justice and its historical development. Historically, as the multifaceted challenges posed by climate-related risks have unfolded, regions across the globe have been affected to varying degrees, with vulnerable groups and communities often bearing the brunt of these impacts. Amidst this, the environmental justice movement began to take shape, first emerging in the United States. On February 11, 1968, the Memphis Sanitation Strike marked the start of the environmental justice movement. This was the first nationwide movement led by African Americans to demand fair wages and better working conditions for sanitation workers, highlighting the fight against environmental injustice.[385] Since then, people, particularly communities of color, low-income neighborhoods, and other marginalized groups, have increasingly become aware of issues related to environmental injustice and the need for environmental justice.

As the environmental justice movement has gained momentum, the definition and types of environmental justice have remained diverse, with no single, universally accepted concept. Different groups define it from varying perspectives, leading to multiple discussions on the types of justice involved. For instance, the concept of environmental justice initially focused on environmental racism, specifically addressing the unequal distribution of environmental issues in communities of color and low-income neighborhoods.[386] Later, scholars began to explore justice from different angles. Vicki Been discussed fairness in distribution patterns, efficiency, and procedures, coining the term distributive justice.[387] Alice Kaswan examined political justice within the environmental justice movement, which refers to fairness in decision-making processes.[388] Robert R. Kuehn connected social justice with environmentalism, emphasizing social justice across race, ethnicity, culture,

[383] Md. Kamal Uddin, "Climate Change and Global Environmental Politics: North-South Divide Global Law and Policy Developments: Climate Change," *Environmental Policy and Law* 47, no. 3–4 (2017), 106–14.
[384] *Ibid*.
[385] Uddin (n 7).
[386] David Schlosberg, "1 Defining Environmental Justice," in *Defining Environmental Justice: Theories, Movements, and Nature*, ed. David Schlosberg (Oxford University Press, 2007), 3–10, https://doi.org/10.1093/acprof:oso/9780199286294.003.0001.
[387] Vicki Been, "What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses," *Cornell Law Review* 78, no. 6 (1993 1992), 1001–85.
[388] Alice Kaswan, "Distributive Justice and the Environment," *North Carolina Law Review* 81, no. 3 (2003 2002), 1045.

livelihood, and economic aspects.[389] Daniel Bertram highlighted the importance of

intergenerational equity in the context of climate change, noting that the relationship between generations should follow a form of equal distribution.[390] He outlined four main principles: (i) the principle of true intergenerational equity, (ii) the principle of sustainable development, (iii) the precautionary principle, and (iv) the rights of future generations. Building on these numerous academic and practical discussions, government agencies have also attempted to define environmental justice. For example, the U.S. Environmental Protection Agency (EPA) defines environmental justice as the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, in the development, implementation, and enforcement of environmental laws, regulations, and policies.

Environmental justice emerged from various movements and has acquired different meanings due to the diverse perspectives of its stakeholders. However, its common thread is the call for equal and fair treatment of different races and communities in legal and political decision-making, distribution processes, and related procedures concerning environmental issues. The rise and development of the environmental justice movement have brought global attention to the racial, economic, and other forms of inequality related to climate and environmental issues. Over the years, the framework of environmental justice has gradually expanded in different regions. Although it originated in the United States, the concept quickly spread to other countries, raising global concerns.[391]

Who is ultimately responsible for the environmental justice issues stemming from climate change? Whether developed countries are obligated to help developing nations cope with the effects of climate change has been a key point of debate among countries and organizations in recent years. This debate touches on issues of distributive justice. For example, although the United States is not among the countries most severely affected by climate change, it is expected to take greater action in reducing greenhouse gas emissions due to its significant contribution to current emission levels.[392] At the same time, the Global North—comprising primarily developed nations—has not adequately shared the technologies and resources with the Global South, i.e., developing countries, which would allow these nations to both accumulate wealth and combat climate change. This imbalance creates issues of inequality and justice, especially as developing countries, while still working to grow their economies, are disproportionately burdened by climate-induced poverty and natural disasters. As the global community shares the same planet, climate change caused by developed nations' early industrialization and wealth accumulation has harmed economically and technologically disadvantaged developing nations. This inequality has given rise to environmental justice issues between developed and developing countries.

[389] Robert R. Kuehn, "A Taxonomy of Environmental Justice," *Environmental Law Reporter News & Analysis* 30, no. 9 (2000), 10681–703.
[390] Daniel Bertram, "'For You Will (Still) Be Here Tomorrow': The Many Lives of Intergenerational Equity," *Transnational Environmental Law* 12, no. 1 (March 2023), 121–49, https://doi.org/10.1017/S2047102522000395.
[391] David Schlosberg and Lisette B. Collins, "From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice," *WIREs Climate Change* 5, no. 3 (2014), 359–74, https://doi.org/10.1002/wcc.275.
[392] Eric A. Posner and Cass R. Sunstein, "Climate Change Justice," *Georgetown Law Journal* 96, no. 5 (2008 2007): 1565–1612.

To address climate-related risks while enabling both developed and developing countries to accumulate wealth and achieve fairness and justice, the global community has recognized the need for substantial financial support to realize environmental justice. On the one hand, developed countries, while continuing to build their wealth, require funding to fulfill their commitments to help developing nations tackle climate change risks. On the other hand, developing countries, in addition to addressing domestic challenges like poverty and technological gaps, need even more financial resources to cope with climate-related risks. The question of how to balance economic development with the need to address climate risks, while properly handling the environmental justice issues between developing and developed nations, has garnered widespread attention from the international community. As a result, climate finance has rapidly gained importance and momentum.

II. CLIMATE FINANCE BETWEEN DEVELOPING AND DEVELOPED COUNTRIES

A. The Failure of International Treaties and the Development of Climate Finance

The emergence and development of climate finance fundamentally reflect the process of negotiation over rights and obligations between developed and developing countries in their joint efforts to address climate change. To adapt to and mitigate the effects of climate change, nations have put forward their respective needs based on their unique circumstances, seeking adherence to specific conditions and rules by signatories of international treaties. In this context, the concept of climate finance gradually emerged, evolving into one of the primary tools for combating climate change. However, instead of serving as an effective instrument to balance environmental justice between developed and developing countries, climate finance has repeatedly faced obstacles in the implementation of various international treaties.

Early legal discussions on climate change primarily focused on international cooperation and fairness between developed and developing countries from the perspective of international law. Harro van Asselt and others argued that because climate change impacts a wide range of socio-economic and environmental sectors, addressing it involves complex issues and international collaboration, situating climate change governance within a broad framework of international law.[393] Edith Brown Weiss emphasized that international climate change law embodies fairness in dealing with both current and future generations as well as between nations in addressing climate change.[394] The adoption of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) marked the beginning of international cooperation among governments to tackle climate change. David Hunter noted that although the UNFCCC established a broad framework for international climate governance, it did not set binding targets or timelines for reducing greenhouse gas emissions.[395] The 1997 Kyoto

[393] Harro Van Asselt, Francesco Sindico, and Michael A. Mehling, "Global Climate Change and the Fragmentation of International Law," *Law & Policy* 30, no. 4 (2008), 423–49, https://doi.org/10.1111/j.1467-9930.2008.00286.x.
[394] Edith Brown Weiss, "Climate Change, Intergenerational Equity, and International Law," *Vermont Journal of Environmental Law* 9, no. 3 (2008 2007), 615–28.
[395] David Hunter, "Implications of the Copenhagen Accord for Global Climate Governance," *Sustainable Development Law & Policy* 10,

Protocol was the world's first legally binding treaty to reduce greenhouse gas emissions, setting a target of a 5% reduction by industrialized nations by 2008–2012.[396] However, Rafael Leal-Arcas critiqued the Kyoto Protocol for failing to reach international agreement on emission limits and timelines for developing countries, which undermined its effectiveness.[397] Despite introducing the concept of emissions trading, Petra Lea Láncos pointed out that the so-called strict mechanisms of the protocol lacked real legal enforcement, as parties could simply choose to withdraw without significant consequences.[398] To address these shortcomings, the 2007 Bali Road Map built on earlier treaties, establishing sustainable and actionable goals, particularly with regard to developing countries' commitments to Nationally Appropriate Mitigation Actions (NAMAs).[399] Wolfgang Sterk and others recognized the challenges developing nations faced in creating financing mechanisms for climate mitigation and adaptation, while also acknowledging Bali as one of the most successful climate negotiations at the time.[400] The 2009 Copenhagen Conference sought to build on Bali by negotiating further, setting a goal to limit global temperature rise to 2°C and obligating developed countries to provide billions in funding to developing nations.[401] However, Lin Feng and Jason Buhi criticized the Copenhagen Accord for lacking substantive content and legal force, noting that the "polluter pays" principle required further discussion.[402] They recommended that both developed and developing countries set aside adversarial positions and embrace international cooperation to combat climate change. Following the perceived failure of the Copenhagen Accord, attention shifted to the 2010 Cancun Climate Change Conference. The Cancun Agreement introduced financial and technological support plans to help developing countries with mitigation and adaptation efforts, including the creation of the Green Climate Fund.[403] However, Robert O'Sullivan and others noted that the Cancun Conference left unanswered questions regarding the legal enforceability of countries' commitments to mitigation, the required amount of funding for the Green Climate Fund, and the extent of financial support for developing countries' participation in climate change efforts.[404] Climate finance saw some development through the aforementioned international treaties. However, due to ambiguities around legal obligations and enforcement, as well as the unclear scope of financial commitments, climate finance has not reached its full potential.

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no. 2 (January 1, 2010), 4–15.

396 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

397 Rafael Leal-Arcas, "Kyoto and the COPs: Lessons Learned and Looking Ahead," *Hague Yearbook of International Law / Annuaire de La Haye de Droit International, Vol. 23 (2010)*, October 28, 2011, 17–90, https://doi.org/10.1163/9789004244689_003.

398 Petra Lea Láncos, "Flexibility and Legitimacy - The Emissions Trading System under the Kyoto Protocol," *German Law Journal* 9, no. 11 (November 2008), 1625–51, https://doi.org/10.1017/S2071832200000602.

399 Conference of the Parties Decision on the agreed outcome pursuant to the Bali Action Plan (United Nations Framework Convention on Climate Change [UNFCCC]) COP Decison 1/CP.18, UN Doc FCCC/CP/2012/8/Add.1, p.3.

400 Wolfgang Sterk et al., "The Bali Roadmap for Global Climate Policy—New Horizons and Old Pitfalls," *Journal for European Environmental & Planning Law* 5, no. 2 (January 1, 2008), 139–58, https://doi.org/10.1163/161372708X324169.

401 Conference of the Parties Decision on the Copenhagen Accord (Conference of the Parties [COP]) COP Decision 2/CP.15, UN Doc FCCC/CP/2009/11/Add.1, p.4, UN Doc FCCC/CP/2009/L.7.

402 Lin Feng and Jason Buhi, "The Copenhagen Accord and the Silent Incorporation of the Polluter Pays Principle in International Climate Law: An Analysis of Sino-American Diplomacy at Copenhagen and Beyond," *Buffalo Environmental Law Journal* 18, no. 1 (2011 2010), 1–74.

403 *Ibid*.

404 Charlotte Streck et al., "The Results and Relevance of the Cancun Climate Conference," *Journal for European Environmental and Planning Law* 8, no. 2 (October 22, 2024), 165–88, https://doi.org/10.1163/187601011X576214.

The 2015 Paris Agreement elevated climate finance to new heights. Article 2 of the Paris Agreement set the goal of keeping the global average temperature increase well below 2°C above pre-industrial levels, while striving to limit it to 1.5°C.[405] Additionally, it called for financial flows to support climate change adaptation and mitigation, thus providing a clear target for the development of climate finance. Michael Mehling noted that the source of climate finance stems from Article 9 of the Paris Agreement, which obligates developed countries to provide financial support to developing nations.[406] By granting the Paris Agreement legal force through the UNFCCC, countries were obligated to fulfill their climate responsibilities, addressing issues that previous treaties had left unresolved, such as clear emission reduction targets, timelines, and differentiated responsibilities for developed and developing nations. The lack of binding emission reduction targets and insufficient funding for developing countries to adapt to climate change are among the reasons why the Paris Agreement has flaws.[407]

The 2021 Glasgow Climate Pact marked further progress in addressing climate finance. It facilitated a significant commitment from 450 companies across 45 countries through the Glasgow Financial Alliance for Net Zero (GFANZ), aiming to direct $130 trillion in climate-related assets.[408] The Glasgow Climate Pact achieved a degree of success by not only enhancing countries' commitments to climate action but also indirectly encouraging greater private sector involvement in climate finance. Subsequently, COP 27 made the scope of climate finance more concrete by establishing the Loss and Damage Fund, which has been hailed as a milestone for environmental justice.[409] The concept of loss and damage was first introduced in 2013 with the creation of the Warsaw International Mechanism for Loss and Damage (WIM).[410] WIM was designed to provide financial support to developing countries that are disproportionately affected by climate change, addressing the losses and damages that cannot be mitigated or adapted to. However, WIM's signatories did not establish the necessary legal frameworks or policies to implement these measures, leaving responsibility for loss and damage unclear.[411] This issue is particularly problematic for low-lying Small Island Developing States (SIDS), which face the existential threat of submersion due to sea-level rise caused by anthropogenic global warming.[412] These countries lack sufficient international legal protections and resources to support either adaptation or relocation,

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[405] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) art2.
[406] Michael Mehling, "ARTICLE 9: FINANCE," in *THE PARIS AGREEMENT ON CLIMATE CHANGE*, Elgar Commentaries Series (Edward Elgar, 2021), https://www.elgaronline.com/view/edcoll/9781788979184/17_article9.xhtml.
[407] Kiran Satish, "The Paris Agreement: A Critical Analysis," *International Journal of Law Management & Humanities* 4 Issue 1 (2021), 1840–48.
[408] Marie-Claire Cordonier Segger, "Climate Law and Public Policy Innovation for the Sustainable Development Goals: Accelerating Post-COP26 Compliance," *Bennett Institute for Public Policy* (blog), December 1, 2021, https://www.bennettinstitute.cam.ac.uk/blog/climate-law-cop26/ .
[409] Arthur Wyns, "COP27 Establishes Loss and Damage Fund to Respond to Human Cost of Climate Change," *The Lancet Planetary Health* 7, no. 1 (January 1, 2023), e21–22, https://doi.org/10.1016/S2542-5196(22)00331-X.
[410] UNFCCC Secretariat, *Report of the Conference of the Parties on Its Eighteenth Session, Held in Doha from 26 November to 8 December 2012. Addendum. Part Two: Action Taken by the Conference of the Parties at Its Eighteenth Session,* U.N. Doc. FCCC/CP/2012/8/Add.1 (Feb. 28, 2013).
[411] Meinhard Doelle, "The Birth of the Warsaw Loss & Damage Mechanism," *Carbon & Climate Law Review* 8, no. 1 (2014), 35–45.
[412] Sam Adelman, "Climate Justice, Loss and Damage and Compensation for Small Island Developing States" 7, no. 1 (March 1, 2016), 32–53, https://doi.org/10.4337/jhre.2016.01.02.

which raises significant justice and moral concerns.[413] Although the Paris Agreement established WIM as a permanent institution, its effective operation has been hindered by unresolved questions regarding the responsibility for loss and damage, as well as the source of funding.[414] At COP 27 in Egypt in 2022, a significant breakthrough was made with the formal arrangement and agreement to establish the Loss and Damage Fund under the Paris Agreement. While the COP 27 agreement highlighted the need for an annual investment of $4 to $6 trillion in renewable energy by 2030 to achieve net-zero emissions by 2050, key questions remained, such as who should contribute to the fund and how the money would be used.[415]

In recent years, countries have continued to sign various international treaties to mobilize climate finance. Despite numerous efforts, as discussed earlier, the challenges of treaty enforcement and the lack of effective oversight mean that non-compliance by signatories often carries minimal consequences. Nevertheless, the impacts of climate change on nations persist, and issues of environmental justice continue to emerge. To address this, the paper proposes leveraging green bonds—a key climate finance instrument—to promote environmental justice and encourage proactive participation from both the public and private sectors in the development of climate finance.

III. GREEN BONDS AND ENVIRONMENTAL JUSTICE

A. Overview of green bonds

Green bonds share similarities and differences with traditional bonds. A bond is a fixed-income instrument designed to bridge a financing gap.[416] Colin Bamford notes that the term "bond" is broadly used to refer to all obligations and instruments representing long-term debt, which are traded between investors throughout the period from their issuance to their redemption deadlines.[417] Philip Wood categorizes bonds into three main types: sovereign bonds, bank bonds, and corporate bonds, facilitated by a prospectus that allows issuers and investors to enter into subscription agreements. Green bonds, a specific type of bond, differ in that they are specifically issued to fund green or climate-related activities. The definition of a green bond is a debt security issued to raise capital for climate-related or environmental projects.[418] In green bonds, issuers typically designate the proceeds for specific climate or environmental projects, signaling their intentions to investors. The issuers of green bonds often include sovereign states, banks, and corporations. Therefore, while green bonds and traditional bonds are largely similar in structure, the primary difference lies in the purpose of the funds raised—green bonds are issued

[413] Veera Pekkarinen, Patrick Toussaint, and Harro van Asselt, "Loss and Damage after Paris: Moving Beyond Rhetoric," *Carbon & Climate Law Review* 13, no. 1 (2019), 31–49, https://doi.org/10.21552/cclr/2019/1/6.
[414] Mircea M. Dutu-Buzura, "International Governance of Climate Change. From the Framework Convention (1992) to COP-27 (2022)," *Law Review*, no. 02 (2022), 158–77.
[415] UNEP, "COP27 Ends with Announcement of Historic Loss and Damage Fund," November 22, 2022, https://www.unep.org/news-and-stories/story/cop27-ends-announcement-historic-loss-and-damage-fund.
[416] Thiam Hee Ng and Jacqueline Yujia Tao, "Bond Financing for Renewable Energy in Asia," *Energy Policy* 95 (August 1, 2016), 509–17, https://doi.org/10.1016/j.enpol.2016.03.015.
[417] Colin Bamford, "The Legal Nature of the International Bond Market," in *Principles of International Financial Law*, ed. Colin Bamford, 3rd ed. (Oxford University Press, 2019), 155–84, https://doi.org/10.1093/law/9780198832713.003.0006.
[418] Scott Breen and Catherine Campbell, "Legal Considerations for a Skyrocketing Green Bond Market," *Natural Resources & Environment* 31, no. 3 (2017 2016), 16–20.

to finance green projects, whereas traditional bonds lack such a specific focus.

The World Bank and the European Investment Bank (EIB) were early issuers of green bonds, driven by European public pension funds' growing interest in sustainable investments.[419] The EIB issued the world's first green bond in 2007.[420] Since then, the green bond market has grown rapidly, with total issuances reaching US$389 billion by 2018.[421] Although the issuance of green bonds continued to rise after 2018, despite the impact of COVID-19, the Climate Bonds Initiative (CBI) predicts that the annual issuance of green bonds could exceed US$1 trillion by 2023.[422] According to the latest report from CBI, global green bonds set a new quarterly record in 2024, amassing USD 195.9 billion in the first few months of the year.[423]

B. Green Bonds and Environment Justice

Green bonds, as a new financing tool, have seen rapid global development due to their unique focus on raising funds for environmental purposes. Despite the bond market's vast potential, the financial markets are still dominated by credit and securities, which explains the limited academic research on green bonds. This author proposes an innovative approach: using green bonds to address environmental justice between developed and developing countries, based on the integration of existing discussions on green bonds and environmental justice. The author finds that green bonds can play a crucial role in achieving global environmental justice through the framework of procedural justice, distributive justice, and intergenerational justice. It is important to note that environmental justice encompasses not only the relationship between developed and developing countries but also justice within each country.

Procedural justice in environmental justice refers to ensuring that all communities, particularly marginalized ones disproportionately affected by pollution, have a fair and meaningful role in environmental decision-making.[424] On a global scale, developing countries have limited or even restricted influence in global financial market decision-making. However, the process of issuing green bonds can effectively practice procedural justice. First, green bonds offer high transparency in their issuance process. Green bonds are regulated by two voluntary frameworks: the Green Bond Principles (GBP) published by the International Capital Market Association and the Climate Bonds Initiative. GBP is structured around four core components: the use of proceeds for green projects, project evaluation and selection, use of proceeds tracking, and reporting. This means that the issuance of green bonds involves strict transparency regarding the use of funds and project selection. Regular reporting and disclosure requirements provide investors with an opportunity to participate in

[419] Mehreen Sheikh and Alexia Kelly, "Launch of the Global Green Bond Partnership," Text/HTML, World Bank, September 13, 2018, https://www.worldbank.org/en/news/press-release/2018/09/13/launch-of-the-global-green-bond-partnership.
[420] *Ibid*.
[421] Climate Bonds Initiative, "Green Bonds: The State of the Market 2018," March 6, 2019, https://www.climatebonds.net/resources/reports/green-bonds-state-market-2018.
[422] Climate Bonds Initiative, "2021 Green Forecast Updated to Half a Trillion – Latest H1 Figures Signal New Surge in Global Green, Social & Sustainability Investment," Climate Bonds Initiative, August 31, 2021, https://www.climatebonds.net/2021/08/climate-bonds-updates-2021-green-forecast-half-trillion-latest-h1-figures-signal-new-surge.
[423] Climate Bonds Initiative, "A Record Start to the Year for Sustainable Debt," Climate Bonds Initiative, June 20, 2024, https://www.climatebonds.net/2024/06/record-start-year-sustainable-debt.
[424] Jonathan Skinner-Thompson, "Procedural Environmental Justice," *Washington Law Review* 97, no. 2 (2022), 399–458.

monitoring, ensuring fairness.[425] According to the latest regulations, 100% of the proceeds must be used for green projects, making it easier for all parties to monitor and evaluate these projects.

Distributive justice is one of the most frequently discussed topics when addressing climate-related risks between developed and developing countries. Climate change exacerbates poverty, reduces agricultural productivity, and limits the ability of developing nations to adapt to and mitigate climate impacts.[426] As previously mentioned, developed countries bear historical responsibility for global climate change due to their industrial emissions and have reaped significant economic benefits through the accumulation of capital. As such, developed nations are expected to provide financial, technological, and institutional support to developing countries for climate change adaptation and mitigation. However, with limited public funding and weak enforcement of international treaties, private sector participation becomes crucial for achieving climate finance and distributive justice between developed and developing nations. Green bonds provide an excellent option for the private sector. From the investors' perspective, green bonds are an attractive investment opportunity, offering relatively low risks under favorable policies and government incentives, coupled with the increasing demand from environmentally conscious investors.[427] From the issuers' perspective, green bonds expand the pool of investors interested in climate-related opportunities and can form part of their fixed-income allocation.[428] This allows issuers to expand their revenues by issuing green bonds. Consequently, the private sector is actively participating in the global green bond market. Moreover, the selection of green projects, a prerequisite for issuing green bonds, directly contributes to distributive justice. For instance, the European Union's EU Taxonomy Regulation plays a critical role in determining whether an economic activity is environmentally sustainable. Article 9 of the EU Taxonomy Regulation outlines environmental objectives, while Article 3 defines criteria for environmentally sustainable economic activities. These objectives guide the flow of capital toward projects that promote sustainability and environmental improvement, helping to alleviate the environmental burdens on vulnerable populations and thus advancing distributive justice.

Green bonds also contribute to intergenerational justice. Companies that issue green bonds can enhance long-term value and operational performance.[429] The projects funded by green bonds, such as green infrastructure, clean technology, and renewable energy, are long-term sustainability initiatives. These projects not only mitigate and adapt to climate change but also lay the foundation for sustainable infrastructure for future generations. Once

[425] Luke Trompeter, "Green Is Good: How Green Bonds Cultivated into Wall Street's Environmental Paradox," *Sustainable Development Law & Policy* 17, no. 2 (2017), 4–11.
[426] Temesgen Abebe Degu, "What Obligations Do Developed Countries Have to Assist Developing Countries in Adapting to and Mitigating Global Warming?," *Open Journal for Legal Studies (OJLS)* 5, no. 1 (2022), 19–30.
[427] Boqiang Lin and Tong Su, "Green Bond vs Conventional Bond: Outline the Rationale behind Issuance Choices in China," *International Review of Financial Analysis* 81 (May 1, 2022), 102063, https://doi.org/10.1016/j.irfa.2022.102063.
[428] Juan Piñeiro-Chousa et al., "The Influence of Investor Sentiment on the Green Bond Market," *Technological Forecasting and Social Change* 162 (January 1, 2021), 120351, https://doi.org/10.1016/j.techfore.2020.120351.
[429] Caroline Flammer, "Corporate Green Bonds," *Journal of Financial Economics* 142, no. 2 (November 1, 2021), 499–516, https://doi.org/10.1016/j.jfineco.2021.01.010.

these green bonds projects are completed, their environmental benefits are verified, contributing to sustainable development and providing future generations with the opportunity to enjoy a

healthy environment and access to sustainable resources.

IV. CONCLUSION

Green bonds, as an innovative tool in climate finance, offer more efficient and direct advantages in addressing environmental justice issues between developing and developed countries compared to international treaties. They not only incentivize public and private sector participation in the development of climate finance and international cooperation but also promote environmental justice in terms of distributive, procedural, and intergenerational dimensions. Although the primary regulatory challenge for green bonds is greenwashing, which refers to false or misleading claims about the environmental benefits of products, brands, or corporate practices.[430] However, stricter and more transparent disclosure regulations worldwide have supported the rapid growth of green bonds. Meanwhile, resolving environmental justice issues cannot rely solely on financial market innovation but also requires cooperation among countries and the improvement of relevant regulatory frameworks. This paper aims to provide valuable insights and references for regulators and stakeholders through the discussion of these issues.

[430] Nick Feinstein, "Learning from Past Mistakes: Future Regulation to Prevent Greenwashing," *Boston College Environmental Affairs Law Review* 40, no. 1 (2013), 229–58.

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https://unfccc.int/resource/docs/2012/cop18/eng/08a01.pdf

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Death, Blood, and Succession: Justinian's Novel 158 and the relationship between inheritance law and imperial power in late Roman law

By Flora MacKechnie

Introduction

This paper looks to Justinian's *Novel 158* to determine the relationship between imperial power, blood, and inheritance in late Roman law. Within this paper, blood' and 'blood relationship' refer to those in kinship, for example, mothers, fathers, children, and siblings. I will use this definition to explain how blood connections were endowed with proprietorial value through the Imperial State's developments in inheritance law. Power refers to the Imperial State and its ability to influence family hierarchy and Empire. Thus, the concept of blood can be used in the abstract because the legal value and the cultural value of a blood relationship could be altered according to the Imperial State's policy aims. The approach of this paper is guided by David Miller and Peter Sarris' annotated translations of Justinian's *Novels*. Miller and Sarris treat the *Novels* as self-conscious literary constructions which emphasise how juristic science functioned as part of imperial power. After discussing the facts of *Novel 158*, this paper will look to how Justinian's *Novel 158* comprises of three dimensions demonstrating the connection between blood and imperial power. The first dimension is cultural and highlights how inheritance and power were linked in late Roman society. The second dimension concerns the impact of the line of succession on the Roman familial hierarchy. The third dimension exhibits the dynamic between inheritance law and imperial power.

Historians of the 6th Century Eastern Roman or Byzantine Empire (for the purposes of this paper, the Roman or Imperial Empire henceforth) such as William Gordon have argued that Justinian's revision to the agnatic line of succession in *Novel 118* signifies an increasing recognition of the blood principle.[431] This paper takes a corrective approach and argues that the exchange of agnatic for general blood principle was not a policy change insofar that the Imperial State had always dealt with a kind of blood. Thus, the change in succession law from agnatic line to general blood line should be viewed as a development within the principle of blood. If the Imperial State dealt consistently with a blood principle in inheritance law, Justinian's *Novel 158* exemplifies how the Imperial State manipulated legal definitions of 'blood' to consolidate its control over family structures.

Novel 158

The *Novels* of Justinian begin after the mid 6th century-promulgation of the *Codex* which sought to "compile and harmonize" the imperial law.[432] Once it became clear that the law would require updating, Justinian circulated the *Novels* in a petition and response structure, rather than an official compilation.[433] The *Novels* were a compressed and reworded version of the Quaestor Tribonian's *Corpus Juris Civilis* and frequently

[431] William Gordon, 'Succession', in Ernest Metzger (ed.), *A Companion to Justinian's Institutes* (London, 1998), 110.
[432] Timothy Kearley, 'The Creation and Transmission of Justinian's Novels', *Law Library Journal*, 102: 3 (August 2010), 278.
[433] *Ibid.*, 379.

asserted that the *Codex* could contain no contradiction.[434] This was stated explicitly in *Constitutio Omnem*, which specifically addressed professors of law.

Novel 158 has been dated at AD 544 and concerns a contest of entitlement between a paternal aunt, Thecla Manos, and maternal uncle, Cosmas, for the inheritance of an orphaned child Sergia. Sergia died within weeks of her mother Thecla's decease.[435] Upon applying to the local advocate, John, for his opinion on her claim, Thecla Manos was favoured. However, when John presided in the hearing between Thecla Manos and Cosmas, he changed his verdict to favour Cosmas:[436]

> John had given a decision contrary to the written answer to her[…]but he had also induced her, our suppliant, to enter into a pact in conformity with the decision, suggesting that also to Asclepius, who acted on behalf of Cosmas.[437]

It is implied here that the case came to an arbitration hearing with a formal pact, possibly *compromissum*, as Cosmas' advocate later argues that his claim should be upheld by the Emperor regardless of the legal situation concerning the case itself.[438] The *Novel* is structured as a response to Thecla Manos' direct petition to Emperor Justinian for her claim to Sergia's inheritance.

Cosmas' claim rests on *Codex* 6.30.18, a Theodosian constitution which states that a child under seven years old remains in infancy and requires the appointment of a guardian or tutor to be entitled to maternal inheritance:

> in support of his decision, the law of Theodosius, of sacred memory [*Codex* 6.30.18], holding that the person not yet seven years of age could not acquire her maternal inheritance, unless he or she had a guardian, but that it belonged to those to whom it would fall as if the minor under the age of puberty, who died, had not been called to this inheritance.[439]

Due to the short period between Sergia and Thecla's death, no guardian was appointed. In the case of there being no guardian, the law behaves as if the child had never existed, and the inheritance reverts to whomever would have received the inheritance from Thecla, which would have been her brother, Cosmas. Nevertheless, the aunt, Thecla Manos' claim is supported by *Codex* 6. 30. 18.4 and *Codex* 6.30.19:

> the petitioner asks us that we do not permit any wrong to be inflicted upon her, especially since in the Code bearing our name there is a law [*Codex* 6.30.18.4] which provides that an infant which is able to speak can rightly acquire her mother's inheritance, and since we enacted a further law [*Codex* 6.30.19], providing that, if anyone is called to an inheritance and dies before claiming or renouncing it, he transmits his right of deliberation in connection with such inheritance to his heirs.[440]

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[434] Paul du Plessis, 'Property', in David Johnston (ed.), *The Cambridge Companion to Roman Law* (Cambridge, 2015), 192.
[435] David Miller and Peter Sarris, *The Novels of Justinian: A Complete Annotated English Translation* (Cambridge, 2018), 987. Both Sergia's deceased mother and her paternal aunt (the appellate) are named Thecla. In the interests of clarity, Sergia'a aunt will be referred to exclusively as Thecla Manos and her mother as Thecla.
[436] *Ibid.*, 988.
[437] *Ibid.*
[438] *Ibid.*
[439] *Ibid.*
[440] *Ibid.*

Thus, Thecla Manos relies on *Codex* 6. 30. 18.4 and can therefore invoke *Codex* 6.30.19. This provides that an heir has a *spatium deliberandi* (the period of one year for an appointed heir to accept an inheritance). If this period is not exhausted by the time the appointed heir dies, the time of deliberation is inherited by the heirs of the deceased. Thus, Thecla Manos argues that Sergia was entitled to her maternal inheritance and that she, as Sergia's aunt, has therefore inherited the period in which to accept the inheritance.[441] It should be noted here that this case precisely presents a situation where it appears the Justinianic *Codex* contained contradiction. The drafter of *Novel 158* does not specifically deal with the discrepancy between the entitlement to inheritance for the child under seven in *Codex* 6. 30.18 and the child able to speak in *Codex* 6.30.18.4. It is suggested that the respective laws apply in different circumstances, but the lack of specificity in the *Codex* is neglected:

> Our law [*Codex* 6. 30. 18.4] shall prevail in the present case and those that are similar to it; the law of Theodosius of sacred memory [*Codex* 6.30.18] shall prevail in those cases in which a year and the time for deliberation has gone by.[442]

The deciding factor of the case lies with the period to accept inheritance, and the case is thus decided in favour of Thecla Manos by providing that *Codex* 6.30.18 is applicable only where the child died "more than a year after becoming able to inherit from the initial deceased without acceptance of inheritance".[443] *Novel 118* is briefly mentioned, stating that the agnatic line and cognatic line of the paternal aunt and maternal uncle would render the pair equal beneficiaries of the inheritance.[444] However, because Thecla Manos and Cosmas' proceedings took place prior to *Novel 118*'s enactment, Justinian favours the claim of the paternal aunt in line with the preference for agnatic lines in the classical Roman law.

The formal pact made in the earlier arbitration, to which Thecla Manos is appealing to Justinian to vitiate, is only briefly and cryptically addressed. It is implied by the *Novel* that private, formal agreements are unenforceable when the successful party of the arrangement
had no right to the inheritance in the first place. This matter will be addressed in the following section on succession and power in Roman Society.

[441] Sergia's age is never specifically mentioned within Novel 158, but we can clearly infer from the applicable law that she was old enough to speak but had not reached her seventh year.
[442] Miller and Sarris, *The Novels of Justinian*, 989.
[443] *Ibid.*
[444] *Ibid.*

i. Inheritance and Social Power in late Rome

Paul du Plessis argues that property and inheritance were intimately bound in the Roman legal sphere, stressing that the legal facet of property cannot be divorced from its roots in "social, economic and political" factors.[445] The social significance of property can be easily traced into the *Novels* of Justinian because they are styled as remedies to social issues.[446] *Novel 158* has two important social contexts that illustrate the connection between inheritance and society. Firstly, the AD 541 outbreak of bubonic plague is referenced in the preamble. Secondly, there is a flavour of elitism in the structure of *Novel 158* as a successful petition to the Emperor. It can be inferred that the case concerned an inheritance of valuable property. These social tenets render *Novel 158* exceptional to the normal case. But it is in the exceptional cases, on the periphery of the normal order, that litigation becomes interesting and provides the platform for imperial power to show its hand. Property inheritance was about imperial control, foremostly to maintain social stability in crisis, but also in cultivating a fictitious principle of equality in access to justice.

The legal crux of *Novel 158* is how Justinian deals with the obligation to accept an inheritance within one year (*Codex* 6.30.19) and the age restrictions applied to entitlement to inheritance without a guardian (*Codex* 6.30.18).[447] As stated, the issue is resolved through a caveat made to *Codex* 6.30.18. The appointment of a guardian as pre-requisite to maternal inheritance only applies when over a year has elapsed from the point the heir was able to inherit. The first reports of plague originate from the port of Pelusium in Lower Egypt around AD 541. Although the exact location of Thecla Manos' petition is unclear, the result of the appeal sent to Constantinople is dated AD 544, which suggests that the case facts coincided with an early bout of plague. This is significant because it adds a dimension of crisis to the law of inheritance where adherence to some legal processes would not have been feasible. The plague outbreak increased the likelihood of a child and parent dying within weeks of each other and therefore rendered the condition of appointing a guardian to inherit unreasonable. Therefore, in *Novel 158* Justinian provides an equitable outcome where the outbreak of plague has caused tension in the law of inheritance by amending the applicability of *Codex* 6.30.18.

[445] Du Plessis, 'Property', 192-194.
[446] Bruce Frier, 'Roman Law's Descent into History'- Review of *The Sources of Roman Law: Problems and Methods for Ancient Historians* (London, 1997), by O.F Robinson and *Roman Law in Context: Key Themes in Ancient History* (Cambridge, 1997)', by David Johnstone, *Journal of Roman Archaeology*, 13 (2000), 448., and Peter Sarris, 'Viewpoint: New Approaches to the 'Plague of Justinian', *Past and Present*, 254: 1 (February 2022), 330.
[447] Miller and Sarris, *The Novels of Justinian*, 987.

In the context of the plague, the social need for clarity in the law of inheritance was paramount to stability. The Imperial State interpreted inheritance legislation to adapt to a social issue while denying that there had been any change to existing legislation:

> For the law of Theodosius, of blessed memory, and our law, are not in conflict. Both laws are in the same book and we have stated in a constitution, which we enacted in reference thereto, that it contained nothing contradictory.[448]

Clarifying the law through *Novel 158* stabilised both the rules of inheritance and the mastery of Imperial State where the drafter demonstrates that for the skilled legal interpreter, there are no contradictions to be found in Justinian's law. Juristic science itself therefore formed a part of the imperial order. This is also prevalent where the *Novel* dismisses the arbitration and formal pact between Cosmas and Thecla Manos:

> It is clear that pacts made after a decision with a free person, who was not even able to acquire anything, could not give to Cosmas the right of action on what was contained in such pact.[449]

As demonstrated by the advocate's initial conflicting advice to Thecla Manos and Cosmas, this case raises a potential contradiction in the *Codex* over when a child has claim to maternal inheritance. Allowing a formal agreement recognising Cosmas' claim would admit that *Codex* 6. 30.18 was applicable law, and therefore that two valid, contradictory laws had existed within the *Codex*. Therefore, *Novel 158* is styled as a corrective to the apparently mistaken advocate whose understanding of law must be set to rights by the superior legal process of the Imperial State.

Contemporary legislation distils what was prioritised in periods of crisis and therefore what was of social significance. While there is some revisionist dismissal of the vastness of the impact of the AD 541 plague, Sarris has vehemently discounted these submissions through reference to the "flurry of significant [imperial] legislation" between AD 542-545.[450] The dissemination of the Justinianic *Novels* in community spaces, such as places of worship and the local markets, exhibits the extent of the societal need to understand the law of succession upon death.[451] It would also reinforce the idea that the imperial central bureaucracy remained in operation. The latter is supported by the first legal response to the plague conditions appearing to be concerned with banking.[452]

The petitions for the inheritance of Sergia and the *Novel*'s direct interaction with the Emperor indicates that the property at stake was of considerable value.[453] This conclusion begs the question of whether inheritance

[448] *Ibid*. 988.
[449] *Ibid*., 989.
[450] Lee Mordechai and Merle Eisenberg, 'Rejecting Catastrophe: The Case of the Justinianic Plague', *Past and Present*, 244:1 (August 2019), 3., and Sarris, 'New Approaches to the Plague', 330.
[451] Kearley, 'Justinian's Novels', 381.
[452] *Ibid*.
[453] Or the inheritance of Thecla, depending on one's position on *Codex* 6.30.18.

was of concern to society irrespective of rank.[454] Frier and McGinn argue that inheritance was definitional of elite status and therefore elites shaped the body of succession law through their easy access to justice.[455] Contention to the exclusive connection between inheritance law and wealth can be found where Gordon argues that in theory, justice was accessible to anybody through the petition and response structure of the late Roman law.[456] Antti Arjava implicitly avoids the conclusion that justice was reserved for elites by noting the scarcity of juristic sources on inheritance queries of smallholders.[457] To establish whether the Imperial State was concerned with general cases of inheritance, a historian might have to go to papyrological documentary evidence and extra-legal sources, while Justinian's *Novels* are largely constricted to appellate cases.[458]

Nevertheless, *Novel 158* depicts the exercise of imperial power through the Imperial State's interest in the appearance of access to justice, if not the reality. The direct addressee of the *Novel* is a high-ranking imperial magistrate, who is receiving his instructions from the Emperor on how the case is to be decided legally, if the facts are found to be as alleged by the petitioner (Thecla Manos). Thecla Manos' petition was published as a source to be studied by the legally trained and as a public pronouncement of the law of inheritance. But the *Novel* also advertises the petition and response system of Justinian's legal process.[459] This system aimed to foster the idea that anyone could write to the Emperor, and in his benevolence, he would save them from the kind of injustice suffered by Thecla Manos during arbitration.[460] The filtered account of legal process and legal reasoning in *Novel 158* contributes to the consolidation of imperial power through inheritance law.

Inheritance and Hierarchy within the late Roman Family

Novel 158 highlights how the law of succession could alter the social positions of family members. The legal quandary within *Novel 158* only occurs because Thecla, and her daughter, Sergia, die intestate. Intestate succession was the exception, rather than the rule in late Roman society.[461] Testacy obscures the blood relationship through the formation of the legal relationship created by the will. In such cases, even if the heir is a blood relation, the blood relationship is rendered surplus to the legal relationship.[462] The imperial court's tacit alteration to the law of succession in *Novel 158* begs the question of how far their power extended where opportunity arose through intestacy cases. This paper suggests that the imperial court dictated the kind of blood that could merit inheritance, meaning imperial power could confer proprietorial value onto some blood relationships over others.

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454 John Crook, *Law and Life of Rome* (New York, 1967), 147.
455 Bruce Frier and Thomas McGinn, *A Casebook on Roman Family Law* (Oxford, 2004), 321.
456 Gordon, 'Succession', 83.
457 Antti Arjava, *Women and Law in Late Antiquity* (Oxford, 1996), 62.
458 For the earlier period of Classical Roman law on property dispute see Bruce Frier, *Landlords and Tenants In Imperial Rome* (Princeton, 1980).
459 The main collection of Novels likely traces its origin to legal instruction in the Schools of Constantinople and Beirut.
460 Miller and Sarris, *The Novels of Justinian*, 988.
461 Caroline Humfress, 'Gift-Giving and Inheritance Strategies in late Roman law and legal practice', in Ole-Albert Rønning, Helle Møller Sigh and Helle Vogt (eds.), *Donations, Inheritance and Property in the Nordic and Western world from late Antiquity until Today* (London, 2017), p. 63., and Gordon, 'Succession', 83.
462 Although, it must be noted that the blood relationship was legally sanctioned via the Justinianic version of the Falcidian portion.

The Roman family was predominantly legal in nature and should be understood as a household encompassing property.[463] Paul du Plessis emphasises that "Roman Law is not modern legal thought" and so by extension, neither are Roman institutions.[464] The institution of the Roman family has been summarised by Frier and McGinn:

> "[Roman] Family law concerns legal aspects of the domestic relationship between persons who are grouped together within a household [...] The overriding concern of Roman family law is not with setting standards for a family's life and internal governance but rather with the implications of family structure for the holding and disposition of property [...] strategies of succession [...] were integral to Roman family law"[465]

The agnatic system emphasised the importance of agnatic blood hegemony over property. The contesting parties in *Novel 158* are the brother and the sister-in-law of the deceased Thecla, and the aunt and uncle of deceased Sergia. Thus, Cosmas' claim to the inheritance rests on his niece's legal existence. Justinian changed the law of intestate succession in AD 543, removing distinction between the male (agnatic) and female (cognatic) lines.[466] Descendants were the immediate heirs, followed by cognatic and agnatic ascendents who were equally entitled, followed by other collaterals.[467] This replaced the classical legal structure of intestate succession favouring the *sui heredes*, the children of the deceased father. [468] The residual precedence of the agnatic line in *Novel 158* demonstrates an overlap between the classical familial hierarchy and the altered succession policy of late antiquity. The agnate's superior status to the cognate was gendered in terms of the blood line from which a person was derived, but they were not personally gendered, unlike systems of primogeniture. The policy was not to do with keeping property out of the control of one gender but rather keeping property within one side of the household.

It has been observed by Gordon that Justinian's revision to the line of succession altered the policy of inheritance law through "increasing recognition of blood relationship" over the agnatic relationship.[469] However, this suggestion overlooks the fact that agnatic principle is a form of blood principle. Justinian altered the law to make blood connection from any line an acceptable pre-requisite for intestate succession. But preference for the agnatic line is also concerned with blood line of a narrower kind. Thus, it is not quite correct to argue that Justinian was entirely substituting policies.[470] The reference to *Novel 118* and the revision to *Codex* 6.30.18 highlight that the Imperial State was able to alter familial hierarchy through the legal definition of blood. This is a significant example of the reach of the state into the private sphere of the household. However, the exchange of agnatic to general blood principle was not a change insofar that the state had always dealt with a kind of blood.

[463] Frier and McGinn, *A Casebook on Roman Family Law*, 4. Note that this property included slaves.
[464] Du Plessis, 'Property', 194.
[465] Frier and McGinn, *A Casebook on Roman Family Law*, 3-6.
[466] Johnstone, 'Succession', 201.
[467] Gordon, 'Succession', 117.
[468] *Ibid.*, 200.
[469] Gordon, 'Succession', 110.
[470] *Ibid.*, 117.

Therefore, the state's power to alter the value of certain kinds of blood against others is indicative of a more extreme form of imperial power over the definition of family.

ii. Inheritance and the Imperial State in late Roman Law

Novel 158 demonstrates how the imperial court functioned, but the *Novel* must be understood as a selective account to create ontological security in the body of law.[471] The nature of the *Novels* constrains any interpretation to foreground the deliberate character of the narrative. Cosmas' claim in *Novel 158* emphasises the importance of blood in the case because it is not grounded in his position as the uncle of Sergia, but as the brother of Thecla. Without Justinian imposing the year long time restriction on *Codex* 6.30.18, the consequence of Sergia being a without a guardian and under seven is that she is to be treated as if she never legally existed.[472] If the imperial court legally invalidated the existence of Sergia, Thecla Manos' relationship to the inheritance becomes a legal relationship rather than a blood relationship. Thecla Manos's position as heir hinges on Sergia's legal existence because they share a blood tie as aunt and niece, whereas Thecla Manos and the deceased Thecla are merely sisters-in-law.

By validating the existence of Sergia and asserting a temporal element to the application of *Codex* 6.30.18, Justinian contributes to the trend in late antiquity that brought reality and the law into conjunction. Property has been characterised as the grammar of inheritance law which serves an "overarching meta-principle [...] such as autonomy, efficiency, equality, or individual flourishing".[473] Justinian's broad interpretation of the law might appear benign and pragmatic, but *Novel 158* is foremostly a case where the imperial court demonstrates the power to decide whether a person legally existed. This is particularly important when the question of legal existence alters the blood relationship upon which an inheritance is predicted.

The implications of imperial power in *Novel 158* are not limited to the legal sphere because there are distinct social repercussions over legal definitions of blood. Latin draws distinction between kinds of blood but broadly, *cognatio*' or 'blood relationship' is understood linguistically to amount to kinship.[474] *Novel 158* is an expression of how this kinship could be controlled by the Imperial State through the power to change what kind of blood merited legal existence and heirship. As previously discussed, a significant policy aim for the publication of Justinian's *Novels* was the consolidation of the fictitious harmony in the constitution. Caroline Humfress has highlighted that the late Roman law of succession allowed testators to support innumerable imperial objectives, including support for the institutional Christian church.[475] Indeed, it was in this realm that "Roman legislators displayed their greatest legal ingenuity".[476] In *Novel 158*, imperial power alters the legal definition and value of blood relationships while supporting its own supremacy through the fiction of harmony.

[471] David Johnstone, 'Introduction', in David Johnstone (ed.), *The Cambridge Companion to Roman Law* (Cambridge, 2015), 3.
[472] Arjava, *Women and Law*, 95.
[473] Carey Miller, 'Property', p. 42., and Thomas Merrill and Henry Smith, 'The Architecture of Property', in Hanoch Dagan and Benjamin Zipursky (eds.), *Research Handbook on Private Law Theory* (Cheltenham, 2020), 1.
[474] Frier and McGinn, *A Casebook on Roman Family Law*, 16.
[475] Humfress, 'Gift Giving and Inheritance Strategies', 21.
[476] *Ibid.*, 22.

The extent to which blood was indicative of kinship in late Roman society determines the extent to which kinship was controlled by the Imperial State. The connection between blood and the right to inherit property is rarely accounted for and further academic study of the nature of kinship is required to separate the legal and social definitions.[477] Yet, broadly speaking, intergenerational inheritance is not only consistent internationally within ancient and modern societies, but it is underpinned by a policy of pragmatism, particularly in cases of intestacy.[478] The organic connection between blood and entitlement to property cannot provide an account of blood and kinship separate from legal study. However, it can provide broad conclusions about the importance the Imperial State imputed onto blood relationships in late Roman law.

Conclusion

Novel 158 highlights the extent to which the Imperial State was involved in curating policy through the law, which imputes social significance upon the law of inheritance. After establishing the relationship between social power and succession, *Novel 158* illustrates how the Imperial State controlled the relations of superiority within the family and finally, how the Imperial State controlled the definition of family itself through its control over the value of blood. Omnipresent in *Novel 158* is the presence of state policy or agenda. The *Novel* indicates that inheritance and power in late Roman Law were tightly imbricated. This is because the Imperial State used succession law to further its policy, perhaps rendering the value of blood dubious outside of what the law projected onto it. Natural blood relationships might underpin entitlement to property, but the kind of blood that merited entitlement was in the hands of an Emperor with multiple agendas, the overarching theme being the strengthening of the Imperial State. Thus, Justinian's *Novel 158* contributes to determining the relationship between succession and power by demonstrating the power of the state to control blood relationships through inheritance law.

[477] William Blackstone, *Volume 2 Commentaries on the Laws of England* (Oxford, 1766), 2.
[478] Frier and McGinn, *A Casebook on Roman Family Law*, 321.

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